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Profanity or Protected Speech?

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Imagine this: an employee writes profanity ("whore board") on a company bulletin board, the employer terminates the employee for the profanity, and the National Labor Relations Board (NLRB) holds that the employee's profanity is speech protected by the National Labor Relations Act (the Act). That is exactly what happened to an aluminum products maker a few years ago. The NLRB held that the profanity constituted "protected concerted activity" under the Act, and the D.C. Circuit of the United States Court of Appeals (the Court) recently upheld the NLRB's decision. This decision highlights the expansive nature of protected concerted activity and why it is so important that employers tread carefully in this area.

What is Protected Concerted Activity?

Section 7 of the National Labor Relations Act guarantees employees numerous rights, including the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection. Common examples of protected concerted activity include discussing terms and conditions of employment (particularly on social media), distributing materials, participating in a concerted refusal to work in unsafe conditions, talking to a government agency about problems in the workplace, speaking to media about workplace labor concerns, and employees joining together to talk directly to the employer about issues in the workplace. Employers may not understand that the

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protections afforded by Section 7 also applies to issues beyond union activity, and to non-unionized workplaces. Therefore, an employee does not have to be conversing about a topic that relates directly to working conditions in the traditional sense to be protected concerted activity.

When Does Profane Language Cross the Line?

In 2020, the NLRB issued a decision in *General Motors LLC* that made a significant change to its standard for determining whether an employer lawfully disciplined or discharged an employee who made abusive or offensive statements in the course of activity otherwise protected under the Act. The NLRB nixed several context-specific standards and found that in cases involving offensive or abusive conduct used in the course of otherwise-protected activity, the Board should decide these cases under the familiar *Wright Line* burden-shifting standard. Under the *Wright Line* standard, the Board's general counsel must initially show that the employee's protected activity was a motivating factor in the discipline. If this burden is met, the employer must then prove it would have taken the same action even in the absence of the protected activity. If an employer is able to meet this burden, the general counsel must then prove that the employer's articulated reason is false or pretextual for a violation of the Act to be found.

However, even under the more employer-friendly *Wright Line* standard, employers still must be cautious when and how they discipline employees who make abusive or offensive statements in the course of activity otherwise protected under the Act. On August 9, 2022, the Court upheld the NLRB's decision that the use of the profane phrase "whore board" was protected by the Act. The Court's decision does not mean using the term "whore board" in the workplace is necessarily appropriate, but it was found that the comment was protected as a lawful protest to the Company's overtime policy. The Court made a point to emphasize that the employer regularly tolerated

vulgarities without imposing discipline, quoting one employee's analogy that "the plant's language could range from a G movie rating to NC-17; the use of 'whore board' rated 'PG.'" The Court used the *Wright Line* standard and found that, because the employer could not demonstrate it would have disciplined the offending employee absent his protected concerted activity, the employer violated the Act.

Takeaways

All employers must be cognizant of the fact that even if an employee's conduct appears on its face to be harassment (like "whore board"), it could be considered protected concerted activity. Employers should determine if the employee's conduct or complaint relates to a complaint or protest against a company policy. If it does, before taking any disciplinary action, employers should make sure that they are being consistent when imposing discipline for profane and obscene language. In other words, employers should enforce their anti-harassment policies consistently no matter what the circumstances are.

As always, Akerman attorneys will continue to monitor changes in NLRB guidance and policies. For any labor or workforce concerns, contact your Akerman labor attorney for further information and guidance.
