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Back to General Motors: New NLRB Majority Restores Employer-Friendly Standard for Abusive Conduct During Protected Activity

Labor lawyers know the drill: interpretations of the National Labor Relations Act (NLRA) tend to swing with the political party that holds the majority on the National Labor Relations Board (Board). Once the newest Board member was sworn in on August 17, giving Republicans the majority, it was only a matter of time before the Board began overturning recent decisions in favor of more employer-friendly interpretations.

That time has come. On September 23, in *Lion Elastomers*, the Board restored a more employer-friendly standard for deciding whether employees may lawfully be disciplined for abusive conduct that occurs during otherwise protected activity. The Board held that its 2020 decision in *General Motors* is once again the governing precedent. Under *General Motors*, employers may discipline employees for abusive conduct—including profane, racist, sexually offensive, or threatening conduct—even when it occurs during union activity or other protected concerted activity, as long as the employer would have imposed the same discipline absent the protected activity.

The Shifting Standards for Employee Misconduct

Section 7 of the NLRA protects employees who act together on wages, hours, safety, and other working conditions, whether or not they are represented by a union. But what happens when that protected activity is accompanied by offensive or aggressive behavior? Can an employer still discipline the employee?

Before 2020, the answer depended on where and how the conduct occurred. The Board applied different standards drawn from several prior decisions to different settings:

- Confrontations with management turned on the location and subject of the discussion, the nature of the employee's outburst, and whether an employer's unfair labor practice provoked it.
- Social media posts and most coworker conversations were judged under a "totality-of-the-circumstances" test.
- Picket-line conduct was judged by whether a reasonable employee could see the conduct as coercive or intimidating regarding the choice to work, strike, or otherwise exercise Section 7 rights.

As a result, an employee could engage in abusive conduct during protected activity and be shielded by the NLRA's protection against discipline for protected activity.

In 2020, the Board's decision in *General Motors* replaced those standards with the familiar burden-shifting framework from the Board's 1980 *Wright Line* decision. Under *Wright Line*, the Board's General Counsel must first show that (1) the employee engaged in Section 7 activity, (2) the employer knew about it, and (3) the employer had animus toward that activity, with evidence sufficient to establish a causal link between the discipline and the Section 7 activity. If the Board's General Counsel makes that showing, the employer can still avoid liability by proving that it would have taken the same action anyway—for example, by showing it has consistently disciplined other employees for similar misconduct.

The Long Road of *Lion Elastomers*

The *Lion Elastomers* case has a winding history. In May 2020, the Board—which had a Republican majority at the time—found that the employer in *Lion Elastomers* violated the NLRA by giving a union representative a verbal warning for disorderly conduct after a meeting during which he repeatedly questioned a safety manager about excessive overtime and heat-related safety concerns. The employer asked the Fifth Circuit Court of Appeals to review the decision. While that appeal was pending, in July 2020 the Board issued *General Motors* and asked the court to send *Lion Elastomers* back to it so that the Board could determine how the new standard affected the outcome of that case.

In 2023, instead of applying *General Motors* on remand, the Board—then with a Democratic majority—overruled *General Motors* altogether and brought back the prior setting-specific standards. The Fifth Circuit vacated the Board's decision in 2024, explaining that the case had been sent back to apply *General Motors*, not to eliminate it, and that the employer should have had a chance to address the proposed change before the Board acted.

On the second remand, the current Republican-majority Board held that the Board's 2023 attempt to overrule *General Motors* did not survive the Fifth Circuit's vacatur. *General Motors* is therefore the governing precedent—including on remand in the *Lion Elastomers* case.

What Employers Should Do Now

The return to *General Motors* swaps a patchwork of setting-specific tests for a single consistent framework. It also resolves a long-standing dilemma for employers: having to choose between complying with the NLRA and enforcing policies against racist, sexually offensive, threatening, or otherwise abusive workplace conduct. That said, misconduct during protected activity does not automatically justify disciplinary action. Before taking any adverse action, employers should:

- identify and document the specific conduct supporting the proposed disciplinary action
- confirm that comparable misconduct has been treated consistently
- ensure that the decision is based on the misconduct rather than the employee's complaint, union activity, or other protected conduct
- consider whether the timing or decision-making process could suggest that protected activity influenced the decision to take disciplinary action

Bottom Line

Lion Elastomers gives employers some leeway to enforce neutrally applied rules when employees cross the line of proper conduct during otherwise protected activity. However, employers must remember that employees' protected activity itself remains protected, and inconsistent enforcement of conduct rules or evidence of hostility toward that protected activity can still lead to liability under the NLRA. Therefore, employers should carefully investigate and document employee misconduct during protected activity before imposing disciplinary action and consult experienced labor counsel to avoid unfair labor practice charges.

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