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Common Sense Finally Prevails: Employers No Longer have to Tolerate Abusive and Offensive Conduct in the Workplace

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Your employee has just cursed at you, calling you every racist and/or sexist name in the book. Naturally, that employee must go! Just as you are ready to sign off on the termination, a thought occurs to you: "Uh-oh. He was standing on a picket line when he called me those names. Am I still allowed to discipline him, or would doing so violate his rights under the National Labor Relations Act? Am I really obligated to keep this employee after the things he called me?"

Until recently, the National Labor Relations Board (NRLB) applied a variety of different tests to determine when employers can lawfully discipline employees for inappropriate and abusive conduct while they are engaged in conduct or speech that would otherwise be protected by the National Labor Relations Act (NLRA). Recognizing that using all of these different tests often resulted in unfair and arbitrary results, the NLRB in a recent decision, *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020), replaced these multiple standards with the familiar burden-shifting framework it established in *Wright Line*, 251 NLRB 1083 (1980).

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Prior Context-Specific Standards

In adopting the *Wright Line* standard for cases where an employee's misconduct occurred while engaging in activity protected by Section 7 of the NLRA, the NLRB discarded its prior context-specific standards, which distinguished between: (1) abusive conduct directed toward management while in the workplace; (2) social media posts or workplace discussions among coworkers; and (3) abusive conduct taking place on the picket line.

- Abusive conduct directed toward management while in the workplace: the NLRB previously applied a pliable four-factor test under its precedent from an earlier case, *Atlantic Steel Co., 245 NLRB 814, 816 (1979)*, to determine whether the employee's conduct was severe enough to lose the NLRA's protection. The NLRB considered the following factors, without assigning a specific weight to any of them: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice. The NLRB in *General Motors* observed that this test was "hardly…a meaningful or fair analytical tool," in part because the second factor relating to the subject matter of the discussion "always tilts the scale in favor of employees retaining protection."
- Social media posts or workplace discussions among coworkers: the NLRB had used a "totality of circumstances" approach "unmoored from any specific factors." While there have been few cases under this standard, the NLRB in *General Motors* observed that the flexibility afforded by this approach created inconsistency and unpredictability.
- Abusive conduct taking place on the picket line: the NLRB had applied a standard from its decision in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), which asks whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the abusive

conduct. Practically, use of this standard meant that employers could only discipline employees for threatening conduct reasonably likely to result in an imminent physical confrontation. The NLRB in *General Motors* observed that this test allowed "appallingly abusive picket-line misconduct to retain protection, including racially and sexually offensive language."

Takeaway for Employers Under the *Wright Line* Standard

With these varying tests producing inconsistent and often confusing outcomes, the NLRB in *General Motors* announced that all such cases would now be analyzed under its longstanding *Wright Line* framework, resulting in a more predictable approach. Under *Wright Line*, the NLRB's general counsel must show: (1) that the employee engaged in protected activity; (2) that the employer had knowledge of that activity; and (3) the employer had animus against the protected activity. Once this showing is made, it is up to the employer to show that it would have taken the same action even in the absence of the employee's protected activity.

In addition to encouraging more consistent results, the NLRB's adoption of the *Wright Line* standard in all of these situations represents a pullback from the previously-accepted notion that employees should have greater leeway to engage in abusive conduct when participating in certain protected Section 7 activity. The rationale for this notion was that disputes over wages, hours, and working conditions are likely to elicit strong negative responses. Following *General Motors*, however, the NLRB has made clear that employers can take action to discipline or terminate employees for abusive, racist, and/or sexist speech without worrying that doing so would violate Section 7 of the NLRA. The NLRB also held that the *Wright Line* standard is to be applied retroactively to all pending abusive conduct cases.

As the NLRB's Chairman, John F. Ring, stated: "This is a long-overdue change in the NLRB's approach to profanity-laced tirades and other abusive conduct in the workplace. For too long, the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today. 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."

If you have questions about whether you can lawfully discipline an employee, contact your Akerman attorney.
