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Labor & Employment Alert

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NLRB reverses course and expands protections for employee misconduct

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The Board's return to a "setting-specific" standard requires employers to tread carefully when prohibited conduct and protected activities overlap.

What's the Impact?

- A return to the (not so) good ol' days? *Lion Elastomers* reinstates a trilogy of "setting-specific," factor-based tests that apply to workplace conduct based on specific circumstances.
- The new (old) standards may prohibit employee discipline if the employee also was engaging in conduct protected under Section 7.
- Employers will need to tread carefully, even when faced with "obvious" employee misconduct.

For a fleeting moment, the National Labor Relations Board (NLRB or the Board) allowed employers to use a common-sense approach to discipline employees who behaved badly in the workplace. For that fleeting moment, the Board recognized that employees' rights to engage in "protected concerted activity" under Section 7 of the National Labor Relations Act (NLRA or the

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Act)[1] usually did not protect employees who engaged in profane outbursts, made racist remarks, or threatened their supervisors. The Board had held in *General Motors*[2] that such conduct would be evaluated under a "burden-shifting" standard, commonly used in discrimination cases. As we previously described, to establish a claim under the *General Motors* standard, the NLRB General Counsel had to show that:

- the employee engaged in activity protected by the Act;
- the employer knew of that activity;
- the employee was disciplined; and
- a causal relationship existed between the discipline and the Section 7 activity.

If the General Counsel established those elements, then the employer could avoid a finding that it violated the Act by showing that it would have taken the same action against the employee even in the absence of Section 7 activity. An employer who consistently disciplined employees for profane outbursts or racist remarks, for example, could rely on this consistent enforcement of its workplace conduct rules to show that a particular employee was not disciplined because their profane outburst or racist remarks happened to have been made while exercising Section 7 rights.

That standard didn't last long. In *Lion Elastomers LLC*,[3] the NLRB recently overruled its decision in *General Motors*. In an "everything old is new again" moment, the Board returned to a "setting-specific" standard set forth in prior holdings, which varies depending on the context in which the conduct takes place. The Board rejected the *General Motors* approach of considering the employer's motive for disciplining the employee, focusing instead on the nature of the employee's conduct and the anticipated effect of the employer's decision to discipline the employee. "The proper focus," the Board ruled, "is on the employee's misconduct (or lack of it) and the predictable effect on the exercise of Section 7 rights if the employer were permitted to discipline or discharge the employee. What matters in both situations is the Board's evaluation of whether the employee's protected conduct retains or loses the protection of the Act due to the perceived misconduct, regardless of whether the employer had a good-faith or bad-faith motive for taking the action against the employee." Other driving forces behind the Board's decision appear to be a concern that the prior Board lacked a compelling basis for overturning "decades" worth of Board precedent, and to ensure a "level playing field" between management and employees.

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[1] Section 7 of the Act protects employees' rights to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" or generally to refrain from such activities.

[2] *General Motors LLC*, 369 NLRB No. 127 (2020).

[3] *Lion Elastomers LLC*, 372 NLRB No. 83 (2023).

What does this decision mean for employers?

With this shift, employers will not be shielded from liability under the Act even if the discipline they impose on an employee would have been the same regardless of whether the employee also was engaged in protected activity. As discussed in more detail below, that means that, when deciding whether to discipline an employee for inappropriate conduct, employers will need to assess whether an employee also was engaged in activity protected by Section 7 at the time of the conduct. If so, employers will need to consider whether or not the factors set out by the Board allow them to discipline the employee.

The "setting-specific" standards

As noted above, *Lion Elastomers* reinstates a trilogy of "setting-specific," factor-based tests that apply to workplace conduct based on specific circumstances.

Employees' conduct toward management in the workplace

For conduct that occurs at the workplace, such as outbursts made during collective bargaining negotiations involving management and employee representatives or during meetings between employees and management involving protected activity (such as discussions concerning compensation), the NLRB will apply the factors set forth in *Atlantic Steel*[4] to determine whether the conduct is protected and therefore should be immune from discipline. Those factors are:

- the place of the discussion;
- the subject matter of the discussion;
- the nature of the employee's outburst; and
- whether the outburst was, in any way, provoked by an employer's unfair labor practice.

For example, in *Plaza Auto Center, Inc.*,[5] after considering the factors noted above, the Board held that an employee who directed profanities at the owner of the company and called him "stupid" during a sales meeting, where compensation was a topic of discussion, was not sufficiently "belligerent" or "menacing" to lose protection under the Act.

Social media posts and employee conversations

For conduct involving posts on social media and for other conversations between employees, the Board will follow *Pier Sixty*[6] and consider the totality of the circumstances. For example, when considering if discipline is appropriate based on an employee's social media post, the Board takes into consideration:

- any evidence of the employer's antiunion hostility;
- whether the employer provoked the employee's conduct;

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[4] *Atlantic Steel*, 245 NLRB 814, 816 (1979).

[5] *Plaza Auto Center, Inc.*, 360 NLRB 972, 976 (2014).

[6] *See Pier Sixty LLC*, 362 NLRB 505 (2015) *enf'd*, 855 F.3d 115 (2d Cir. 2017).

- whether the employee's conduct was impulsive or deliberate;
- the location of the post;
- the subject matter of the post;
- the nature of the post;
- whether the employer considered similar conduct to be offensive;
- whether the employer maintained a specific rule prohibiting the conduct; and
- whether the discipline was typical of that imposed for similar violations or disproportionate to the offense.

In this context, the Board considered whether an employee's pro-union Facebook post , which also happened to be riddled with profanities directed at the employee's supervisor, along with an arguable threat, retained protection under the Act. Using a "totality of the circumstances" approach, the Board concluded that it did and that it was unlawful for the employer to have fired the employee.

Picket-line conduct

For conduct by employees while on a picket line, the Board considers whether "under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct." *See Lion Elastomers*, 372 NLRB No. 83 at n.6.

For example, in *Cooper Tire & Rubber Co.*,[7] the Board held that an employee who lobbed racially derogatory comments at replacement workers from the picket line was protected by the Act.

Conflicts with other federal labor laws

One concern stemming from the Board's (now-reinstated) precedent described above is how employers are to address employee conduct that may be protected by one law but may cause the employer to violate another. Protecting a racist rant, for example, that occurs during activity protected by Section 7 puts the employer at risk of violating federal, state, and local anti-discrimination statutes including Title VII of the Civil Rights Act of 1964 (Title VII). The now-overruled *General Motors* decision addressed that issue and partly relied on the difficulty employers faced when confronted with that type of conduct as the rationale for adopting the burden-shifting standard.

The *Lion Elastomers* Board was unconvinced. It determined that employers could comply with their obligation not to discipline employees for conduct taking place in connection with protected Section 7 activity while also complying with their obligations under anti-discrimination statutes. In particular, the Board reasoned, "[t]he *General Motors* Board cited no judicial support for the proposition that employers have a legal *duty* under antidiscrimination law to discipline or discharge employees in every instance involving the sort of 'offhand comments and isolated incidents'—those that are not 'extremely serious'—which the Board typically would find retained

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[7] *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. 7-10 (2016) *enf'd*, 866 F.3d 885 (8th Cir. 2017).

the protection of the Act if they occurred in the course of Section 7 activity." The Board further reasoned that it is "free to take into account a possible conflict with another [f]ederal statute, it if were to find that the misconduct otherwise retained the Act's protection."

However, where the line falls between permitted and prohibited discipline remains unclear. For example, most employers likely would agree that "racially offensive, stereotyped comments about food" should result in discipline for the employee who made them. Not so, according to the Board—at least when the comments are made from the picket line.[8]

Thus, the question becomes whether the employee's conduct is "extremely serious," and not just an "offhand comment" or an "isolated incident" (at least in the Board's view), such that the conduct loses its protection, thus freeing the employer to impose discipline without concern about infringing the employee's Section 7 rights.

Further, where there is employee conduct that falls in between those extremes, whether the Board would "take into account a possible conflict with another [f]ederal statute," and thus allow for employee discipline despite the coexistence of protected Section 7 activity, remains to be seen in future cases.

The takeaway

The takeaway from *Lion Elastomers*: employers should tread very carefully.

Before imposing disciplinary action for employee misconduct, employers should consider whether the employee also was engaged in any activity arguably protected by Section 7 of the Act. Employers should keep in mind that Section 7 is not a "union" issue: the Act covers non-supervisory employees even when they are not members of a union. If an employee might be exercising their Section 7 rights, employers would be well-advised to review the circumstances with labor counsel before moving forward with disciplinary action.

Further, while employers must strive to maintain a workplace free from discrimination, it is clear that the Board believes those concerns should take a back seat to Section 7 rights. When faced with a potential conflict between Title VII and the Act, the Board has signaled strongly that it will hold the rights of an employee engaged in protected activity above the rights of other employees to have a workplace free from discrimination and harassment. Thus, discipline that otherwise might be appropriate under most circumstances is not necessarily permitted if the employee also was engaging in conduct protected under Section 7.

Adding to the uncertainty left by the decision itself, we have little doubt that the Board's decision will be reviewed by the courts.

Employers should put the NLRA back to the front of their minds and dust off their pre-2020 approach to handling employee misconduct.

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[8] See *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017).

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