

Electronic Alert

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NLRB Changes Standard for Assessing Discipline of Individuals Engaged in Protected Conduct

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On May 1, 2023, in *Lion Elastomers LLC II*, the National Labor Relations Board (NLRB) overruled *General Motors*, a case that provided the standard for determining when an employer unlawfully disciplines an employee who engages in “abusive conduct” while also engaging in concerted activities protected under the National Labor Relations Act (NLRA). In its previous framework, the NLRB focused its analysis on an employer’s motive when taking an adverse employment action. Under its new decision, the NLRB will instead look to the “setting-specific” context in which the employee’s abusive conduct takes place.

Now, the NLRB will apply one of three different setting-specific standards:

1. The *Atlantic Steel* test will apply to employee conduct towards management in the workplace. Under *Atlantic Steel*, the NLRB weighs the following factors to assess whether an employee’s conduct during Section 7 activity loses its protected status: (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the employee’s outburst; and (d) whether the outburst was provoked by an employer’s unfair labor practice.
2. The Totality-of-the-Circumstances test will apply to an employee’s abusive conduct in social media posts or conversations among employees. As its name implies, under this test the NLRB considers the totality of the circumstances for determining whether an employee’s conduct justifies discipline.
3. The *Clear Pine Mouldings* test will apply at the picket-line. Under *Clear Pine Mouldings*, the NLRB considers whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by an employee’s abusive picket-line conduct.

In its decision, the NLRB explains that abusive “conduct occurring during the course of protected activity must be evaluated as part of that activity—not as if it occurred separately from it and in the ordinary workplace context.” The NLRB emphasized that “disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses” and therefore, an employee’s abusive conduct towards management, or their fellow employees, may be justified as an exercise of their Section 7 rights. The NLRB went so far as to state that epithets which “are erroneous and defame one of the parties to [a labor] dispute” are “not so indefensible to remove them from the protection of” the NLRA.

Lion Elastomers LLC II is another example of why employers need to stay up to date on the continued developments from the NLRB. For questions related to compliance with the NLRA, contact Nick Ball at 503-276-2150 or nball@barran.com, or Nicole Elgin at 503-276-2109 or nelgin@barran.com.