EMPLOYEES' PROFANE, ABUSIVE OR RACIST SPEECH NO LONGER PROTECTED UNDER NATIONAL LABOR RELATIONS ACT

Hodgson Russ Labor & Employment Alert
July 23, 2020

In a landmark decision issued on July 21, 2020, the National Labor Relations Board ("NLRB" or the "Board") dramatically changed its standard for determining whether employers have lawfully disciplined or discharged employees who made abusive or offensive statements—including profane, racist, and sexually unacceptable speech—in the course of activity otherwise protected under the National Labor Relations Act ("NLRA" or the "Act"). This Board ruling, in General Motors LLC, 369 NLRB No. 127 (2020), applies both to union and non-union workplaces.

By way of background, Section 7 of the NLRA protects the rights of employees to engage in protected "concerted activities," with or without a union. To be covered by Section 7, however, such concerted activity must be for the workers' "mutual aid or protection." Over the years, the NLRB developed a variety of setting-specific standards to determine if Section 7 protected an employee's outburst—one for encounters with management, another for exchanges between employees and postings on social media (a "totality of the circumstances" test), and a third for offensive statements and conduct on the picket line. These tests took into account such factors as whether a worker's profanity was provoked by the employer's unfair labor practice, and whether an employee's profanity should be tolerated because of the heated nature of a picket line.

While these tests were based on the view that employees should be permitted some leeway for impulsive behavior when engaging in activities protected under the Act, they often resulted in reinstatement of employees discharged for extremely repugnant and offensive conduct. Many employers viewed these decisions as hostile to workplace norms and difficult to reconcile with federal and state antidiscrimination laws. Indeed, the Board's view of certain employee outbursts that contained racist epithets or sexually offensive language, as being within the ambit of Section 7 protection had been criticized as both morally unacceptable and inconsistent with other workplace laws by Federal judges as well as within the NLRB.

The General Motors LLC case concerned Charles Robinson, who works as a union committeeperson at the General Motors LLC ("GM") automotive assembly facility in Kansas City, Kansas. On April 11, 2017, Robinson had a heated exchange with

Attorneys

Luisa Bostick
Joseph Braccio
Glen Doherty
Andrew Drilling
Ryan Everhart
Andrew Freedman
Peter Godfrey
John Godwin
Charles H. Kaplan
Christopher Massaroni
Elizabeth McPhail
Lindsay Menasco
Kinsey O'Brien
Jeffrey Swiatek
Michael Zahler

Practices & Industries

Labor & Employment

GM manager Nicholas Nikolaenko near management offices about overtime coverage for employees away on cross-training. Robinson yelled at Nikolaenko that he did not "give a f**k about your cross-training," that "we're not going to do any f** kin' cross-training if you're going to be acting that way," and that Nikolaenko could "shove it up [his] f**kin' ass." [Foul language redacted by Hodgson Russ LLP.] GM suspended Robinson for three days. However, after a hearing, the NLRB Administrative Law Judge ("ALJ") concluded that Robinson's conduct retained the protection of Section 7 of the Act, notwithstanding Robinson's profanity-laced tirade to manager Nikolaenko regarding cross-training, because the outburst occurred in a closed door meeting with management and Robinson believed that GM had engaged in an unfair labor practice. Accordingly, the ALJ ruled that GM had committed an unfair labor practice by suspending Robinson. In its July 21 Decision, however, the Board declined to adopt this conclusion. Instead, the NLRB announced its new standard for evaluating whether management lawfully disciplined a worker.

Under the General Motors LLC ruling, the NLRB will now decide cases involving offensive or abusive conduct by workers in the course of otherwise-protected activity under the familiar Wright Line standard, which the Board has long used with court approval in mixed-motive discipline and discharge cases. Under Wright Line, the NLRB's General Counsel must first prove that the employee's protected activity was a motivating factor in the employer's discipline. If that burden is met, the employer must then prove that it would have taken the same action even in the absence of the protected activity, for example, by showing consistent discipline of other employees who engaged in similar abusive or offensive conduct.

Commenting on this important Decision, Board Chairman John F. Ring observed that it represents "a long-overdue change in the NLRB's approach to profanity-laced tirades and other abusive conduct in the workplace." He added that "For too long, the Board has protected employees who engage in obscene, racist, and sexually harassing speech not tolerated in almost any workplace today. Our decision in General Motors ends this unwarranted protection, eliminates the conflict between the NLRA and antidiscrimination laws, and acknowledges that the expectations for employee conduct in the workplace have changed."

If you have any questions about the NLRB's General Motors LLC ruling, or any other labor law or employee discipline and discharge issues, please contact Joseph Braccio (716.848.1436), Charles H. Kaplan (646.218.7513), Glen Doherty (518.433.2433), Elizabeth McPhail (716.848.1530) or Peter Godfrey (716.848.1246).

If you received this alert from a third party or from visiting our website, and would like to be added to our Labor & Employment alert mailing list or any other of our mailing lists, please visit us **HERE**.