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INSIGHT: NLRB Finally Limits Protection of Abusive, Profane, Offensive Conduct

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The NLRB's July *General Motors LLC* opinion finally clarifies when employers can discipline workers for offensive, abusive conduct, say Morgan, Lewis & Bockius LLP attorneys, including former NLRB chairman Philip A. Miscimarra. They offer employer takeaways and welcome the clarification that recognizes an employer's legitimate need to maintain order and a discrimination-free workplace.

The National Labor Relations Board, in its long-awaited decision in *General Motors LLC* , abandoned its problematic standard around the discipline and discharge of employees who engage in abusive conduct in connection with protected concerted activity.

Particularly in this moment in time, when creating safe, respectful, diverse and inclusive workplaces is so important, the board's clarification is welcome news.

Prior Standard Led to Flood of Cases Protecting Offensive, Abusive Conduct

Prior to *General Motors*, employees were often protected from discipline or discharge—even in circumstances involving racist, profane, and/or vitriol-filled attacks—so long as those attacks occurred simultaneously with conduct otherwise protected by the National Labor Relations Act (NLRA).

As outlined in the NLRB's detailed analysis, this prior standard led to a flood of cases protecting offensive, abusive conduct. Whether an employer could discharge an employee for using a racist slur or calling a company vice president a "stupid f***ing moron" was questionable and turned on context-specific multi-factor tests, which often resulted in the conduct being protected and immune from discipline.

The NLRA protects certain employee rights, including the right to work together to raise concerns about terms and conditions of employment. In addition to being concerted activity, it must also be for mutual aid or protection to be legally protected under the NLRA. The board has long recognized that that disputes regarding wages, hours, and working conditions can "engender ill feelings" and solicit strong responses.

The *General Motors* opinion, however, recognizes that the board has permitted this explanation to infringe on an employer's legitimate need to maintain order and a discrimination-free workplace.

The board recognized that its prior standards failed to properly consider employers' legal obligations to prevent harassment and a hostile work environment, as well as to maintain respect at work. The board announced it would apply its familiar *Wright Line* standard for discriminatory conduct moving forward.

Employers must meet the NLRA's protections, the board held, while also complying with the duty under U.S. anti-discrimination laws that may require investigation, discipline, discharge, or other prompt action against an employee engaged in workplace misconduct.

Employer Takeaways

- The *General Motors* decision is an important change for employers, recognizing both their ability and obligation to maintain safe and respectful work environments. The board now acknowledges that employers can have a legitimate non-discriminatory interest in disciplining or discharging employees for abusive, profane, and/or discriminatory behavior, even if related to other Section 7-protected activity.
- The board overruled all of its prior doctrine relating to the NLRA protection of abusive conduct. It is unclear whether any of this doctrine remains if an employer chooses to discipline for conduct tied into protected activity that is problematic but not "abusive." However, the "disloyalty doctrine"—which applies specifically to attacks on an employer's product or service during labor disputes and whether such attacks remain protected under the NLRA—still remains.
- The board did not provide a single definition of "abusive conduct" but rather provided examples of actions from past cases that it would consider abusive conduct. Generally, it appears the board considers "abusive conduct" as covering behavior that violates or risks violation of anti-discrimination and anti-harassment laws, that constitutes personally directed ("ad hominem") profane attacks, and that potentially even extends to modern definitions of "bullying."
- An employer should decide what conduct it considers to be abusive and characterize the conduct as such in its disciplinary documents. While the board has not provided a clear definition, common sense can apply in this situation until the NLRB provides further guidance.
- *General Motors* also demonstrates that this board takes seriously the General Counsel's need to prove legally-protected conduct as a motivating factor for the discipline, treating the protected concerted activity and the baseline abusive conduct as analytically distinct. Employers will thus now have more of a chance to prove that the employee's protected activity was not the cause for any discipline imposed on the employee, and the mere proximity in timing where abusive conduct and protected conduct occur during the same event—without more—will no longer be sufficient to support a claim of pretext in abusive conduct cases.

- Although a familiar test, employers should remain aware that the *Wright Line* analysis can be expansive and difficult to confront when employer discipline is challenged. For example, employers should carefully review any potential comparator situations to ensure consistent enforcement of workplace standards and policies. Any evidence of discriminatory intent against unions or protected activity and evidence of pretext will also be a critical part of the analysis.
- Finally, employers with currently-pending proceedings involving abusive conduct should evaluate the potential application of *General Motors* to their cases.

Author Information

Philip A. Miscimarra, a partner at Morgan, Lewis & Bockius LLP, is the former chairman of the NLRB. He leads the firm's NLRB special appeals practice and is co-leader of the firm's workforce change team, which manages all employment, labor, benefits, and related issues arising from mergers, acquisitions, startups, workforce reductions, and other types of business restructuring.

Harry I. Johnson, a partner at Morgan, Lewis & Bockius LLP, is a former member of the NLRB and now serves clients as a management-side defense lawyer, with more than 20 years of experience in traditional labor matters before the NLRB and federal courts. He is the co-practice group leader of the firm's nationally-recognized labor/management relations practice.

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Sharon Perley Masling, a partner at Morgan, Lewis & Bockius LLP, is co-director of the firm's workplace culture consulting group and helps companies and organizations create safe, respectful, and inclusive workplaces, focusing on preventing and responding to issues of workplace harassment and misconduct. Having served for eight years as chief of staff and senior counsel to Commissioner Feldblum at the EEOC, she provides insight on the enforcement of all employment civil rights laws and advises employers on issues of employment discrimination.

Authors' Note: The prior NLRB standards governing offensive workplace conduct and workplace civility requirements were criticized by Johnson and Miscimarra when they served as NLRB members. The board's recent General Motors decision relied on Johnson's dissenting opinion in Pier Sixty LLC, 362 NLRB 505 (2015). The board also now broadly permits workplace civility requirements (previously deemed unlawful) based on The Boeing Co., 365 NLRB No. 154 (2017), decided in part by former NLRB chairman Miscimarra. The EEOC first called attention to the tension between employers' obligations under employment anti-discrimination laws and the

NLRB's position in a report co-authored by Feldblum in 2016, and the EEOC filed an amicus brief in the NLRB General Motors case urging a standard for employers that would allow them to fulfill their obligations under those laws.

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