

NLRB Flips (Again), Reinstates Context-Specific Standards For Employee Misconduct

Labor Relations Update on May 8, 2023

On Monday, the National Labor Relations Board (“Board”) issued a decision making it riskier and more complicated for employers to discipline employees for abusive workplace conduct alleged to have arisen within the context of protected activity under Section 7 of the National Labor Relations Act (the “Act”). In [Lion Elastomers, 372 NLRB No. 83 \(2023\)](#), the Board—reasoning that a “fundamental difference” exists between “employee misconduct committed during Section 7 activity and misconduct during ordinary work”—overturned recent Board precedent from the previous administration and reinstated the use of a trio of context-specific standards for determining whether an employer violates the Act by disciplining an employee for abusive conduct occurring in three specific settings: (1) in employee conversations or interactions with management in the workplace; (2) in employee social-media posts (and in most employee workplace discussions among co-workers); and (3) on picket lines. As will be seen, the first two settings are particularly problematic.

Background

Just a few years ago (as we [covered at the time](#)), in *General Motors*, 369 NLRB No. 127 (2020), the Board rejected the use of these same context-specific standards in the strongest of terms—explaining that “setting-specific standards” not only had “failed to yield predictable, equitable results,” but also, in some cases had “conflicted alarmingly with employers’ obligations under federal, state, and local antidiscrimination laws.” Accordingly, the Board replaced the use of context-specific standards with a uniform standard traditionally used to assess whether an employer’s conduct is discriminatory under the Act—the burden-shifting *Wright Line* standard—which is conceptually similar to the standard used to evaluate discrimination claims and generally turns on whether an employer would have taken the same challenged action in the absence of the employee’s protected activity. The Board explained that the *Wright Line* standard “promises more reliable, less arbitrary, and more equitable treatment of abusive conduct,” while still “ensur[ing] that employees’ Section 7 rights continue to be protected.”

The Return Of Context-Specific Standards

As noted earlier, prior to its July 2020 *General Motors* decision, the Board employed context-specific standards for determining whether an employer violated the Act by disciplining an employee for abusive conduct arising in three specific settings. With its *Lion Elastomers* decision, the Board has restored the law to its pre-*General Motors* state, re-adopting the context-specific framework in which it determines whether abusive conduct is severe enough to lose the protection of the Act by applying one of the following tests, depending on the context of the activity at issue:

1. The *Atlantic Steel* test—which is used when abusive conduct occurs in the course of otherwise-protected workplace conversations with management—and considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.
2. The totality of the circumstances test, which is used when abusive conduct takes place on social media or in workplace discussions among coworkers.
3. The *Clear Pine Moldings* test, which is used when the abusive conduct takes place on the picket line. Under this test, an employee loses the Act’s protection where “the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercises of rights protected under the Act.”

Takeaways

Board precedent over the years has found protected a number of outbursts that would not be tolerated in any other setting. The latest in a string of precedent-reversing decisions, the Board's decision here in *Lion Elastomers*—which applies retroactively to all “abusive conduct” cases currently pending—re-establishes an exemption under *Atlantic Steel* for otherwise-sanctionable employee outbursts when the conduct is bound-up in Section 7 protected activity, making it tougher for employers to predict the consequences of disciplining employees in such situations. (And, as we have [previously noted](#), the application of the *Atlantic Steel* test has led to some strange results.)

Said differently, by once again evaluating employee conduct with different standards—based on whether the employee's outburst is bound up with Section 7 activity—*Lion Elastomers* makes it harder for employers to evaluate the risk of imposing discipline. Worse still, however—as Member Kaplan emphasized in his dissent—is that the decision could result in employers being required “to continue to employ individuals who have engaged in such abusive conduct any reasonable employer would have terminated them for that conduct.”

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