

NLRB Clarifies its Section 7 Evidentiary Standard for Evaluating Employer Discipline for Employee Abusive Conduct

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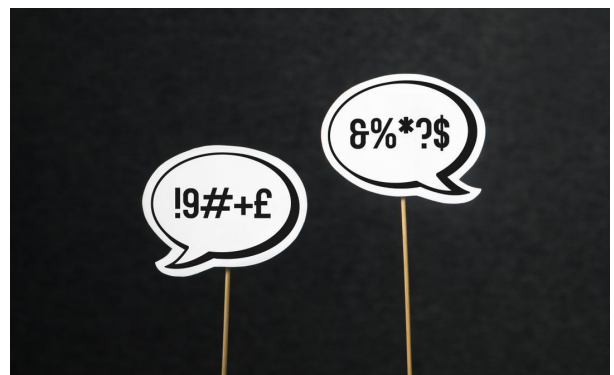
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Last September, [we anticipated](#) a change in National Labor Relations Board (Board) policy regarding the evidentiary standard for resolving unfair labor practice charges related to employer discipline of employee abusive conduct. Now, the Board will employ a single proof paradigm—the *Wright Line* test—to resolve such unfair labor practice allegations.

Previously, the Board employed different evidentiary standards depending on the context of the alleged misconduct. For example, the Board used criteria under *Atlantic Steel* in dealing with employee misconduct in connection with management interactions. The Board also used a separate “totality of the circumstances” test for dealing with abusive social media posts. Finally, the Board used a third approach to deal with picket line misbehavior by analyzing whether the conduct was reasonably intended to coerce or intimidate employees in the exercise of their rights protected under the National Labor Relations Act (Act).

In making its decision, the Board was critical of how these tests rendered Section 7 activity and abusive conduct “analytically inseparable.” The Board said the use of these multiple tests resulted in vague standards, a lack of predictability for all parties, and mixed decisions, all of which made it appear as though the result was at the whim of the Board.



Traditionally, the Board has used a shifting burden analysis under *Wright Line* to determine whether an employer’s action was motivated by an employee’s exercise of protected activity; whether an anti-union [animus](#) could be attributed to the employer; and ultimately, whether the employer violated the Act. Under *Wright Line*, the General Counsel of the Board bears the burden of demonstrating that an employee engaged in protected activity, that the employer knew of the protected activity

and also harbored an animus toward the protected activity. Once the General Counsel has made this showing, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same disciplinary action in the absence of Section 7 protected activity.

Significant *amici* briefing was submitted in response to the Board's request for comment on whether the various standards should be changed. Even the U.S. Equal Employment Opportunity Commission (EEOC) weighed-in on the topic. In supporting the multiple standards previously employed by the Board, it offered the rationale that the "realities of industrial life" are most likely to engender ill feelings and strong responses among employees. Therefore, some tolerance of abusive behavior on the part of employees should be expected as part of the day-to-day workplace experience. However, the Board said that its concern was overstated, and it will no longer continue to feed into the misconception that abusive conduct must be tolerated for Section 7 rights to be meaningful.

To an extent, this decision aligns the perspectives of the EEOC and the Board on certain abusive working environments. The equal employment opportunity laws do not forgive bad behavior merely because it arises from ill feeling in the workplace. The Board now states that its duty is to protect employees from interference with Section 7 rights and not necessarily to referee what abusive conduct is severe enough to warrant discipline. Additionally, the Board noted that its tests in the past have been wholly indifferent to employer obligations under other laws, or even its own policies. Previously, that precedent resulted in employer liability for attempting, for example, to address and discipline racial epithets thrown on the picket line and abusive posts using the "f-bomb" liberally to refer to management. In many cases, the employer was found liable and the employee was protected from discipline. Now, the Board has sent a strong signal that this type of behavior will no longer be tolerated.

The holding of *General Motors LLC* is that *Wright Line* should be used to resolve cases where the allegation is that discipline for abusive conduct was motivated by protected Section 7 activity. Employers are now able to predict with certainty the evidentiary standard and its obligations to justify discipline imposed—even when protected activity is arguably in the picture. Employment lawyers should understand that the employer still has a high burden, as it must prove it would have taken the same disciplinary action in the absence of Section 7 activity. However, the process is now streamlined and employers will have the ability to defend and introduce its policies and obligations under other laws when relevant to the case.

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