

# NLRB Reverses Course, Provides Broader Protection to Employees Engaged in Offensive Behavior

## Labor & Employment Law Update

on May 10, 2023

On May 1, 2023, the National Labor Relations Board (“NLRB” or “Board”) issued a decision, *Lion Elastomers LLC*, that provides employees with extensive cover for inappropriate workplace behavior under the guise of the National Labor Relations Act (the “Act”). Moving forward, employers must carefully scrutinize the environment and circumstances under which bad employee behavior occurs and analyze whether levying consequences for such behavior could land it in hot water under the Act.

As background, in a 2020 decision entitled *General Motors LLC*, the Board (the majority of which, at the time, were Trump administration appointees) expanded employers’ right to discipline “abusive conduct” in the workplace, regardless of whether such conduct occurred while an employee purportedly was exercising Act-provided rights. That decision essentially boiled down to this: if an employer would have disciplined an employee over the same conduct had it not occurred within the context of Act-related behavior, the discipline would not be found in violation of the Act.

With that in mind, we turn to *Lion Elastomers*. Management of Lion Elastomers, a Texas-based rubber company, had a history of less-than-positive interactions with a long-time employee over issues like scheduling, employee terminations, safety, etc. Multiple written warnings over the employee’s behavior had been issued. Things finally boiled over in June 2018, when Lion Elastomers fired the employee over his refusal to sign a Last Chance Agreement.

The Fifth Circuit Court of Appeals directed the Board to analyze these facts in light of the *General Motors* decision. Instead of doing so, the Board—a majority of which now are Biden administration appointees—took it upon itself to simply toss out *General Motors* and reinstate prior precedent that provided much more extensive employee protections. As such, an employer’s options for addressing and potentially disciplining egregious workplace conduct are far more limited, and the setting of the behavior now is of central importance. It would appear employees on a picket line may again be protected when referring to their bosses with profanity or shouting racial slurs at replacement workers, because

again, in the words of the current NLRB, reinstating those protections “...ensures that adequate weight is given to the rights guaranteed to employees by Section 7 of the Act, by ensuring that those rights can be exercised by employees robustly without fear of punishment for the heated or exuberant expression and advocacy that often accompanies labor disputes.”

Albeit the result of political ping pong, the fact remains that the law has changed and an employer is well advised to refresh its recollection of the pre-*General Motors* rules. In light of this recent decision, when determining whether to discipline “abusive conduct” in the workplace, an employer must critically analyze the following factors:

- Place of the discussion (the more spontaneous, the more protected);
- Subject matter of the discussion (the more it relates to terms and conditions of employment, the more protected);
- Nature of the employee’s outburst (loud and boisterous behavior, including cutting off a supervisor and delivering words in an animated and challenging tone, is protected); and
- Whether the outburst was, in any way, provoked by an employer’s unfair labor practice (and, even if not, still potentially protected based on the prior factors).

Importantly, this decision applies to *all* employers covered by the Act and is not limited to employers with a unionized workforce. As the Board’s emphasis toward Act enforcement on non-unionized employers continues, all employers subject to the Act should take note of this decision and review their policies to ensure they align with the *Lion Elastomers* decision, particularly those policies that refer to picket line conduct, social media use and other workplace discussion, speech or other activities that sound of concerted action.

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