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Last Fridays "Lunch and Learn" Webinar

They Said What?!
The NLRB's New Standard for Determining When Abusive Workplace Conduct is Unprotected

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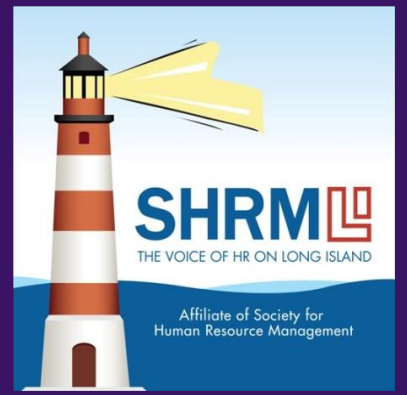

Introductory Statement

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What's New?

- In a sweeping decision that overrules several of their precedents, the National Labor Relations Board (NLRB) has decided that it no longer will apply "setting-specific" standards for determining when an employee's abusive conduct loses the protection of the National Labor Relations Act (NLRA). *General Motors LLC,* 369 NLRB No. 127 (2020).

- The NLRB modified its standard for determining whether an employee has lost the protection of the NLRA and been lawfully disciplined or discharged after making abusive or offensive comments in work-related situations.

- The decision will be applied retroactively "to all pending cases in which the Board would have determined, under one of its setting-specific standards, whether abusive conduct in connection with section 7 activity had lost an employee or employees the Act's protection."

What Happened Here?

- On April 11, April 25, and October 6 of 2017, an employee was disciplined for using invective toward management personnel while engaging in protected concerted activity protected by Section 7 of the NLRA. He filed unfair labor practice charges alleging the discipline violated the NLRA. After a trial, an NLRB ALJ decided the employer had violated the NLRA only in connection with its discipline of the employee for his April 11 conduct.
  - Employee, in arguing about overtime coverage, said he did not "give a f*** about your cross-training," that "we're not going to do any f****n' cross-training if you're going to be acting that way," and that the manager could "shove it up [his] f****n' a**."

- Unsurprisingly, the employer appealed the decision and the NLRB (with a Republican majority) invited briefs on the issue, including on the question of: "Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act?"

- The NLRB reversed the ALJ, and with it, years of Board precedent.

A Quick Overview – Relevant For An Election Year

- NLRA protects employees from retaliation for engaging in protected concerted activity.
- Protected concerted activity: Typically, two or more employees acting together to attempt to improve their working conditions OR one person acting on behalf of others.
  - **Includes political speech/activity when the speech/activity has a sufficient connection to the workplace or to employees' terms and conditions of employment**.
  - Applies equally to unionized and union-free workplace.
  - Applies both inside and outside the workplace (including online!).

A Quick Overview – Relevant For An Election Year

- Political speech/activity unrelated to a specifically identified employment concern is not protected.
  - Example: “Vote for Smith” button, or discussions regarding capital gains restrictions.

- Political speech/activity for or against a specific issue related to a specifically identified employment concern is protected.
  - Example: “Vote to Raise the Minimum Wage!” button, or discussions regarding right-to-work legislation.

The Former Standard

- Under President Obama, the NLRB expanded protections for employees who cursed, made inappropriate comments, or threatened their employers while otherwise engaging in PCA. Different settings = different tests.

- For outbursts to management in the workplace, the Board applied a four-factor test examining: (i) the place of the discussion; (ii) the subject matter of the discussion; (iii) the nature of the employee's outburst; and (iv) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

- As the usage of social media began to explode, the Board tackled the protections afforded to employees using social media and developed a nine-factor totality of the circumstances test.

THEY SAID WHAT?!

NLRB held the following comments were protected:

- During a union organizing drive, an employee posted on Facebook: “Bob is such a NASTY MOTHER F****** don’t know how to talk to people!!!!!! F*** his mother and his entire f****ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!” (*Pier Sixty, LLC* (2014)).
  - According to the Second Circuit, the employee’s post sat at the “outer-bounds of protected, union-related comments,” and it agreed with the Board that the employee’s conduct was **not** so opprobrious or egregious as to lose the protection of the NLRA.
- In the middle of a meeting about commissions, minimum wage and employee breaks, an employee called his supervisor a “f****ing crook”; an “a**hole” and a “f***ing mother f****ing”. (*Plaza Auto Center, Inc.* (2014)).

THEY SAID WHAT?!

NLRB held the following comments were protected:

- After a supervisor warned employees to shorten their breaks, two employees responded that things would “get ugly” if they were fired, and one warned his supervisor to “better bring your boxing gloves.” (*Kiewit Power Constructors Co.* (2010)).

- Employee wrote “Dear P*ssies, Please read!” and “Hey cat food lovers, how’s your income doing?” on union newsletters left in the women’s bathroom during union organizing drive. (*Fresenius USA Manufacturing Inc.* (2012)).

A Breath Of Fresh Air For Employers

- In last week's *General Motors* decision, the Board noted that its history of inconsistent standards and decisions raised "serious concerns that the Board is giving little, if any, consideration to employers' right to maintain order and respect."

- The NLRB concluded these series of tests had strayed from the precepts of the NLRA, which call for a determination of whether an employee *would have been* discharged for the conduct regardless of their actions or expressed sentiments in favor of unions or other protected conduct.

- So what's the new "test" . . .

A Breath Of Fresh Air For Employers

- The NLRB decided that its landmark *Wright Line* decision is the proper standard to apply for deciding cases "where employees engage in abusive conduct in connection with Section 7 activity, and the employer asserts it issued discipline because of the abusive conduct." *Wright Line*, 251 NLRB 1083 (1980). Think mixed motive case analysis.

- Under that decision, the NLRB General Counsel (GC) has an initial burden. If the GC meets his burden of proving that the employee's protected activity was a motivating factor in the discipline, the employer must prove that it would have taken the same action even in the absence of the Section 7 activity.
  - The sole issue considered is whether the employer's action was "motivated" by Section 7 activity. If not, the employer's action is lawful.

- The NLRB determined that it would apply *Wright Line* in these cases "regardless of the setting involved, whether it be a workplace, social media, or picket line."

Takeaways

- Employers will remain subject to the *Wright Line* test, under which the employer must demonstrate that an employee engaging in unacceptable behavior would have been terminated (or disciplined) regardless of their engaging in any Section 7 activity.

- For example, if an employer tolerates low-level vulgarity on an ongoing basis in its work environment, and an employee who favors the union utilized the same low-level vulgarity is discharged, it may be difficult to defend that termination decision since others who have not engaged in protected activity did not suffer a similar consequence.

- Before disciplining employees for engaging in abusive conduct, employers should determine whether the employee was involved in protected concerted activity while doing so and whether the employee would have been disciplined even if they were not engaged in protected concerted activity.

What Should Employers Do Now?

- For too long, “the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today,” said NLRB Chairman John Ring. “Our decision in General Motors ends this unwarranted protection, eliminates the conflict between the NLRA and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed.”

- The Board did not look at issues where employers discipline employees on the basis of disparagement or disloyalty towards the employer. For example, the Facebook “like” situation. *General Motors* focused on discipline for abusive conduct.

- Review and update policies – code of conduct, respectful workplace, social media, etc.

- Make sure policies are actively enforced in a nondiscriminatory fashion – do not allow employees to go without discipline even when protected activity is not implicated.
  - This will help in the defense of a claim that an employee’s Section 7 rights were violated.

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Thank you.