Alert

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COZEN O'CONNOR

NLRB Makes it Harder to Discipline Employees who Engage in Abusive Behavior

In *Lion Elastomers LLC*, 372 NLRB No. 83 (5/1/2023)(*Lion Elastomers*), the National Labor Relations Board (NLRB or Board) revisited the issue of what happens when an employee engages in abusive or inappropriate conduct while also participating in a protected, concerted activity that would otherwise be protected by Section 7 of the National Labor Relations Act (Act). In 2020, the NLRB under President Trump issued a decision in *General Motors LLC*, 369 NLRB No. 127 (2020), which reversed previous board decisions and applied what is known as the *Wright Line* test, which looks at whether the employer would have imposed the same discipline regardless of the protected activity.

In *Lion Elastomers*, a newly constituted Board under President Biden reversed the *General Motors* decision and reinstated the previous test set forth in *Atlantic Steel,* 245 NLRB 814 (1979), which requires an examination of the specific setting and allows the employee to engage in admittedly abusive or inappropriate conduct while engaging in the otherwise protected activity unless the conduct is extreme. The Board cited the fact that this protection goes back 70 years without recognizing that the workplace — and demands of employees (and management) to be treated with a certain level of civility — has changed over that time. This alert will review the decision and provide recommendations for employers on how to address disciplinary issues for abusive behavior when employees also engage in what might be considered protected concerted activities.

What Are Protected Concerted Activities under Section 7 of the Act?

Section 7 of the Act applies when one or more employees act on matters relating to collective terms and conditions of employment, including wages and benefits, hours of work, work rules, etc. Obvious examples of employees engaging in protected concerted activities include employees involved in collective bargaining, grievance proceedings, and picketing during a strike. However, protected concerted activities are much broader in scope and apply to workplaces where the employees may not be represented by a union. For example, if two employees approach a supervisor to discuss their wages, the employees are engaged in "concerted" activities because there are two or more employees involved. They are engaged in "protected" activities because they are discussing terms and conditions of their employment. Additionally, a single employee can engage in protected concerted activity when expressly or implicitly, the employee speaks or acts on behalf of himself or herself and other co-workers. Arguing an individual grievance is not "concerted."

In addition, employees do not have to be physically at work to be protected. For example, employees discussing work issues on social media after work can be engaged in protected, concerted activities.

How Does Engaging in Conduct Covered by Section 7 Affect the Decision to Discipline Employees Who Also Engage in Misconduct?

The U.S. Supreme Court has stated that because labor disputes are often "heated affairs,[1] and that "[f]ederal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."[2] Similarly, in an earlier NLRB decision, the Board had stated, "disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses."[3]

Peter J. Ennis

Member

pennis@cozen.com
Phone: (412) 620-6512
Fax: (412) 275-2390

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As a result of the license the Board had given to employees and unions to pursue their Section 7 rights in an aggressive, and sometimes abusive, manner prior to *General Motors*, the Board had analyzed each case based on "setting-specific standards that, within limits, treat certain employee conduct as inseparable from the statutorily protected activity during which it occurs." *Lion Elastomers*. In regard to actions towards management, the factors relied upon were the:

1. place of the discussion/conduct;
2. subject matter of discussion;
3. nature of employee's outburst; and
4. whether the outburst was provoked in any way by the employer's unfair labor practice.[4]

In regard to actions on a picket line, the standard is whether, under all the circumstances, non-strikers would reasonably be coerced or intimidated by the picket-line conduct.[5] Finally, in regard to social media posts and other situations involving employee discussions in the workplace, the standard is the totality of the circumstances.[6]

Of course, this raises the issue of what the limits are. Unfortunately for employers, it is a very high threshold: "The relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service."[7] At one point, this standard led the Board to conclude that verbal threats on a picket line, unaccompanied by physical acts, were protected. This decision was eventually reversed so that the Board now looks at whether the misconduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[8] What is missing from that standard is any consideration of the employer's right to maintain a safe and productive workforce.

What the Decision in *General Motors* Did.

Instead of looking strictly at the employee's conduct, the Board in *General Motors* relied on the motivation of the employer. Specifically, once the Board demonstrated that the employee was engaging in protected behavior at the time of being disciplined, the burden then shifted to the employer to prove that it would have made the same decision regardless of whether the employee engaged in protected activities. This approach is known as the *Wright Line* standard and applies to claims that the employer discriminated against the employee based on their union activities.

The practical effect of the *General Motors* decision was that the employer treated all employees the same. If the employer could demonstrate that any employee engaging in the misconduct would have received the same discipline, there is no violation of the Act.

Lion Elastomers Gives More Protection to Certain Employees

The practical effect of the Board decision in *Lion Elastomers* is to provide certain employees — i.e., employees who are also engaging in protected concerted activities — greater protection than employees who are acting on their own, even though they engage in the exact same misconduct. This is entirely intentional, as the Board in *Lion Elastomers* stated that the employer's motive and good faith were "immaterial."[9] The Board also stated that "the elevation of 'civility' as a supposed statutory goal gives employers dangerous discretionary power over employees whenever they exercise statutory rights in opposition to the employer's interests."[10] In contrast, according to the Board, the "setting-specific" standard "ensures" that employees can exercise their rights "robustly without fear of punishment for the heated or exuberant expression and advocacy that often accompanies labor disputes."[11]

The extent to which the setting-specific standard protects abusive, if not dehumanizing, behavior is illustrated by cases cited by the dissenting opinion where the Board overturned employee discipline:

- During a grievance meeting, an employee called the supervisor an 'ass,' unleashed a stream of profanity, forcefully stood up, stepped toward the supervisor, shook her finger within striking distance, and continuously screamed, 'I can say anything I want,' 'I can swear if I want,' and 'I can do anything I want."[12]
- Employee engaged in protected conduct when the employee posted on Facebook that a

manager “is such a NASTY MOTHER F****** don’t know how to talk to people!!!!! F*** his mother and his entire f***ng family!!! What a LOSER!!!!! Vote YES for the UNION!!!!!”[13]

- Striker said “f*** you [N word]” to a black security guard while gesturing with both middle fingers.[14]

In contrast, the majority cited the following cases where discipline was upheld:

- Discharge upheld where employee distributed and discussed a union survey during state-mandated medical and eye exams and refused multiple requests to stop.[15]
- Discharge upheld where an employee improperly used a security passcode to lead a group of employees and non-employees into a secured area in a hotel to present a petition to management.[16]

Handling Employee Discipline in the Future.

Unfortunately, the Board has failed to recognize, and give weight to, how the workplace has evolved over the past 70 years and, as a result, has given certain employees more rights than others. Nonetheless, the following steps will help employers comply with the current state of the law when disciplining employees:

1. **What to do now?**
   A. Review written policies and update as appropriate: It is going to be easier to establish that an employee’s conduct was egregious if it violates a written policy. While that is true of all workplaces, it can be particularly helpful in a union environment where the union has agreed on what constitutes grounds for discipline/discharge.
   B. Train management in how to respond to difficult employees.
      a. Clear written rules
      b. Review with the employee the supervisor’s expectations on not only the employee’s job duties but also how the employee is to interact with others.
      c. Provide specific consequences for failing to meet expectations.
      d. Do not ignore a problem. Deal with it when it arises so that memories are fresh.
      e. Enforce the rules consistently — do not let the employee be in a position to say some other employee has done the “same” thing.
   C. Train management on how to deal with employee outbursts.
      a. Stay calm and attempt to listen to the employee unless it is an emergency.
      b. Is the employee having a bad day that can easily be resolved by a cooling off period, or is the employee actually threatening an employee?
   D. Train management how to conduct investigations and interviews: Any investigation should be conducted in a manner that protects the privacy and dignity of the employees involved. This includes such factors as:
      a. Conducting meetings in an area where confidentiality can be maintained.
      b. Ensuring that supervisors are aware that a bargaining unit employee who is subject to potential discipline is entitled to representation, upon request, during an investigatory interview (known as “*Weingarten* rights”).
      c. Preparing questions in advance.
      d. Avoid providing the names of employees who provided information.
      e. Letting the accused employee tell their story.
      f. If the employee being questioned is belligerent, staying calm and taking a break. If that does not work, tell the employee the consequences of their behavior.
2. **Deciding on appropriate discipline**
   A. Was the employee engaging in Section 7 activity at the time (e.g., engaging with at least one other employee or on behalf of other employees regarding terms and conditions of work)? If not, apply your normal disciplinary process. If so, go to the next step.
   B. Apply the applicable standard utilized by the Board. For example, if it involves an interaction with management, apply the four factors from *Atlantic Steel*:
      a. The place of the discussion/conduct; subject matter of discussion; nature of the employee’s outburst; and whether the employer contributed to the situation.
      b. For example, an employee yelling in the middle of a group meeting that the employee thinks the particular topic is “b*** s***” may not be protected conduct in

the first place, but even if it is, that is not the time, place, or manner to talk like that.

C. Apply the employer's written policies, as well as its practices. For example:
    a. How has the employer treated other employees for such conduct?
D. Consider the egregiousness of the employee's comments/conduct. For example.:
    a. Has the employee been disciplined for such conduct in the past?
    b. What was the impact of the employee's conduct on the employer's business (financially, time commitment, impact on employee relations, etc.)?
E. Before making a final decision, review it with upper management and/or human resources professionals and/or counsel.

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[1] *Linn v. United Plant Guard Workers of Amer., Local 114*, 383 U.S. 53, 58 (1966).

[2] Slip Op. p. 4, quoting *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974).

[3] Slip Op. p. 2, quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

[4] Slip Op. p. 1, citing *Atlantic Steel*, supra.

[5] Slip Op. p. 1 fn. 6, citing *Clear Pine Moulding, Inc.*, 268 NLRB 1044, 1046 (1984)

[6] Slip Op. p. 1 fn. 5, citing *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1839 fn. 3 (2016).

[7] *Id.*

[8] *Clear Pine Mouldings*, 268 NLRB 1046 (1984) enfd. 765 F. 2d 148 (9th Cir. 1985).

[9] Slip Op. p. 5.

[10] Slip Op. p. 11.

[11] Slip. Op. p. 3.

[12] *Postal Service*, 364 NLRB 701, 702-04 (2016).

[13] *Pier Sixty*, 362 NLRB 505, 506-08 (20115).

[14] *Airo Die Casting, Inc.*, 347 NLRB at 812.

[15] Slip. Op. p. 2, fn. 11, citing *Gene's Bus Co.*, 357 NLRB 1009, fn. 4 (2011).

[16] Slip Op. p. 2, fn. 11, citing *KHRG Employer LLC*, 366 NLRB No. 22 (2018).