

NLRB Makes It Easier For Employers to Take Action Against Offensive Employee Conduct – Even in the Course of Protected Activity

Labor & Employment Law Update

By Beverly Alfon on July 22, 2020

In a decision issued yesterday, General Motors LLC, 369 NLRB No. 12 (2020), the National Labor Relations Board declared that “[it] will no longer stand in the way of employers’ legal obligation to take prompt and appropriate corrective action to avoid a hostile work environment on the basis of protected characteristics.”

Prior to yesterday’s decision, employees who engaged in obscene, racist, and sexually harassing speech in the course of activity otherwise protected by the NLRA, were protected by various setting-specific standards that provided leeway to employees to engage in such conduct depending on the setting (i.e., encounters with management, postings on social media, and conduct on the picket line). The Board noted that while these standards were put into place to allow for some impulsive behavior in the course of protected activity, they did not require any showing of discrimination or antiunion motivation – “mistakenly assum[ing] discrimination and antiunion motivation by treating union activity as inseparable from related abusive conduct.” The Board specifically recognized the tension between these setting-specific standards and antidiscrimination laws.

Going forward, the applicable standard for all cases involving offensive or abusive conduct in the course of otherwise-protected activity, regardless of setting, will now be decided under the well-established *Wright Line* standard. Under *Wright Line*, the NLRB General Counsel must first prove that the employee’s protected activity was a motivating factor in the discipline. If that burden is met, the employer must then prove it would have taken the same action even in the absence of the protected activity, for example, by showing consistent discipline of other employees who engaged in similar abusive or offensive conduct.

The Board reasoned that the application of *Wright Line* in this context will ensure that employees’ Section 7 rights (referring to the section of the Act that gives employees the right to form, join or assist labor organizations, bargain collectively through a representative of their own choosing, and engage in other

protected group activity for mutual aid or protection, and to refrain from any or all of these activities) will continue to be protected, while also “honor[ing] the employer’s right to maintain order and respect.” This is undoubtedly a positive decision for employers who are faced with offensive and abusive employee conduct in the course of activity protected by the NLRA.

Want to learn more about how to maintain order and respect in the workplace in the face of political speech and conduct by employees? Check out our upcoming complimentary webcast on Wednesday, August 19th. We will be discussing how to identify conduct that is severe enough to trigger lawful discipline and what legal parameters are at play.

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