

Akerman Lens

# Profanity, Policy, and Protected Activity: Fifth Circuit Rebalances the Analysis

May 19, 2026

By [Ryan Krone](#), [Amy Moor Gaylord](#), and [Thomas Y. Mandler](#)



---

## Related People

[Amy Moor Gaylord](#)  
[Ryan Krone](#)  
[Thomas Y. Mandler](#)

In a significant decision for employers navigating employee misconduct during union activity, the Fifth Circuit vacated an NLRB ruling that found Starbucks unlawfully terminated a pro-union supervisor. The court held that the Board failed to adequately consider evidence that the employee’s conduct — particularly his highly offensive and targeted profanity — was materially different from workplace language the company had previously tolerated.

**Legal Standard**

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 abandoned prior 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.

### **The Facts and Analysis**

The case involved a shift supervisor who was disciplined and ultimately terminated after sending profane and abusive messages to coworkers and opening company mail from the NLRB. The Board had concluded that Starbucks acted because of the employee's union support, emphasizing that similar workplace language had been tolerated in the past. The court found the Board did not adequately grapple with evidence that the employee's language — described as “unhinged abuse” — was far more severe than other workplace profanity. Additionally, the court highlighted additional conduct — failure to complete work tasks and opening company mail — that could independently justify discipline.

While the Fifth Circuit remanded the case to the Board, a concurring judge would have gone further, criticizing the NLRB for what he viewed as a stark departure from “law-based adjudication.”

### **Key Takeaways for Employers**

This decision reinforces several key principles that employers can leverage when addressing employee misconduct — even in the context of protected concerted activity.

First, there are meaningful limits to what the Act protects. Even in union or organizing contexts, employees do not have carte blanche to engage in extreme, abusive, or threatening conduct. Employers retain the right to discipline behavior that crosses the line. The protections of Section 7 are not a blanket shield against accountability for genuinely egregious workplace behavior.

Second, context and consistency remain critical. The ruling underscores the importance of maintaining and documenting consistent standards of workplace conduct. The Fifth Circuit focused heavily on whether the employee's behavior truly aligned with conduct the employer had historically tolerated. Employers who apply their policies evenly and can demonstrate that history will be far better positioned to defend disciplinary decisions when challenged.

Third, employers should clearly document distinctions in severity. Where profanity or workplace banter is commonplace, the key question becomes how a particular incident differs in degree or kind from what has come before. Detailed, contemporaneous documentation of those distinctions — whether in tone, target, or context — provides the evidentiary foundation needed to sustain a termination.

Fourth, the full disciplinary record matters. The court signaled that progressive discipline and patterns of misconduct carry real weight. Employers should ensure that disciplinary decisions reflect cumulative conduct rather than isolated incidents, and that the paper trail tells a coherent story of escalation and opportunity to correct.

Finally, employers benefit from preserving multiple, independent grounds for discipline. Here, the

company's reliance on several distinct policy violations helped reinforce that the termination decision was not pretextual. When a discharge rests on more than one legitimate basis, it becomes considerably harder for the Board or a reviewing court to conclude that protected activity was the true motivating factor.

## **The Bottom Line**

The bottom line is this: the Fifth Circuit's decision provides helpful support for employers seeking to discipline serious misconduct in unionized or organizing workplaces. While the NLRB continues to scrutinize employer motives closely, this ruling confirms that courts will expect the Board to rigorously engage with evidence showing legitimate, non-discriminatory reasons for discipline — particularly where employee conduct is extreme and outside the bounds of workplace norms.

The Fifth Circuit has ordered the National Labor Relations Board to rethink a ruling that Starbucks unfairly fired a union backer who sent profane messages and opened its mail, saying the board did not grapple with evidence showing his “extreme” words were an outlier in a workplace that tolerated some profanity.

 [www.law360.com/...](http://www.law360.com/...)