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It's What You Said and How You Said It: The NLRB's Attempt to Separate Employee Misconduct from Protected Activity in General Motors LLC

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INTRODUCTION

On June 22, 2005, an employee of Airo Die Casting was picketing and yelled "fuck you n[-----]!" to a Black security guard leaving work.[1] On January 7, 2012, an employee of Cooper Tire & Rubber Co. was picketing outside their facility when a van full of mostly Black replacement workers entered the facility.[2] The employee yelled, "Hey, anybody smell that? I

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1. Airo Die Casting, Inc., 347 N.L.R.B. 810, 811 (2006).

2. Cooper Tire & Rubber Co. (*Cooper Tire I*), 2015 L.R.R.M. (BNA) 178146, 2015 WL 3544120, at *3 (N.L.R.B. Div. of Judges June 5, 2015), *adopted as modified*, 363 N.L.R.B. No. 194 (May 17, 2016), 2016 WL 2894792, *enforced*, 866 F.3d 885 (8th Cir. 2017).

smell fried chicken and watermelon."[3] On October 2, 1989, a picketing employee at Wayne Stead Cadillac grabbed his testicles and gyrated his hips towards a car while mouthing "fuck you" to a security guard.[4] The guard's eight-year-old daughter was in the car with him at the time.[5] Unsurprisingly, each of the respective employers terminated these employees due to their misconduct.[6] In each of these cases, however, the National Labor Relations Board found that the terminations were unfair labor practices and ordered the companies to reinstate the employees.[7]

The National Labor Relations Act ("NLRA" or "the Act") prohibits employers from discriminating against employees for engaging in concerted activity protected by Section 7 of the Act.[8] The Act gives employees the right to join a union, bargain collectively over wages and working conditions, and engage in other concerted activities for "mutual aid or protection."[9] The right to act in concert applies to most private-sector employees, regardless of whether a union represents them.[10] However, there are limits to the conduct employees can engage in and still retain protection of the Act.[11] The National Labor Relations Board ("NLRB" or "the Board") has decided several lines of cases that considered what types of conduct in certain settings lost the protection of the Act.[12] The NLRB's decisions have sometimes protected racially or sexually offensive behavior, forcing employers to accept conduct that may

3. *Id.*

4. Wayne Stead Cadillac, Inc., 303 N.L.R.B. 432, 436 (1991).

5. *Id.*

6. *Airo Die Casting*, 347 N.L.R.B. 810; *Cooper Tire I*, 2016 WL 2894792; *Wayne Stead Cadillac*, 303 N.L.R.B. at 432.

7. *Airo Die Casting*, 347 N.L.R.B. 810; Cooper Tire & Rubber Co. (*Cooper Tire II*), 363 N.L.R.B. No. 194 (May 17, 2016), 2016 WL 2894792; *Wayne Stead Cadillac*, 303 N.L.R.B. at 432.

8. National Labor Relations Act § 8, 29 U.S.C. § 158.

9. *Id.* § 7.

10. John R. Runyan & Mami Kato, *What Every Employment Lawyer Needs to Know About the National Labor Relations Act*, 92 MICH. B.J. 34 (2013). One example of concerted activity by non-union employees is an agreement by workers to wear certain color shirts on a particular day to protest wage cuts or other workplace rules. *Id.*

11. *See, e.g.*, Eastex, Inc. v. NLRB, 437 U.S. 556, 567–68 (1978); Tex. Instruments, Inc. v. NLRB, 637 F.2d 822, 830 (1st Cir. 1981); NLRB v. Wash. Aluminum Co., 370 U.S. 9, 17 (1962).

12. *See* Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017.

expose them to liability under Title VII of the Civil Rights Act of 1964 ("Title VII") and other antidiscrimination laws.[13]

In *General Motors LLC*, the NLRB reconsidered its previous approaches to dealing with racially or sexually offensive conduct and other misconduct occurring during otherwise protected activity, such as picketing or representing employee concerns to management.[14] The Board overruled its prior decisions establishing several different setting-specific standards for determining whether employee misconduct was so "opprobrious" that the employee lost the protection of the Act.[15] The Board held that it will now review "abusive conduct" that occurs during the course of NLRA Section 7 protected activity using the *Wright Line* burden-shifting framework.[16]

In its decision, the NLRB did not define "abusive conduct" and did not decide how to evaluate misconduct that falls short of "abusive" in future cases.[17] The failure to define "abusive conduct" means that employers, unions, employees, and Administrative Law Judges currently lack clarity on what types of conduct the NLRA protects.[18] A Democratic board under the Biden administration may result in a narrower interpretation of "abusive conduct," because Democratic boards tend to be more protective of unions.[19] This change in administrations underscores the unpredictability of how the NLRB will apply *General Motors LLC* in future cases.[20] An overly expansive reading of "abusive conduct" in the future will unnecessarily restrict employees' statutory right to engage in protected activity, contrary to the purpose of the NLRA.[21]

The NLRB should provide additional guidance on what constitutes employee misconduct so severe that an employee loses the protection of the Act. The *General Motors LLC* decision was appropriate as applied to

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13. Ryan Vann & Melissa Logan, *The Tension Between the NLRA, The EEOC, and Other Federal and State Employment Laws*, 33 A.B.A. J. LAB. & EMP. L. 291, 292 (2018).

14. *General Motors II*, 2020 WL 4193017.

15. *Id.* at *1.

16. *Id.*

17. *See id*.

18. *See id.*

19. *See* Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223 (2016).

20. *See id.* at 273.

21. *See* Lauren P. McDermott, *Unprotected Profanity: The Erosion of an Employee's Right to Convey Grievances*, 4 AM. U. LAB. & EMP. L.F. 1 (2014).

sexually and racially offensive conduct, and the definition of "abusive conduct" should also apply to other conduct that directly creates potential liability for the employer under antidiscrimination or other employment statutes. The definition of "abusive conduct" should not, however, encompass merely profane or insulting language. To address conduct that falls short of "abusive," the NLRB should consolidate its setting-specific standards and apply a modified version of *Atlantic Steel*[22] to conduct that occurs in the course of Section 7 activity, regardless of the setting.

Part I introduces the NLRA, Title VII, other antidiscrimination laws, and the employer obligations under each. Part II provides an overview of the various standards that the NLRB previously applied to instances of employee discipline involving protected Section 7 activity. Part III discusses *General Motors LLC*, a recent NLRB opinion involving abusive and racially tinged conduct, which took place during the course of Section 7 protected activity. Part IV proposes a standard for "abusive conduct" that includes conduct that exposes an employer to liability under Title VII or other federal, state, or local antidiscrimination laws. In addition, this Part proposes that the NLRB should evaluate conduct that falls short of abusive under the *Atlantic Steel* framework rather than under the *Wright Line* burden-shifting framework.

I. THE EMPLOYER'S SIMULTANEOUS OBLIGATIONS UNDER THE NLRA AND TITLE VII

The default employment relationship in the United States is at-will employment.[23] In an at-will employment relationship, either party can generally terminate the relationship at any time, with or without cause.[24] The default rule of employment at-will demonstrates that the legislatures and courts in the United States generally do not regulate even the most extreme adverse employment action—termination.[25] By extension, less extreme adverse actions, such as suspension or demotion, are also largely

22. *See infra* Section II.B.1.

23. JOHN BOURDEAU & BARBARA J. VAN ARSDALE, 82 AM. JUR. 2D WRONGFUL DISCHARGE § 2 (2d ed. 2020).

24. *Id.*

25. Under employment at-will, an employer can terminate an employee for a good reason, a bad reason, or no reason at all. For example, after the Green Bay Packers beat the Chicago Bears in the NFC Championship in 2011, a car dealership in Chicago fired a salesman for wearing a Packers tie to work. STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 80 (Carolina Academic Press, 6th ed. 2017).

unregulated.[26] However, there are exceptions to at-will employment, including employment contracts that specify a duration of the employment agreement[27] and statutory protections that prohibit terminations and other adverse actions based on certain protected characteristics.[28] For example, Title VII and other antidiscrimination laws prohibit employers from discriminating in hiring, firing, and other terms and conditions of employment based on statutorily protected characteristics such as race or gender.[29] The NLRA provides additional statutory protections to employees by prohibiting employers from taking adverse actions, including discharge, against employees because of their participation in certain protected activities.[30]

A. The National Labor Relations Act

In the early nineteenth century, employers unilaterally set wages and working conditions, terminated employees without cause, and blacklisted union supporters.[31] Employees seeking to alter their wages or conditions of employment would sometimes resort to a strike—a "concerted refusal of employees to work"—until the employer changed its wages or working conditions.[32] Judges were hostile to strikes and frequently issued injunctions ordering strikers to cease and desist.[33] In 1932, Congress passed the Norris-LaGuardia Act, limiting the use of injunctions against labor strikes.[34] However, employers retained the right to unilaterally set working conditions and refused to recognize unions.[35]

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26. Ruth Mayhew, *Federal Labor Laws Regarding Discipline & Termination*, CHRON, https://smallbusiness.chron.com/federal-labor-laws-regarding-discipline-termination-56444.html [https://perma.cc/WS2Q-CC7R] (last visited Jan. 28, 2021).

27. BOURDEAU & VAN ARSDALE, *supra* note 23.

28. William Homer, *Just Cause for Trust: Honoring the Expectation of Loyalty in the At-Will Employment Relationship*, 45 FLA. ST. U. L. REV. 833, 836 (2018).

29. Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1); Age Discrimination in Employment Act § 4, 29 U.S.C. § 623(a)(1); Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(b)(5)(a).

30. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c).

31. 8 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 10601 (2020).

32. *Id.*

33. *Id.*

34. *Pre-Wagner Act Labor Relations*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/pre-wagner-act-labor-relations [https://perma.cc/UV3K-9HHX] (last visited Sept. 30, 2020).

35. 8 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 10601 (2020).

During the Great Depression, hostility toward employers grew,[36] and the public demanded federal intervention.[37] In response, Congress passed the National Industrial Recovery Act of 1933 ("NIRA"), which guaranteed the right to form unions, but this did little to calm the industrial strife.[38] In August 1933, President Roosevelt created the National Labor Board ("NLB"), comprised of three industry representatives, three labor representatives, and chaired by Senator Robert F. Wagner.[39] The NLB ultimately lacked the enforcement power necessary to effectively resolve disputes, and the Supreme Court declared the NIRA unconstitutional on May 27, 1935.[40]

By the time the Supreme Court invalidated the NIRA, Senator Wagner was already drafting a new bill, the NLRA, to address the enforcement problems with the previous NLB.[41] Congress enacted the NLRA in 1935, granting employees the right to bargain collectively.[42] The NLRA created the NLRB to enforce the Act.[43] Initially, employers defied the NLRA, assuming that, like the NIRA, the Supreme Court would declare it unconstitutional.[44] In 1937, however, the Supreme Court upheld the constitutionality of the NLRA.[45] Congress has amended the NLRA several times since its passage, but the right to bargain collectively and engage in other concerted activity and the existence of the NLRB as an enforcement agency remain key features of the Act.[46]

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36. *Id.*

37. Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 427, 434 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

38. *Id.*

39. *1933 The NLB and "The Old NLRB,"* NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1933-the-nlb-and-the-old-nlrb [https://perma.cc/FS3J-4ZAF] (last visited Sept. 30, 2020).

40. The Supreme Court invalidated NIRA in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). Wachter, *supra* note 37.

41. *1935 Passage of the Wagner Act*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act [https://perma.cc/H43V-ZCCP] (last visited Sept. 30, 2020).

42. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935).

43. *1935 Passage of the Wagner Act*, *supra* note 41.

44. Wachter, *supra* note 37.

45. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

46. *See, e.g.*, Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); Landrum Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959).

1. The NLRA Creates Certain Protections & Obligations for Employees and Employers

Section 7 of the NLRA provides that employees have the right to join a union, bargain collectively, and "engage in other concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection."[47] The NLRB considers an employee's activity concerted if the employee is acting in conjunction with or on behalf of other employees.[48] The courts have interpreted the meaning of "mutual aid or protection" broadly.[49] "Mutual aid or protection" encompasses not only activity that is directed at conditions that the employer has within its control, but also activity "in support of employees of [other] employers" and "through channels outside the immediate employee-employer relationship."[50] While most complaints arise in a union-represented context, the protections of Section 7 also extend to non-union-represented employees engaging in concerted activity.[51] Therefore, it is important for all covered employers,[52] whether or not a union represents their employees, to understand employee rights and employer obligations under the NLRA.[53]

Section 7 protection does have limits, and an employee can lose the protection of the Act if his or her conduct is too egregious.[54] The Supreme Court first established limits to Section 7 protection in *NLRB v. Local Union No. 1229 (Jefferson Standard)*, discussing the need to engage in an "inquiry to determine whether [the] concerted activities were carried on in such a manner as to come within the protection of [Section] 7."[55] Activity that is unlawful, violent, has the potential to damage the employer's

47. National Labor Relations Act § 7, 29 U.S.C. § 157.

48. Runyan & Kato, *supra* note 10, at 35.

49. *See* Eastex, Inc. v. N.L.R.B., 437 U.S. 556 (1978).

50. *Id.* at 562–65 (holding that the "mutual aid or protection" clause protected portions of a union-sponsored newsletter urging employees to write to legislators to oppose a right-to-work provision in the state constitution and criticizing a presidential veto of an increase in the federal minimum wage).

51. Runyan & Kato, *supra* note 10.

52. The United States, Federal Reserve banks, states and political subdivisions, and entities covered by the Railway Act are not covered employers under the Act. National Labor Relations Act § 2(2).

53. Runyan & Kato, *supra* note 10.

54. *See, e.g.*, *Eastex*, 437 U.S. at 567–68; Tex. Instruments, Inc. v. NLRB, 637 F.2d 822, 830 (1st Cir. 1981); NLRB v. Wash. Aluminum Co., 370 U.S. 9, 17 (1962).

55. NLRB v. Local Union No. 1229 (*Jefferson Standard*), 346 U.S. 464, 475 (1953).

property, or is insubordinate or disloyal may fall outside of the protection of the NLRA.[56]

Section 8 of the NLRA details a list of activities that constitute an unfair labor practice for employers and unions.[57] Section 8(a)(1) provides a broad prohibition against employers "interfer[ing] with, restrain[ing], or coerc[ing] employees" in the exercise of their Section 7 rights.[58] A violation of Section 8(a)(1) may be independent of any other violations,[59] or if the employer commits an unfair labor practice under any of the other subsections of Section 8(a), it commits a derivative violation of Section 8(a)(1).[60] Section 8(a)(3) makes discrimination against certain employees for the purpose of encouraging or discouraging union membership an unfair labor practice.[61] Other subsections of Section 8 prohibit the employer from dominating or providing illegal support or contributions to a union, retaliating against employees who have filed charges with the NLRB, and refusing to bargain with the union in good faith.[62]

2. Enforcement of the NLRA Through Adjudication and Rulemaking

The NLRA created the NLRB as an enforcement agency.[63] The NLRB consists of five members, appointed by the president for five-year terms, with one member's term expiring each year.[64] Customarily, the party

56. *Id.* at 464 (upholding the NLRB's refusal to reinstate employees who distributed a disparaging handbill unrelated to a labor dispute); *Wash. Aluminum Co.*, 370 U.S. at 17; *Tex. Instruments*, 637 F.2d at 830.

57. National Labor Relations Act § 8.

58. *Id.* § 8(a)(1).

59. Examples of independent Section 8(a)(1) violations are: threatening employees if they vote to join a union, threatening to close a facility if a union is organized in it, spying on union gatherings, and granting wage increases timed specifically to discourage employees from voting for a union. NATIONAL LABOR RELATIONS BOARD, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 14 (1997), https://www.nlrb.gov/sites/default/files/attachments/pages/node-184/basicguide.pdf. [https://perma.cc/B7GY-PQ4R].

60. TED SCOTT ET AL., EMPLOYEE RIGHTS AND UNFAIR LABOR PRACTICES UNDER THE NATIONAL LABOR RELATIONS ACT.

61. National Labor Relations Act § 8(a)(3). Examples of Section 8(a)(3) violations are: discharging employees because of their support for a union, refusing to reinstate employees because of their participation in a lawful strike, and demoting employees because they acted together to ask for wage increases. BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 59.

62. National Labor Relations Act § 8(a).

63. *Id.* § 3(a).

64. *Id.*

holding the White House will have a three-to-two advantage on the NLRB.[65] Republican boards tend to be more management friendly, while Democratic boards tend to be more union friendly.[66]

The Act empowers the NLRB to prevent the commission of unfair labor practices by employers and unions, issue complaints and hold hearings to determine if a party committed an unfair labor practice, issue cease-and-desist orders, and order affirmative actions such as reinstatement of employees.[67] In addition to the NLRB members, the General Counsel of the NLRB and Administrative Law Judges play important roles in the enforcement of the NLRA.[68] The General Counsel is responsible for investigating and prosecuting unfair labor practices.[69] The General Counsel is independent from the Board and is appointed by the president to a four-year term.[70] The Administrative Law Judges hold hearings over unfair labor practice complaints.[71]

If employees believe that their employer committed an unfair labor practice and violated their Section 7 rights, the employees may file a charge against their employer with the regional director of the NLRB.[72] Board agents investigate the charge and issue findings to the regional director.[73] If the NLRB investigation finds evidence supporting the charge and the parties cannot reach a settlement, the General Counsel issues a complaint.[74] An Administrative Law Judge will hold a hearing for the

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65. *NLRB is Likely to Operate with Just Four Members for the Time Being*, FOX ROTHSCHILD LLP (July 31, 2018), https://laborlaw.foxrothschild.com/2018/07/articles/general-labor-law-news-updates/national-labor-relations-board-nlrb/nlrb-is-likely-to-operate-with-just-four-members-for-the-time-being/#:~:text=A%20fully%20constituted%20NLRB%20is,by%20three%2Dmember%20NLRB%20panels.&text=By%20custom%2C%20the%20NLRB%20will,to%20overrule%20the%20extant%20precedent [https://perma.cc/72SQ-J6VQ].

66. *Id.*

67. National Labor Relations Act § 10.

68. *Who We Are*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/bio/general-counsel [https://perma.cc/Z9JL-CGPF] (last visited Oct. 19, 2020).

69. *General Counsel*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/bio/general-counsel [https://perma.cc/C2VC-F482] (last visited Sept. 30, 2020).

70. *Id.*

71. *Division of Judges*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/division-of-judges [https://perma.cc/R94G-ZGBG] (last visited Sept. 30, 2020).

72. *Investigate Charges*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges [https://perma.cc/679S-U8HC] (last visited Sept. 30, 2020).

73. *Id.*

74. *Id.*

complaint, with the NLRB General Counsel's office representing the charging party.[75] The Administrative Law Judge will issue a recommendation, which will become the NLRB decision unless one of the parties challenges it by filing an objection with the Board.[76] If an objection is filed, the NLRB or a three-member panel of the Board may review the decision.[77]

After it issues an order, the NLRB can petition the court of appeals to enforce the order.[78] Any party harmed by an NLRB order may also petition the court of appeals for judicial review.[79] The courts show great deference to NLRB decisions and will uphold an NLRB order unless it applied the wrong legal standard, departed from precedent without providing a justification, or was not supported by "substantial evidence on the record."[80] The appeals court may enforce the order, modify the order, or set it aside in whole or in part.[81]

Section 6 of the NLRA gives the NLRB statutory authority to promulgate rules,[82] and the Supreme Court has unanimously affirmed this authority.[83] A rule is an agency statement that interprets or implements the law or establishes the procedural requirements of the agency.[84] While the complaint process is an adjudicatory process resulting in a specific order for a specific set of facts that have occurred in the past, the rulemaking process results in rules with more general applicability and prospective

75. *Id.*

76. *Decide Cases*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/decide-cases [https://perma.cc/5BJV-4JUZ] (last visited Sept. 30, 2020).

77. *Id.*

78. National Labor Relations Act § 10, 29 U.S.C. § 160(e).

79. *Id.*

80. *Id.*; Inova Health Sys. v. NLRB, 795 F.3d 68, 80 (2015). "Substantial evidence on the record" means that the "record is so compelling that no reasonable factfinder could fail to find to the contrary." *Id.* (quoting Bally's Park Place, Inc. v. NLRB, 646 F.3d 929, 935 (D.C. Cir. 2011)).

81. National Labor Relations Act § 10.

82. *Id.* § 6.

83. NLRB v. Am. Hosp. Ass'n, 499 U.S. 606 (1991), *aff'g* 899 F.2d 651 (7th Cir. 1990).

84. Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121, 122 (1990).

application.[85] The Administrative Procedure Act governs the rulemaking process and requires a notice and comment period on any proposed rules.[86]

Agencies have broad discretion to choose between using rulemaking or adjudication.[87] The Supreme Court recognized this discretion in *SEC v. Chenery* but also urged agencies, where possible, to fill in the gaps in laws "through th[e] quasi-legislative promulgation of rules to be applied in the future."[88] While there are limits to the NLRB's ability to create policies using adjudication, absent an abuse of discretion the NLRB has the choice between creating policies through rulemaking or through adjudication.[89] The NLRB has relied almost exclusively on case-by-case adjudication, rather than rulemaking.[90] Case-by-case adjudication allows the Board to engage in more exploration of factual disputes and to make incremental policy changes.[91] Case-by-case adjudication has also led to significant inconsistencies in outcomes because the Board frequently overrules prior precedents, as it did in the *General Motors LLC* decision.[92] These changes to precedent are often attributable to changes in the party of the current presidential administration and, consequently, the composition of NLRB membership.[93]

Despite some inconsistencies in application, the NLRB's enforcement powers provide protection from adverse employment actions, including termination, to employees who participate in Section 7 activities. In much the same way, Title VII and other antidiscrimination laws protect employees from adverse employment actions on the basis of certain protected characteristics.

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85. *Id.*

86. Administrative Procedure Act § 4, 5 U.S.C. § 553(c); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 297 (1991).

87. Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1473 (2015).

88. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).

89. *See* NLRB v. Wyman-Gordon, 394 U.S. 759 (1969) (upholding application of a rule-like policy announced in an adjudication but expressing disapproval of the NLRB's disregard of APA rulemaking procedures); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (sustaining the NLRB's application of the "managerial employee" exemption to certain employees and reaffirming the NLRB's discretion in choosing between rulemaking and adjudication).

90. Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 F.I.U. L. REV. 411, 415 (2010).

91. *Id.* at 415–17.

92. *Id.*

93. *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board Revisited*, 14 HOUS. BUS. & TAX L.J. 24, 31–32 (2014).

B. Title VII of the Civil Rights Act of 1964 and Other Workplace Antidiscrimination Laws

Title VII prohibits workplace discrimination in compensation, terms, conditions, or privileges of employment based on race, sex, color, religion, or national origin.[94] The purpose of Title VII is to promote equality in employment decisions by forcing employers to consider more objective criteria rather than an employee's race, gender, or other protected characteristics.[95] Congress selected the protected characteristics incorporated into Title VII because those classes faced a history of unequal treatment in the workplace.[96] A party complaining of unlawful discrimination may prove a violation of Title VII by showing disparate treatment[97] or disparate impact.[98]

Title VII also protects employees from harassment based on a protected characteristic.[99] In *Meritor Savings Bank v. Vinson*, the Supreme Court held that the prohibition on discrimination afforded employees "the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[100] Harassment that is so severe or pervasive that it alters the conditions of employment and creates an abusive working environment is known as a "hostile work environment."[101] An employer is liable under Title VII if it fails to prevent even non-supervisory employees from creating a hostile work environment.[102] Title VII is not, however, a

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94. Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1).

95. *Title VII of the Civil Rights Act of 1964*, SOC'Y FOR HUMAN RES. MGMT., https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/pages/titleviioftheciviirightsactof1964.aspx [https://perma.cc/ER53-3TS2] (last visited Oct. 15, 2020).

96. *Id.*

97. "Disparate treatment" is defined as "[t]he practice, esp. in employment, of intentionally dealing with persons differently because of their race, sex, national origin, age, or disability. To succeed on a disparate-treatment claim, the plaintiff must prove that the defendant acted with discriminatory intent or motive." *Disparate Treatment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

98. "Disparate impact" is defined as "[t]he adverse effect of a facially neutral practice (esp. an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity. Discriminatory intent is irrelevant in a disparate-impact claim." *Disparate Impact*, BLACK'S LAW DICTIONARY (11th ed. 2019).

99. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

100. *Id.*

101. Ali v. McCarthy, 179 F. Supp. 3d 54, 64 (D.D.C. 2016).

102. *See* Vann & Logan, *supra* note 13.

"general civility code"; Title VII does not prohibit all harassment in the workplace, only discriminatory harassment based on one of the statute's protected characteristics.[103]

The NLRB's review of cases involving discriminatory harassment most often relates to Title VII, but there are other federal, state, and local antidiscrimination laws that impose similar liability on employers.[104] The Age Discrimination in Employment Act ("ADEA") prohibits employers from discriminating against employees solely due to their age.[105] The ADEA protects individuals who are age 40 or over, but individuals under the age of 40 have no recourse under the act.[106] The Americans with Disabilities Act ("ADA") prohibits discrimination against "qualified individuals" with a disability.[107] The ADA also requires employers to make "reasonable accommodations" that would enable a disabled person to perform the job.[108] States are also increasingly adopting antidiscrimination and antiharassment laws, sometimes imposing even greater protections than federal law requires.[109]

C. Interaction NLRA and Antidiscrimination Laws

Employers are generally free to discharge employees for any reason.[110] The NLRA and antidiscrimination statutes provide some protection against adverse actions to employees based on their involvement in protected activity or on their protected characteristics.[111] Employers are obligated to comply with both the NLRA and antidiscrimination statutes.[112] These obligations sometimes conflict with each other, especially because of past application of NLRB standards to cases that involve employer obligations under both sets of laws.[113]

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103. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

104. *See* Vann & Logan, *supra* note 13.

105. Age Discrimination in Employment Act § 4, 29 U.S.C. § 623(a)(1).

106. *Id.* § 12.

107. Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(a). A "qualified individual" is one who can perform the essential functions of the job, with or without a reasonable accommodation. *Id.* § 101(8).

108. *Id.*

109. Vann & Logan, *supra* note 13, at 301; *see also* 775 ILL. COMP. STAT. ANN. 5/2-101–5/2-110 (West 2018); CAL. GOV'T CODE §§ 12940–12952 (West 2018); COLO. REV. STAT. § 24-34-402 (2018).

110. BOURDEAU & VAN ARSDALE, *supra* note 23.

111. *See* Vann & Logan, *supra* note 13.

112. *Id.* at 295.

113. *Id.*

II. HISTORICAL NLRB STANDARDS APPLIED IN EMPLOYEE DISCIPLINE CASES INVOLVING SECTION 7 PROTECTED ACTIVITIES

The NLRA provides some protection to employees engaging in Section 7 protected activity, but the protection is not absolute.[114] An employer may not take an action against an employee because of the employee's participation in protected activity, but the employer may take actions based on legitimate business needs, such as maintaining order or dealing with underperformance.[115] The NLRB must balance the rights of employees with those of the employer, and the underlying motivation for an adverse action is not always clear.[116] To address the balancing of rights, the NLRB adopted different standards to evaluate disciplinary actions in (1) cases where the employer gave a pretextual reason for discipline that was actually motivated by anti-union sentiment, (2) cases where an employer had dual motives for disciplinary action, one legitimate and one based on anti-union sentiment, and (3) cases in which an employer disciplined an employee for misconduct that occurred during the course of engaging in Section 7 protected activity.[117]

A. Pretextual Reasons for Discipline Motivated by Anti-Union Sentiment

An employer will rarely assert that it disciplined an employee due to anti-union sentiment because to do so would be a clear violation of the NLRA.[118] Instead, an employer who disciplines an employee for no reason other than their union support is likely to assert a legitimate business reason[119] as justification for the discipline.[120] If an employer provides a legitimate business reason as justification for an adverse action against an employee, the Board will determine if the adverse action was actually "discriminatorily motivated."[121] If there was a discriminatory motive, then

114. NLRB v. Local Union No. 1229 (*Jefferson Standard*), 346 U.S. 464, 475 (1953).

115. BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 59.

116. Wright Line, 251 N.L.R.B. 1083, 1083–84 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

117. *Id.*; Atl. Steel Co., 245 N.L.R.B 814 (1979).

118. *Wright Line*, 251 N.L.R.B. at 1083.

119. An employer has a "legitimate business reason" to discharge an employee for economic reasons or other cause, such as disobedience or underperformance. BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 59.

120. *Wright Line*, 251 N.L.R.B. at 1083–84.

121. W.W. Grainger, Inc. v. NLRB, 582 F.2d 1118, 1121 (7th Cir. 1978) (finding that a "failure to investigate the incidents upon which the employer relies as grounds for discharge may reflect an employer's discriminatory motivation").

the reason given is pretextual and the disciplinary action is a violation of the NLRA.[122]

B. Dual Motives for Discipline Partially Motivated by Anti-Union Sentiment—The Wright Line *Standard*

In a dual-motive case, the discipline or discharge decision involves both legitimate and illegitimate motives.[123] The first motive is a legitimate business reason, giving the employer "cause"[124] for discipline, and the second motive is the employer's anti-union sentiment.[125] The second motive, in isolation, would be a violation of Section 8(a)(3) of the NLRA.[126] In *Wright Line*, the NLRB considered the appropriate standard to adopt when an employer demonstrated two motives for disciplining an employee, one permissible and one impermissible under the NLRA.[127]

Wright Line terminated Bernard Lamoureaux, a leading union advocate.[128] Lamoureaux alleged that his union activity motivated the termination—a violation of Section 8(a)(3).[129] Wright Line alleged that discrepancies in Lamoureaux's timesheet motivated the termination—a "legitimate business purpose."[130] Wright Line had employed Lamoureaux for over ten years and considered him a "better than average employee."[131] When Lamoureaux's supervisor Francis Forte discovered the discrepancy in the timesheet, Forte reported it to his supervisor who then instructed Forte to ask Lamoureaux for an explanation.[132] Lamoureaux explained that while he may not have performed the job at the precise time listed on his timesheet, he did complete the job in that same day.[133] Wright Line rejected Lamoureaux's explanation and discharged him, but records revealed that Wright Line had already prepared Lamoureaux's final paycheck before the conversation with Forte occurred.[134]

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122. *Wright Line*, 251 N.L.R.B. at 1084.
123. *Id.*
124. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c).
125. *Wright Line*, 251 N.L.R.B. at 1084.
126. *Id.*
127. *Id.*
128. *Id.* at 1090.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

In *Wright Line*, the NLRB adopted a burden-shifting framework to evaluate whether a dual-motive disciplinary action violated the Act.[135] First, the General Counsel must make a *prima facie* showing that protected activity was a motivating factor in the discipline.[136] If the General Counsel succeeds, the burden shifts to the employer to show that it would have taken the same action in the absence of the employee's involvement in Section 7 protected activity.[137] If the employer succeeds in showing that it would have taken the same action, then the employer will prevail; if the employer cannot demonstrate that it would have taken the same disciplinary action in the absence of Section 7 activity, the employer's actions are a violation of 8(a)(3) and, derivatively, 8(a)(1).[138]

In *Wright Line*, the General Counsel established his *prima facie* case by showing that the employee had become a leading union advocate and supervisors referred to him as the "union kingpin."[139] The burden then shifted to Wright Line to show that it would have taken the same action in the absence of Lamoureaux's union involvement.[140] Wright Line could not make this showing because it did not terminate other employees with similar timesheet discrepancies.[141] As a result, the NLRB found that the discharge was a violation of Sections 8(a)(1) and 8(a)(3) of the NLRA and ordered Wright Line to reinstate Lamoureaux.[142]

C. Discipline for Misconduct During Section 7 Protected Activities

In cases where an employee engaged in misconduct during the course of engaging in Section 7 protected activities, the NLRB applied different standards depending on the specific setting of the conduct.[143] Three distinct settings have emerged: workplace discussions with management, social media, and the picket line.[144] These cases differ from dual-motive cases because the conduct an employee engages in during protected

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135. *Id.* at 1089.
136. *Id.*
137. *Id.* at 1090.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1091.
142. *Id.*
143. Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017, at *6.
144. Atl. Steel Co., 245 N.L.R.B. 814 (1979); Pier Sixty, LLC, 362 N.L.R.B. 505 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

activity is at issue, rather than a legitimate business reason that is distinct from any protected activity.[145]

1. Misconduct During Management Discussions—The Atlantic Steel *Standard*

When the conduct at issue occurred during otherwise protected workplace conversations with management, the Board applied the four-factor test from *Atlantic Steel* to determine if the employee lost the protection of the Act due to the nature of his misconduct.[146] In *Atlantic Steel*, Kenneth Chastain, an employee of Atlantic Steel, approached his supervisor in the production area with a question about the assignment of overtime.[147] After the foreman provided an explanation and began walking away, Chastain turned to another employee and called the foreman a "lying son of a bitch."[148] Atlantic Steel initially suspended Chastain for the outburst and later terminated him.[149]

The Board laid out four factors to determine whether an employee's conduct loses the protection of the Act: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was . . . provoked by an . . . unfair labor practice."[150] The Board indicated that the Act is less likely to protect conduct occurring in the work area during work time than conduct occurring during grievance meetings or other meetings between the union and management.[151] In *Atlantic Steel*, the NLRB ultimately found that Chastain lost the protection of the Act because the outburst occurred on the production floor, outside of the available grievance process, and was obscene and unprovoked.[152]

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145. *See Wright Line*, 251 N.L.R.B. at 1091; *Atl. Steel Co.*, 245 N.L.R.B. 814. For example, if an employee is terminated for calling his boss a "fucking moron" during a meeting between the union and management over working conditions, it would be misconduct occurring during Section 7 protected activity. If an employee is terminated in part because he is active in a union and in part because he called his boss a "fucking moron" for supporting a different football team, it would be analyzed as a dual-motive case, because the misconduct itself had nothing to do with concerted activity.

146. *General Motors II*, 2020 WL 4193017, at *6.

147. *Atl. Steel Co*., 245 N.L.R.B. at 814.

148. *Id.*

149. *Id.*

150. *Id.* at 816.

151. *Id.*

152. *Id.* at 816–17.

The NLRB has further explained the application of the *Atlantic Steel* factors in subsequent cases.[153] Under the first factor, the NLRB distinguishes between incidents that occur in a private setting away from other employees and those that occur in the presence of other employees, with private discussions weighing further in favor of protection.[154] Under the third factor, obscene, profane, personal attacks weigh against the protection of the NLRA, but they do not automatically result in loss of the Act's protection.[155] In cases where the employee used profanity in an outburst, the Board is more likely to protect profanity used to describe a policy than profanity directed at an individual.[156] While the Board used the *Atlantic Steel* framework for discussions that occurred between the union and management, it declined to extend the standard to conduct that occurred in other settings, such as the picket line and social media.[157]

2. Misconduct During Conversations on Social Media

In instances where an employee engaged in otherwise protected conduct during social media discussions, the NLRB evaluated whether the employee's conduct lost the protection of the NLRA under a totality of the circumstances approach.[158] For example, in *Pier Sixty,* employees of a catering company were campaigning to form a union.[159] Two days before the union election, Hernan Perez, a thirteen-year employee, was working at a catered event when his supervisor belittled him and other employees in front of the guests.[160] Perez was frustrated, and during a break posted to Facebook on his personal page: "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people . . . Vote YES for the

153. *See* Plaza Auto Ctr. (*Plaza Auto I*), 360 N.L.R.B. 972 (2014).

154. *Id.* at 978.

155. *Id.* at 977.

156. *Id.* (citing Wal-Mart Stores, Inc., 341 N.L.R.B. 796, 807–08 (2004)). In *Wal-Mart Stores*, an employee did not lose the protection of the Act by describing a method of measuring as "bullshit." *Wal-Mart Stores*, 341 N.L.R.B. 796. In contrast, the employee of Plaza Auto Center called the vice-president a "stupid fucking moron," which weighed the "nature of the outburst" factor against protection of the Act. *Plaza Auto I*, 360 N.L.R.B. 972.

157. *See* Pier Sixty, LLC, 362 N.L.R.B. 505, 505–06 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

158. Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017, at *9.

159. *Pier Sixty*, 362 N.L.R.B. at 505.

160. *Id.*

UNION!!!!!!!"[161] Pier Sixty discharged Perez about two weeks later because of the Facebook post.[162]

Because Perez's Facebook post expressed support for the union election, Section 7 protected that part of the message, and the Board had to determine whether Perez's profane attack on his supervisor caused the message to lose the protection of the Act.[163] The Board used a totality of the circumstances approach and found that Perez had not lost the protection of the Act.[164] Relevant circumstances included evidence of the employer's anti-union hostility, the location and subject matter of the post, whether the employer tolerated similar conduct in the workplace, and whether the employer used the same level of discipline for similar offenses.[165] In cases regarding disparaging or disloyal remarks about the company or its products on social media or to third persons, the Board applied a separate test, asking whether an employee's efforts to improve wages or working conditions were "pursued in a reasonable manner under the circumstances."[166]

3. Misconduct on the Picket Line—The Clear Pine Mouldings *Standard*

In cases of misconduct on the picket line, the NLRB applied the *Clear Pine Mouldings* standard.[167] Shortly after a strike at Clear Pine Mouldings, Inc. began, Rodney Sittser, a striking employee, flagged down the car of an employee who was not striking and told her that "she was taking her

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161. *Id.*

162. *Id.* at 506.

163. *See id.* at 505–06.

164. *Id.* at 506.

165. In *Pier Sixty,* the Board considered:

> (1) whether the record contained any evidence of the Respondent's anti-union hostility; (2) whether the Respondent provoked Perez' conduct; (3) whether Perez' conduct was impulsive or deliberate; (4) the location of Perez' Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the Respondent considered language similar to that used by Perez to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon Perez was typical of that imposed for similar violations or disproportionate to his offense.

Id.

166. Sierra Publ'g Co. v. N.L.R.B., 889 F.2d 210, 220 (1989).

167. Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017, at *10.

life in her hands by crossing the picket line and would live to regret it."[168] The remarks frightened the woman, and she began taking alternate routes to work.[169] In a separate incident, Robert Anderson was on the picket line during a shift change and used a club to beat at the vehicles of non-striking employees as they were leaving work.[170] He told one employee, "I am going to kill you, you son-of-a-bitch."[171]

In previous decisions, the NLRB held that verbal threats "'not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words,' do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers."[172] In *Clear Pine Mouldings*, however, the Board rejected this standard because an abusive threat not accompanied by any physical acts or gestures may still amount to "restraint and coercion" prohibited elsewhere in the NLRA.[173] Instead, the NLRB adopted the Third Circuit's test: an employee's conduct on the picket line loses the protection of the Act when the employee's conduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[174] In its decision, the Board explicitly rejected a balancing test weighing the gravity of management's unfair labor practices against the gravity of the employee's misconduct and stated that it will deny reinstatement and backpay to employees who "exceed the bounds of peaceful and reasoned conduct."[175] Using this standard, the Board denied reinstatement to the picketing employees, because their actions tended to coerce and intimidate other employees who were exercising their right to not participate in the strike.[176]

The NLRB's use of three separate standards depending on the setting of the conduct complicated the analysis of employers' discipline of employee misconduct.[177] Although determining the setting of conduct may be straight-forward, employers, unions, employees, and judges must be

168. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1044–45 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

169. *Id.* at 1045.

170. *Id.*

171. *Id.*

172. *Id.* (quoting Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973)).

173. *Id.* at 1046; National Labor Relations Act § 8, 29 U.S.C. § 158.

174. *Clear Pine Mouldings*, 268 N.L.R.B. at 1046 (quoting NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 528 (3d Cir. 1977)).

175. *Id.* at 1047.

176. *Id.*

177. Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017, at *6.

familiar with three separate standards in order to correctly apply the law.[178] In addition, the NLRB has frequently applied these standards in a way that potentially conflicts with employer obligations under Title VII and other antidiscrimination laws.[179]

D. Conflict Between Existing NLRB Standards and Title VII

Employers face a difficult choice when confronted with instances of possibly illegal harassment perpetrated during the course of Section 7 protected activities: investigate the incident and discipline the employee and open the company up to sanctions from the NLRB, or avoid disciplining the harassing employee and face potential liability under Title VII or other antidiscrimination laws.[180] An employee could make racist or sexual comments while engaging in Section 7 protected activity, and the speech may be protected, meaning discipline would violate the NLRA.[181] Meanwhile, failing to take any disciplinary action may subject the employer to liability for racial or sexual discrimination claims.[182] Even if a single instance of conduct or speech does not create a hostile work environment,[183] the employer's ability to investigate it and take corrective action is essential to avoid a pattern of behavior that does create a hostile work environment and opens the employer up to liability.[184]

Under the setting-specific standards, the NLRB issued several decisions that conflict with Title VII's goal of ending workplace harassment.[185] In *Airo Die Casting,* the NLRB applied the holding of *Clear Pine Mouldings* to protect the use of racial slurs.[186] An employee of Airo Die Casting, Ronald Lawson, was participating in a picket of the company and yelled "fuck you n[-----]" at a Black security guard who was leaving the site.[187] Airo Die Casting discharged Lawson as a result of the

178. *Id.*
179. *See* Vann & Logan, *supra* note 13.
180. *Id.*
181. Michael Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017 U. CHI. LEGAL F. 235, 248 (2017).
182. *Id.*
183. Harassment that is so severe or pervasive that it alters the conditions of employment creates a hostile work environment. Ali v. McCarthy, 179 F. Supp. 3d 54, 64 (D.D.C. 2016).
184. *See* Vann & Logan, *supra* note 13, at 294.
185. *Id.* at 292.
186. Airo Die Casting, Inc., 347 N.L.R.B. 810 (2006).
187. *Id.* at 811.

incident.[188] The NLRB did not find that the conduct was accompanied by threats or coercion, and, under the *Clear Pines Moulding* standard, the employee did not lose the protection of the NLRA.[189]

The NLRB had another opportunity to examine this issue in its 2016 *Cooper Tire & Rubber Co.* decision.[190] While on strike at Cooper Tire, Anthony Runion yelled racially offensive remarks at a van of mostly Black replacement workers.[191] Cooper Tire terminated Runion the following week for his statements on the picket line.[192] The NLRB found that while Runion's statements were "racist and offensive," they did not "tend to coerce or intimidate employees in the exercise of their Section 7 rights," and Runion did not lose the protection of the NLRA.[193]

Scholars and business groups were critical of the setting-specific standards that the NLRB adopted, primarily because of the inherent conflict with an employer's responsibilities under Title VII and other antidiscrimination laws.[194] The courts have also shown skepticism toward the approach for similar reasons.[195] In a concurring opinion, one federal circuit court judge referred to the NLRB's approach to sexually and racially offensive conduct as "cavalier and enabling" and noted that this type of conduct is "illegal in every other corner of the workplace."[196] Judge Millett recognized that rough words may arise in the tense environment surrounding a workplace strike but argued that racially or sexually motivated conduct should be unacceptable.[197] Recognizing the conflicts between the NLRA and Title VII, the NLRB and Equal Employment Opportunity Commission announced in 2017 that they would cooperate with each other to publish guidance for employers, but they never issued

188. *Id.*
189. *Id.* at 812.
190. *See* Vann & Logan, *supra* note 13, at 295.
191. Cooper Tire & Rubber Co. (*Cooper Tire I*), 2015 L.R.R.M. (BNA) 178146, 2015 WL 3544120 (N.L.R.B. Div. of Judges June 5, 2015), *adopted as modified*, 363 N.L.R.B. No. 194 (May 17, 2016), 2016 WL 2894792, *enforced*, 866 F.3d 885 (8th Cir. 2017).
192. *Id.*
193. *Id.*
194. *See, e.g.*, Green, *supra* note 181; *see* Vann & Logan, *supra* note 13; Brief for Association of Corporate Counsel as Amicus Curiae, Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020) (No. 14-CA-197985), 2020 WL 4193017.
195. *See, e.g.*, Consol. Commc'ns, Inc. v. NLRB, 837 F.3d 1, 20 (D.C. Cir. 2016) (Millett, J., concurring).
196. *Id.*
197. *Id.* at 21.

this guidance.[198] It is against this backdrop that the NLRB heard the *General Motors LLC* case.

III. *GENERAL MOTORS LLC*—THE NLRB OVERRULES THE SETTING-SPECIFIC STANDARDS

In July 2020, the NLRB issued its decision in *General Motors LLC*.[199] The Board overruled its previous line of cases that determined when an employee's abusive or discriminatory conduct occurring during the course of Section 7 activities would lose the protection of the NLRA.[200] As a result of this decision, the Board will no longer apply *Atlantic Steel*, *Clear Pine Mouldings*, or the totality of the circumstances standards to employee discipline involving "abusive conduct."[201] This decision resolves the conflict between the NLRA and antidiscrimination laws and simplifies the number of standards involved in discipline cases.[202] At the same time, the Board's definition of "abusive conduct" is ambiguous, and an expansive reading would erode workers' rights.[203]

A. Factual and Procedural Background

Charles Robinson worked as a union committeeperson at a General Motors assembly plant in Kansas City, Kansas.[204] In 2017, General Motors suspended Robinson following three separate incidents of profane or racially insensitive comments, all of which occurred during the course of union activity.[205] The first instance was an argument with a manager, Anthony Stevens, about overtime coverage for cross-training employees that became heated and ended with Robinson telling the manager to "shove it up [his] fuckin' ass."[206] The second exchange took place at a regular meeting between the union and management over subcontracting: after Stevens told Robinson he was talking too loudly, Robinson began acting like a "caricature of a slave" and calling Stevens "Master Anthony."[207] In the final incident, during another manpower meeting, Robinson told

198. *See* Vann & Logan, *supra* note 13, at 298.
199. *General Motors II*, 2020 WL 4193017.
200. *Id.*
201. *Id.* at *2.
202. *Id.* at *16.
203. *See id.*
204. *Id.* at *2.
205. *Id.*
206. *Id.*
207. *Id.*

Stevens that he would "mess [Stevens] up."[208] Robinson continued to disrupt the meeting by playing loud music with offensive lyrics for somewhere between ten and thirty minutes.[209] These incidents resulted in suspension for three days, two weeks, and thirty days, respectively.[210]

Robinson filed charges with the NLRB on May 3, 2017, and October 19, 2017.[211] The General Counsel issued a complaint alleging that General Motors violated the NLRA by disciplining Robinson with the three suspensions while he was "engaged in protected activity on behalf of the Union."[212] General Motors denied violating the NLRA, arguing that Robinson's conduct lost the protection of the Act.[213] On September 18, 2018, the Administrative Law Judge issued her decision, applying the *Atlantic Steel* standard to determine whether Robinson's conduct while engaged in union activity lost the protection of the NLRA.[214]

Under the *Atlantic Steel* framework, the Administrative Law Judge determined that General Motors violated the NLRA for the discipline issued in response to the first incident, in which Robinson told the manager to "shove it up [his] fuckin' ass."[215] The Administrative Law Judge concluded that the *Atlantic Steel* factors favored protection because Robinson was acting in his capacity as a union committeeperson regarding his honest belief that the supervisor had violated an agreement with the union and because the conversation took place in the managers' office area.[216] For the second and third suspensions, the place of the incidents (a closed-door meeting between the union and management) and the subject matter (terms and conditions of employment and manpower) weighed in favor of protection.[217] The nature of the outbursts and the absence of an unfair labor practice provoking the outbursts weighed against protection.[218] Balancing these factors, the Administrative Law Judge concluded that Robinson had lost the protection of the NLRA, and consequently, the second and third suspensions did not violate the Act.[219]

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208. *Id.* at *3.
209. *Id.* at *2.
210. *Id.* at *2–3.
211. Gen. Motors LLC (*General Motors I*), No. 14-CA-197985, 2018 WL 4489341 (N.L.R.B. Div. of Judges Sept. 18, 2018).
212. *Id.*
213. *Id.*
214. *General Motors II*, 2020 WL 4193017, at *3.
215. *General Motors I*, 2018 WL 4489341.
216. *Id.*
217. *Id.*
218. *Id.*
219. *See id.*

After the General Counsel filed an exception, the NLRB issued an Invitation to File Briefs[220] on September 5, 2019.[221] The NLRB invited the parties and interested amici to file briefs in response to five questions, largely dealing with how much leeway Section 7 should give employees when using profane language or racially or sexually offensive speech while engaging in Section 7 activity.[222] Twenty amici filed briefs, including unions, management groups, and law firms.[223] Following review of the parties' and amici's briefs, the NLRB issued its decision, overruling the prior setting-specific standards.

B. The NLRB Decision

In its decision, the NLRB explained its concerns with the previous setting-specific standards.[224] First, the NLRB stated that the application of the previous standards yielded unpredictable results.[225] Second, the NLRB recognized the conflict between employers' obligations under Title VII and other antidiscrimination laws.[226]

After considering the exceptions and briefs filed by the parties and amici, the NLRB overruled its prior setting-specific standards and announced that it will now apply its *Wright Line* burden-shifting framework "to cases involving abusive conduct in connection with activity protected by" the NLRA.[227] Under this framework, the General Counsel must first show: "(1) the employee engaged in Section 7 activity, (2) the

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220. In significant cases, the NLRB occasionally invites the public to file amicus briefs. The Board maintains a list of invitations on its website with filing deadlines and short descriptions of the issues. *Invitation to File Briefs*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/cases-decisions/filing/invitations-to-file-briefs [https://perma.cc/9BK6-ENG3] (last visited Sept. 30, 2020).

221. Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017, at *3.

222. Gen. Motors LLC (*General Motors III*), 368 N.L.R.B No. 68 (Sept. 5, 2019), 2019 WL 4240696, at *2–3 (notice and invitation to file briefs).

223. *General Motors II*, 2020 WL 4193017, at *4.

224. *Id.* at *1.

225. *Id.* The Board noted examples of inconsistent results. In *DaimlerChrysler* the Board found that an employee lost the protection of the Act for calling his supervisor an "asshole" and saying that he didn't "have to put up with this bullshit." *Id.* at *8 (citing DaimlerChrysler Corp., 344 N.L.R.B. 1324 (2005)). The Board then cited *Postal Service* and *Plaza Auto* as examples of cases with more egregious conduct where the Board nevertheless found the employees had not lost the protection of the Act. *Id.*

226. *Id.* at *1.

227. *Id.*

employer knew of that activity, and (3) the employer had animus against the Section 7 activity."[228] If the General Counsel establishes a *prima facie* case, then the burden shifts to the employer to prove that it would have taken the same action in the absence of Section 7 protected activity.[229] The NLRB remanded the case to the Administrative Law Judge for further proceedings consistent with the decision.[230] Following remand, the NLRB filed a dismissal letter after the General Counsel determined that he could not establish a *prima facie* case under the *Wright Line* standard.[231]

C. The Shortcomings of the NLRB Decision

Although the *General Motors LLC* decision took a positive step by refusing to continue to protect egregious racially or sexually offensive conduct, the decision left two major questions unanswered.[232] First, the Board did not define the scope of "abusive conduct" that now triggers the *Wright Line* analysis.[233] Second, the Board did not decide the appropriate standard for conduct that falls short of abusive.[234]

1. What Is Abusive Conduct?

The *General Motors LLC* decision applies to "abusive conduct in connection with activity protected by Section 7."[235] The Board did not provide a definition or test for "abusive conduct" in its decision, although it did specifically reference "profane ad hominem attack[s] or racial slur[s]."[236] In addition, the NLRB discussed previous cases as examples of "abusive conduct."[237] Calling the owner of the company a "fucking crook" and "asshole" and calling a supervisor a "NASTY MOTHER FUCKER"

228. *Id.* at *15.
229. *Id.* at *16.
230. *Id.* at *5.
231. The General Counsel's office filed a motion on October 21, 2020, stating that after further investigation, he was unable to meet his *prima facie* case under *Wright Line* and asking that the case be remanded to the Acting Regional Director so the complaint could be withdrawn. The NLRB filed a dismissal letter on November 16, 2021. *General Motors LLC*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/case/14-CA-197985 [https://perma.cc/4JXY-TDCD] (last visited Jan. 28, 2020).
232. *See General Motors II*, 2020 WL 4193017.
233. *See id.*
234. *See id.*
235. *Id.* at *1.
236. *Id.* at *13.
237. *Id.*

were examples of "profane ad hominem attacks."[238] A statement regarding "fried chicken and watermelon" in reference to Black replacement workers was an example of a racial slur.[239]

There is no statutory definition of "abusive conduct" in the NLRA.[240] Some circuit courts have recognized that "abusive conduct" is not protected by the NLRA but have not defined the term.[241] In the Title VII context, the Supreme Court described "abusive conduct" in *Oncale v. Sundowner Offshore Services, Inc.* as "behavior so objectively offensive as to alter the 'conditions' of the victim's employment."[242] The Court's description of "abusive conduct" in *Oncale* appears to be a much narrower definition of "abusive conduct" than the NLRB's.[243] Not every profane ad hominem attack implicates a characteristic protected by antidiscrimination laws, and even racially or sexually offensive statements may not be severe enough to alter the conditions of employment.[244] The *Oncale* decision, however, is not directly applicable to unfair labor practice complaints,[245] and the NLRB did not indicate that it was adopting this definition in its decision.[246]

It is not clear from the NLRB's definition of "abusive conduct" whether each incident at issue in *General Motors LLC* was "abusive conduct" or whether the sum of the incidents was "abusive," because the NLRB remanded the case to the Administrative Law Judge without deciding that question.[247] In the first incident, Robinson told his manager to "shove it up [his] fuckin' ass," which is not a racially or sexually offensive statement or an ad hominem attack.[248] The NLRB did not intend

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238. *Id.* at *1 nn.1–2.

239. *Id.* at *1 n.3.

240. *See* 29 U.S.C. § 152.

241. *See* OPW Fueling Components v. NLRB, 443 F.3d 490 (6th Cir. 2006); Roadmaster Corp. v. NLRB, 874 F.2d 448 (7th Cir. 1989); Plaza Auto Ctr. Inc., v. NLRB (*Plaza Auto II*), 664 F.3d 286 (9th Cir. 2011).

242. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S 75, 81 (1998).

243. *Id.*

244. *See id.*

245. The *Oncale* decision considered what conduct created a hostile work environment in violation of Title VII, and the Court did not need to consider a broader definition of "abusive conduct" outside of the Title VII context. *Id.*

246. *See id.*; Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017.

247. *See General Motors II*, 2020 WL 4193017, at *13.

248. *Id.*, 2020 WL 4193017, at *2. The second incident, in which Robinson began acting as a "caricature of a slave" and calling his manager "Master Anthony," may fall under the definition of "abusive conduct" as a "racial slur."

to classify all types of misconduct as "abusive conduct," noting that "[since the] decision only addresses abusive conduct, precedent on disparagement or disloyalty is beyond its scope."[249] By failing to define "abusive conduct," the NLRB added to the complexity and uncertainty surrounding conduct protected by the NLRA.[250]

2. What Standard Applies to Non-Abusive Misconduct?

The NLRB recognized in the *General Motors* decision that certain types of employee misconduct do not fall under "abusive conduct" but did not suggest an applicable standard for those cases in the future.[251] The NLRB only overruled *Atlantic Steel*, *Clear Pine Mouldings*, and the totality of the circumstances approach in social media cases "to the extent they are inconsistent with" its holding that it will now review "abusive conduct" under *Wright Line*.[252] This suggests that the setting-specific standards may still apply to conduct that is not "abusive" under *General Motors*, but the Board did not explicitly state this conclusion.[253] The absence of clarity over the correct standard to apply to instances of non-abusive misconduct will make it more difficult for employers, unions, and Administrative Law Judges to argue and issue decisions in these cases in the future.[254]

IV. CLARIFYING THE SCOPE AND TREATMENT OF ABUSIVE AND NON-ABUSIVE CONDUCT DURING SECTION 7 PROTECTED ACTIVITIES

The ambiguous language of the *General Motors LLC* decision means there is a risk that the NLRB will apply it inconsistently in the future.[255] The recent change in the political composition of the Board resulting from the Biden administration's recent appointments is also likely to result in a

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The NLRB was not reviewing the decision relating to the third incident in which Robinson disrupted a meeting by playing loud, offensive music.

249. *Id.* at *9 n.16.

250. Philip Miscimarra et al., *INSIGHT: NLRB Finally Limits Protection of Abusive, Profane, Offensive Conduct*, BLOOMBERG L. (Aug. 6, 2020, 3:01 AM), https://www.bloomberglaw.com/document/XBMEB8CO000000 [https://perma.cc/CX2Z-68MS].

251. *General Motors II*, 2020 WL 4193017, at *9 n.16.

252. *Id.* at *1.

253. *See id.*

254. *See* Miscimarra, *supra* note 250.

255. *See General Motors II*, 2020 WL 4193017, at *1; *see* Garden, *supra* note 87.

change in approach.[256] To provide clarity to employers, unions, and Administrative Law Judges, the NLRB should adopt a clear definition for "abusive conduct" and clarify what standard should apply to non-abusive conduct. To avoid increasing the complexity of the analysis in these cases, the Board should consider consolidating the setting-specific frameworks[257] into one standard.

A. Creating a Test for "Abusive Conduct"

While certain conduct is so severe that it should lose the protection of the Act, courts recognize that "not every impropriety committed during [Section 7 protected] activity places the employee beyond the protective shield of the act."[258] Any test for "abusive conduct" should distinguish between conduct that is severe enough to lose protection and conduct that is merely improper.[259] The NLRB should adopt a test for "abusive conduct" that encompasses conduct that employers are legally obligated to restrict but excludes other types of misconduct, such as profanity and insults.

1. Conduct That Is Racially or Sexually Offensive

Some amici in *General Motors LLC* argued that there does not need to be any change to the application of the setting-specific frameworks to racially or sexually offensive conduct in the course of protected activity.[260] These amici argued that the existing frameworks are adequate to address this type of conduct.[261] The NLRB decisions in *Cooper Tire* and *Airo Die*

256. In August, the U.S. Senate confirmed two new members of the NLRB, giving Democrats control of the Board for the first time since 2016. Daniel Wiessner & David Shepardson, *U.S. Senate Approves Union Lawyers to NLRB, Giving Democrats Control*, REUTERS (July 28, 2021, 7:17 PM), https://www.reuters.com/legal/legalindustry/senate-approves-union-lawyer-wilcox-nlrb-seat-2021-07-28/ [https://perma.cc/2ZJZ-DYNN].

257. The setting-specific frameworks are the *Atlantic Steel* framework for discussions between the union and management, totality of the circumstances for social media discussions, and the *Clear Pine Mouldings* standard for the picket line.

258. NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965).

259. *See id.*

260. *General Motors II*, 2020 WL 4193017, at *5 n.12.

261. *See, e.g.*, Brief for AFL-CIO as Amicus Curiae at 12, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985); Brief for National Nurses United as Amicus Curiae at 4, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985);

Casting demonstrate, however, that the setting-specific frameworks do not adequately address racially and sexually offensive conduct.[262] In each of these cases, the NLRB ordered employers to reinstate employees who made racially offensive statements because they did not consider the statements to be threatening or coercive.[263]

It was appropriate for the NLRB to lower the protection afforded to racially or sexually offensive conduct by applying the *Wright Line* standard, because this type of conduct is categorically different from profanity, insults, and other types of misconduct.[264] Racially and sexually motivated conduct "conveys a message of exclusion, defamation, and intimidation to a blanket group, rather than addressing a particular grievance in the workplace."[265] Speech that targets people because of their race or gender is valueless and has a serious impact on those at whom it is directed.[266] Furthermore, allowing an employer to discipline an employee who engages in this type of conduct resolves the conflict with the employer's obligations under Title VII.[267] Therefore, in future applications of *General Motors LLC*, the Board should continue to include racially and sexually offensive conduct in the definition of "abusive conduct."

2. Other Conduct That Increases Employer Liability Under Applicable Employment Laws

While the NLRB only specifically lists racially and sexually offensive speech as examples of "abusive conduct" that are discriminatory in nature, Title VII and other antidiscrimination laws protect many characteristics beyond race and sex.[268] The main rationale for the NLRB's decision to analyze "abusive conduct" under *Wright Line* is to account for an

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Brief for Communications Workers of America as Amicus Curiae at 6, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985).

262. Airo Die Casting, Inc., 347 N.L.R.B. 810 (2006); Cooper Tire & Rubber Co. (*Cooper Tire II*), 363 N.L.R.B. No. 194 (May 17, 2016), 2016 WL 2894792.

263. *Airo Die Casting*, 347 N.L.R.B. at 813; *Cooper Tire II*, 2016 WL 2894792, at *1.

264. Carly Thelan, *Hate Speech as Protected Conduct: Reworking the Approach to Offensive Speech Under the NLRA*, 104 IOWA L. REV. 985, 1000 (2019).

265. *Id.* at 1000–01.

266. *Id.* at 1009.

267. *Id.* at 1001.

268. Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017, at *13; Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1).

employer's obligations under Title VII.[269] This rationale extends to other protected characteristics under Title VII and other statutory schemes.[270] Since offensive comments based on a co-worker's age, disability, nationality, or religion would create similar liabilities for an employer as comments based on race and gender, the NLRB should also treat these types of comments as "abusive conduct" under the *General Motors LLC* decision.[271] A flexible standard that encompasses any conduct that an employer has a direct legal obligation to prevent will adapt to varying local legislation and any federal expansion of statutory protections in the future.[272] This may mean that "abusive conduct" would include certain conduct in some states and localities and not in others.[273] This standard would not add complexity for employers or unions, however, since they should already be aware of and in compliance with any local statutory requirements.[274] "Abusive conduct" that triggers the *Wright Line* analysis should be narrowly construed to only apply to conduct that creates liability for the employer under other legislation and should not extend to other forms of misconduct.

3. Conduct That Is Merely Profane or Insulting

The NLRB should not expand the definition of "abusive conduct" to include merely profane or insulting language; nor should it retain "profane ad hominem" attacks, without more, as part of the definition. The main rationale behind the NLRB's decision to abandon *Atlantic Steel* and the other setting-specific standards was the resulting tension with antidiscrimination laws.[275] However, Title VII is not a "general civility code" and only prohibits harassment that is based on a protected characteristic.[276] Therefore, profanity or insults without racial or sexual content, or content based on other protected characteristics, do not create liability under Title VII or other antidiscrimination laws.[277] It is only when

269. *General Motors II*, 2020 WL 4193017, at *11.
270. *See, e.g.*, Title VII of the Civil Rights Act of 1964 § 703; Age Discrimination in Employment Act § 4, 29 U.S.C. § 623(a)(1); Americans with Disabilities Act of 1990 § 102, 42 U.S.C. § 12112(b)(5)(a).
271. *See General Motors II*, 2020 WL 4193017, at *11.
272. *See* Vann & Logan, *supra* note 13, at 292.
273. *See id.* at 301–02.
274. *See id.*
275. *General Motors II*, 2020 WL 4193017, at *1.
276. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).
277. *See id.*

there is conflict with other statutory protections that the Act should afford less protection to employees exercising their Section 7 rights.[278]

Subjecting profane and insulting language to the *Wright Line* analysis rather than the setting-specific standards that previously existed will curtail employee rights under the NLRA.[279] The NLRB and courts have historically been more protective of rude or emotional outbursts made in the course of a labor dispute because emotions tend to run high in those circumstances.[280] Disputes concerning pay and working conditions may elicit strong responses, and the protection of the Act would be hollow if the NLRB did not recognize this reality.[281] Uncensored comments are necessary for the posturing that is inherent in labor relations and can redress the imbalance of power that exists between employers and employees.[282]

Placing constraints on the language that may be used—even profane and insulting language—would undermine the bargaining process by unbalancing the power in the union-management relationship.[283] After all, an employee has "no parallel method of retaliation" if the employer uses profane or insulting language.[284] As the NLRB noted in *Bettcher Manufacturing*, its seminal decision on the use of offensive and insulting statements in collective bargaining, if employers could discipline employees because they resented statements made during bargaining, either "collective bargaining would cease to be between equals . . . or employees would hesitate ever to participate."[285] Applying *Wright Line* would have a chilling effect on employee participation in Section 7 protected activity by removing more employee conduct from the protection of the Act.[286]

Previous Boards have used the setting-specific standards for conduct occurring during Section 7 activity because they viewed the Section 7 activity as "analytically inseparable" from the conduct in these cases, but

278. *See* Consol. Commc'ns, Inc. v. NLRB, 837 F.3d 1, 20 (D.C. Cir. 2016) (Millett, J., concurring).

279. *See* McDermott, *supra* note 21, at 6.

280. Runyan & Kato, *supra* note 10, at 35.

281. Plaza Auto Ctr. (*Plaza Auto I*), 360 N.L.R.B. 972, 978 (2014).

282. Christine Neylon O'Brien, *I Swear! From Shoptalk to Social Media: The Top Ten National Labor Relations Board Profanity Cases*, 90 ST. JOHN'S L. REV. 53, 56 (2016).

283. *See* McDermott, *supra* note 21.

284. Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948).

285. *Id.*

286. *See id.*; McDermott, *supra* note 21.

the *Wright Line* analysis requires two distinct motives.[287] For example, the Seventh Circuit found in *Thor Power Tool Co.* that a "remark cannot be considered in a vacuum," and in some cases, a remark may "furnish[] the excuse rather than the reason" for a disciplinary action.[288] In the *General Motors* decision, the current Board rejected the idea that Section 7 activity is "analytically inseparable" from abusive conduct.[289] The NLRB found it plausible that, in the cases it examined, the employer disciplined the employees entirely for their conduct and not for their union activity.[290]

Advocates for removing profane and insulting language from the protection of the NLRA argue that employees have other means of voicing their frustrations.[291] This view ignores the confrontational nature of collective bargaining.[292] Negotiations are intended to implement a long-term employer-employee relationship, and this requires "[a] frank, and not always complimentary, exchange."[293] In passing the NLRA, Congress intended to encourage open debate between labor and management, and permitted the use of blunt and profane language from representatives of both labor and management.[294] Retaining a higher level of protection for misconduct that does not create potential employer liability under antidiscrimination laws will allow employees to continue to effectively voice workplace concerns without conflicting with other statutory obligations of the employer.[295]

B. Consolidation of the Setting-Specific Standards for Non-Abusive, Protected Conduct

Continued application of all of the setting-specific standards to conduct that is not abusive would result in an additional layer of analysis

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287. "The Board has explained, 'Where an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee's protected activity, *Wright Line* is inapplicable. This is because the causal connection between the protected activity and the discipline is not in dispute.'" Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017, at *15 (citing Roemer Indus., Inc., 362 N.L.R.B 828, 834 n.15 (2015)).

288. NLRB v. Thor Power Tool Co., 351 F.2d 584, 586–87 (7th Cir. 1965).

289. *General Motors II*, 2020 WL 4193017, at *15.

290. *Id.* at *12.

291. *See, e.g.*, Brief for Equal Employment Opportunity Commission as Amicus Curiae at 21, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985).

292. O'Brien, *supra* note 282.

293. Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948).

294. Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 272 (1974).

295. *See* O'Brien, *supra* note 282.

in cases where employers discipline employees for misconduct that occurs during the course of a protected activity.[296] Before determining which standard to apply, an Administrative Law Judge would first have to decide whether the conduct was abusive.[297] If the conduct was abusive, the judge would apply the *Wright Line* burden-shifting framework.[298] If the conduct was not abusive, the judge would have to determine the relevant standard based on the setting of the conduct.[299] The NLRB should consolidate the setting-specific standards into one test and apply *Atlantic Steel*[300] to workplace discussions with management, social media discussions, and the picket line.[301] This consolidation will simplify the number of standards applied to employee misconduct while maintaining a higher level of protection for conduct that occurs while engaging in protected activity.

1. Maintaining the Atlantic Steel *Framework for Workplace Discussions with Management*

Atlantic Steel provides a useable framework for conduct occurring in the workplace.[302] The *Atlantic Steel* standard acknowledges human fallibility and balances the employee's right to engage in concerted activity with the employer's right to maintain order.[303] The NLRA protects the *subject matter* of employee statements, while the *manner of expression* determines whether the employee should lose that protection.[304] The question in each instance is whether the outburst is so unconscionable that it should no longer be protected.[305] Whether the conduct is so egregious that it loses the protection of the Act depends not only on what was said,

296. *See General Motors II*, 2020 WL 4193017.

297. *Id.*

298. *Id.*

299. *Atlantic Steel* would apply to conduct occurring in meetings with management, *Clear Pine Mouldings* would apply to conduct on the picket line, and the totality of the circumstances approach would apply to social media and other conversations that occurred outside of the workplace.

300. The *Atlantic Steel* four-factor test considers (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked by an unfair labor practice.

301. *See General Motors II*, 2020 WL 4193017, at *6.

302. Brief for National Nurses United as Amicus Curiae at 4, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985).

303. *Id.*

304. Brief for Communications Workers of America as Amicus Curiae at 6, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985).

305. *Id.*

but also on the context in which it was said.[306] *Atlantic Steel* allows for the fact-specific analysis necessary to evaluate both the content of what was said and the context in which it was said.[307]

There are legitimate reasons why employers want to prohibit the use of profanity and other insulting language in their businesses, but *Atlantic Steel* adequately addresses these reasons.[308] One reason for limiting profanity is that employers do not want to lose control of employee behavior.[309] The *Atlantic Steel* framework adequately addresses this concern by considering the privacy of the conversation, providing more protection to conversations that occur in private than those occurring on the shop floor.[310] Another reason for limiting profanity is to preserve the image of the company, especially in a retail setting where customers may be present.[311] The courts and the NLRB have already recognized that *Atlantic Steel* is inappropriate for outbursts that occur in front of customers and use the *Wright Line* analysis in those cases.[312] Therefore, outbursts in front of customers do not need to be categorized as "abusive conduct" under *General Motors LLC* in order to allow employers to effectively deal with those incidents.[313] Allowing some leeway for obscene or insulting conduct during the course of protected activity promotes the NLRA's goal of protecting an employee's right to engage in concerted activity, and the NLRB can balance this right under existing standards without impeding an employer's legitimate interest in maintaining order in the workplace.[314]

2. Adapting the Atlantic Steel *Framework to Social Media Discussions*

Cases involving employee conduct on social media are relatively recent.[315] In 2011, the Acting General Counsel of the NLRB issued a

306. Brief for AFL-CIO as Amicus Curiae at 12, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985).

307. Brief for American Federation of Teachers as Amicus Curiae at 10, *General Motors II*, 2020 WL 4193017 (No. 14-CA-197985).

308. *See* O'Brien, *supra* note 282, at 58.

309. *Id.*

310. Atl. Steel Co., 245 N.L.R.B 814 (1979).

311. *See* O'Brien, *supra* note 282.

312. *Id.* at 72.

313. *See id.*

314. Plaza Auto Ctr. (*Plaza Auto I*), 360 N.L.R.B. 972, 978 (2014).

315. *See* Elizabeth Allen, *You Can't Say That on Facebook: The NLRA's Opprobriousness Standard and Social Media,* 45 WASH. U. J.L. & POL'Y 195 (2014).

memorandum suggesting a modified *Atlantic Steel* analysis that considered disruption to workplace discipline and disparagement of the employer's products.[316] Some Administrative Law Judges also utilized *Atlantic Steel* in early decisions on social media discussions.[317] In 2015, the NLRB rejected the adaptation of *Atlantic Steel* to social media posts and adopted a totality of the circumstances approach instead.[318] Despite the NLRB rejection, the Board can eliminate the totality of the circumstances approach and adapt *Atlantic Steel* for use in social media cases by modifying the first factor.[319]

The first *Atlantic Steel* factor, "the place of the discussion," must be modified for application to social media posts.[320] The physical location of employees is less impactful when they post something to social media than when they engage in a face-to-face discussion with management in the workplace.[321] The impact of a social media post depends more on what platform it was shared on, whether it was public or private, and whether the employer or coworkers were tagged than on whether the employee made the post from home, the workplace, or somewhere else.[322] In the social media context, "the place of the discussion" factor must encompass both the amount of disruption to the workplace, as is done in the traditional *Atlantic Steel* application, as well as the public nature of the post.[323] Because the *Atlantic Steel* framework favors conduct that occurs in private due to its less disruptive nature,[324] when adapted to social media this factor should weigh more in favor of protection for posts that are shared privately and visible only to friends than for posts that are made public or in which the employer is named or tagged.[325]

The NLRB does not need to modify the remaining *Atlantic Steel* factors—the subject matter of the discussion, the nature of the outburst, and whether an unfair labor practice provoked it—in order to apply them

316. *Id.* at 208–09.
317. *Id.*
318. *See* Pier Sixty, LLC, 362 N.L.R.B. 505, 506 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017).
319. *See* Allen, *supra* note 315, at 209.
320. *Id.*
321. *See* James Long, *#Fired: The National Labor Relations Act and Employee Outbursts in the Age of Social Media*, 56 B.C. L. REV. 1217, 1240 (2015).
322. *See* Allen, *supra* note 315, at 209–10.
323. Long, *supra* note 321, at 1245.
324. Plaza Auto Ctr. (*Plaza Auto I*), 360 N.L.R.B. 972, 978 (2014).
325. *See* Allen, *supra* note 315, at 217.

to social media cases.[326] If the subject matter is not related to traditionally protected topics, such as wages or conditions of employment, that factor should weigh against protection.[327] Under the nature of the outburst, the NLRB may continue to consider whether the employee used profanity or other insulting language and whether the language was directed at an individual or at a policy.[328] Finally, if an employer's unfair labor practice provokes the employee's post, that factor should weigh in favor of protection.[329]

Critics of applying *Atlantic Steel* to social media activity may argue that it will negatively impact the employer's ability to maintain its reputation and brand image due to negative employee posts.[330] However, the *Atlantic Steel* analysis only comes into play if the social media post was an instance of "concerted activity" that is afforded Section 7 protection.[331] Concerted activity requires group action, not action by an individual employee on his own behalf.[332] Mere complaining without the objective of taking action is also not considered concerted activity.[333] Since the NLRB would not apply *Atlantic Steel* to cases that do not involve concerted activity, and most social media posts do not involve concerted activity, the framework will not unduly burden employers seeking to manage their corporate image online.[334]

3. Adapting the Atlantic Steel *Framework to the Picket Line*

Since the adoption of *Clear Pine Mouldings*, the NLRB has utilized an objective standard to determine whether an employee lost the protection of the Act—whether conduct reasonably tended to coerce or intimidate other employees in the exercise of their Section 7 rights.[335] Applying *Atlantic Steel* to picket line conduct would allow the NLRB to balance employee misconduct against an employer's unfair practices, as it did in

326. *Id.* at 216.
327. *See id.*
328. *See Plaza Auto I*, 360 N.L.R.B. at 977 (citing Wal-Mart Stores, Inc., 341 N.L.R.B. 796, 807–08 (2004)).
329. Allen, *supra* note 315, at 216.
330. *See id.* at 218.
331. *Id.*
332. Long, *supra* note 321.
333. *Id.* at 1223.
334. Allen, *supra* note 315, at 218.
335. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

pre-*Clear Pine Mouldings* cases.[336] Application of *Atlantic Steel* to the picket line would require modification of the place-of-the-discussion factor.[337] The NLRB would not need to modify the remaining *Atlantic Steel* factors, but their application would result in a change to the scope of what conduct on the picket line the Act will protect.[338]

To adapt the *Atlantic Steel* framework for the picket line setting, the NLRB should consider both the place and the time of the conduct under the first factor.[339] Employees may picket on or near company property, but they may not engage in lawful strikes in the working area.[340] Employees are also not on company time while they are striking.[341] Since striking employees are not in the working area or on company time, the employer does not have as strong of an interest in maintaining order.[342] Therefore, the time and place of the conduct would generally favor protection in a picket line case.[343]

The previous test in *Clear Pine Mouldings*, whether an employee's conduct was coercive or intimidating, can be incorporated into the second factor of the *Atlantic Steel* framework.[344] The second *Atlantic Steel* factor considers the nature of the employee's outburst. Obscene, profane, and personal attacks, as well as threatening or coercive conduct would weigh against protection.[345] The use of this factor would change the scope of

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336. Under the *Thayer* doctrine, which pre-dated *Clear Pine Mouldings*, the NLRB balanced an employer's unfair labor practices against an employee's misconduct to determine if the employees lost the protection of the Act. Albin Renauer, *Reinstatement of Unfair Labor Practice Strikers Who Engage in Strike-Related Misconduct: Repudiation of the* Thayer *Doctrine by* Clear Pine Mouldings, 8 INDUS. REL. L.J. 226, 247 (1986).

337. *See* Atl. Steel Co., 245 N.L.R.B 814, 816 (1979).

338. *See id.*

339. *See id.*

340. In *NLRB v. Fansteel Metallurgical Corp.*, the Supreme Court held that a "sit-down strike," in which employees occupied the plant and refused to leave, was not protected by the Act. 306 U.S. 240 (1939).

341. Employers will not continue to pay workers who are on strike, but the union pay provides employees benefits out of a strike fund. *Labor Strike FAQs*, FINDLAW, https://employment.findlaw.com/wages-and-benefits/labor-strike-faqs.html#:~:text=Workers%20on%20strike%20will%20not,to%20pay%20workers%20on%20strike [https://perma.cc/79EC-JLXP] (last updated May 2, 2017).

342. *See* Plaza Auto Ctr., Inc. (*Plaza Auto I*), 355 N.L.R.B. 493, 494 (2010).

343. *See Atl. Steel*, 245 N.L.R.B at 816.

344. *See* Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

345. *See Plaza Auto I*, 360 N.L.R.B. at 977.

protection that *Clear Pine Mouldings* previously offered.[346] Under *Clear Pine Mouldings*, profane and insulting language would not lose protection of the Act if it was not threatening or coercive; whereas under *Atlantic Steel*, profane and insulting language would weigh against, but not automatically result in loss of, protection.[347] Conversely, threatening or coercive language did automatically result in loss of protection under *Clear Pine Mouldings*; while under *Atlantic Steel*, it would merely weigh against protection.[348]

Under *Clear Pine Mouldings*, the NLRB did not consider whether the employer engaged in an unfair labor practice that provoked the strike.[349] By utilizing the *Atlantic Steel* framework in picket line cases, the NLRB would consider an employer's unfair labor practices under the fourth factor.[350] If an employer has committed an unfair labor practice that provokes a strike, and an employee engages in misconduct on the picket line, then both sides have committed a wrong.[351] If the Board orders reinstatement of the employee, then the employer faces the consequences for its unfair labor practice, but the employee does not face the consequences for his or her misconduct.[352] If the Board does not order reinstatement, the employee faces the consequences, but the employer does not.[353] By using *Atlantic Steel*, the NLRB would be able to use the fourth factor to balance the wrongs committed by each party and take action against the more egregious wrongdoer.[354] Using the fourth factor, the Board can consider the severity of any unfair labor practices and would be more likely to protect conduct that occurs during an unfair-labor-practice strike than conduct that occurs during an economic strike.[355]

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346. *See Clear Pine Mouldings*, 268 N.L.R.B. at 1046.

347. *See id.*; *Plaza Auto I*, 360 N.L.R.B. at 977.

348. *See Clear Pine Mouldings*, 268 N.L.R.B. at 1046; *Plaza Auto I*, 360 N.L.R.B. at 977.

349. *See Clear Pine Mouldings*, 268 N.L.R.B. 1044.

350. *See* Atl. Steel Co., 245 N.L.R.B 814, 816 (1979).

351. Renauer, *supra* note 336, at 248.

352. *Id.*

353. *Id.*

354. *See id.*

355. An unfair-labor-practice strike is one that employees initiate or prolong in response to an employer's unfair labor practice. An economic strike is any other type of strike not prohibited by law or by a collective bargaining agreement. A strike that begins as an economic strike can convert to an unfair-labor-practice strike if an employer's unfair labor practice prolongs the strike. An economic striker who is permanently replaced is only entitled to reinstatement if there is a vacancy in an equivalent position, while unfair labor practice strikers must be reinstated, even if the employer hired permanent replacement workers. Michael

4. The Advantages of Retaining the Atlantic Steel *Standard*

Applying *Atlantic Steel* to conduct that falls short of abusive, regardless of the specific setting of the conduct, will retain a higher standard of protection for Section 7 activity while simplifying the Board's analysis.[356] The NLRB has applied the *Atlantic Steel* standard for over 40 years.[357] Employers and labor organizations are familiar with the *Atlantic Steel* framework and how the NLRB applies it.[358] While the courts have sometimes disagreed with the NLRB's application of the standard in individual cases, the courts have approved of the standard itself.[359]

In *General Motors LLC*, the NLRB criticized *Atlantic Steel* because its application provided inconsistent results.[360] The Board did not address how its own composition and reliance on adjudication rather than rulemaking may contribute to the lack of consistent results.[361] The NLRB consists of political appointees.[362] Each new presidential administration eventually results in turnover of Board membership, and changes to the political makeup of its members are often followed by significant policy changes.[363] During the Trump administration, the Republican controlled NLRB repeatedly overturned prior precedent, frequently in cases where the parties to the case did not ask them to.[364] An empirical analysis of NLRB decisions during the George W. Bush and Bill Clinton presidencies found that one of the most important predictors of how a particular panel will vote is the political makeup of its members.[365] It is the political nature

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D. Moberly, *Striking a Happy Medium: The Conversion of Unfair Labor Practice Strikes to Economic Strikes*, 22 BERKELEY J. EMP. & LAB. L. 131, 137–38 (2001).

356. *See* Atl. Steel Co., 245 N.L.R.B 814, 816 (1979).

357. Brief for National Treasury Employees Union as Amicus Curiae at 11, Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020) (No. 14-CA-197985), 2020 WL 4193017.

358. *Id.* at 6.

359. *Id.* at 11.

360. *See General Motors II*, 2020 WL 4193017, at *8.

361. *See id.*

362. National Labor Relations Act § 3(a), 29 USC § 153(a).

363. Garden, *supra* note 87, at 1476.

364. Robert Iafolla, *Labor Board Repeatedly Topples Precedent Without Public Input*, BLOOMBERG L. (July 12, 2019, 5:15 AM), https://news.bloomberglaw.com/daily-labor-report/labor-board-repeatedly-topples-precedent-without-public-input [https://perma.cc/BF6Q-C359]. The author notes 10 decisions during the Trump administration that overturned precedent without giving prior notice or an opportunity for public input.

365. Semet, *supra* note 19, at 273. This study examined the decisions of three-member panels of the NLRB and found that a panel of all Democrats will grant

of the Board, rather than a flaw in the *Atlantic Steel* framework, that results in inconsistent adjudication results.[366] Therefore, a lack of consistent results alone should not prevent retention of the *Atlantic Steel* framework for conduct that falls short of abusive.[367]

To provide clarity to employers, unions, and Administrative Law Judges, the NLRB should adopt a clear definition of "abusive conduct" and clarify the standard that should apply to non-abusive conduct occurring during otherwise protected activity.[368] "Abusive conduct" should be defined to cover offensive language on the basis of a statutorily protected characteristic, or other conduct that directly creates liability for the employer under applicable law.[369] "Abusive conduct" should not encompass merely profane or insulting language, as this would unnecessarily restrict employees in their exercise of protected activity.[370] For conduct that falls short of abusive, the NLRB should consolidate the setting-specific standards into one modified *Atlantic Steel* framework that applies to workplace discussions with management, social media, and the picket line.

CONCLUSION

Historical NLRB standards for determining when employee conduct loses the protection of the NLRA conflicted with employer obligations under federal, state, and local antidiscrimination statutes.[371] The *General Motors LLC* decision brought the interpretation of the NLRA into closer alignment with these antidiscrimination laws.[372] At the same time, the decision left two broad questions unanswered: (1) what is the scope of "abusive conduct" covered by the decision and (2) how should instances of misconduct that are not "abusive" be analyzed in the future?[373] The

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relief to the pro-labor party 90% of the time, a panel with one Republican and two Democrats 84% of the time, a panel with two Republicans and one Democrat 75% of the time, and an all-Republican panel 60% of the time. The political makeup of the panel and the decision below of the Administrative Law Judge were the two most important factors in predicting panel outcomes.

366. *See* Garden, *supra* note 87, at 1476; *see* Semet, *supra* note 19.

367. *See* Garden, *supra* note 87; *see* Semet, *supra* note 19.

368. *See* Miscimarra, *supra* note 250.

369. *See* Vann & Logan, *supra* note 13, at 292.

370. McDermott, *supra* note 21, at 6.

371. *See* Vann & Logan, *supra* note 13, at 292.

372. *See* Gen. Motors LLC (*General Motors II*), 369 N.L.R.B. No. 127 (July 21, 2020), 2020 WL 4193017.

373. *See id.*

NLRB should clarify the scope of "abusive conduct" to include conduct that directly creates employer liability under applicable employment laws, such as Title VII.[374] This will adequately balance employer obligations under the NLRA and Title VII and other antidiscrimination laws, and provide a flexible standard that adapts to differences in local legislation.[375] The scope of "abusive conduct" should exclude conduct that is merely profane or insulting.[376] This interpretation will uphold the purpose of the NLRA by maintaining the balance of power between employers and employees and protecting employees who are engaging in concerted activity.[377] In instances of misconduct that occur during otherwise protected activity, the NLRB should apply *Atlantic Steel* if the conduct falls short of abusive, regardless of whether the conduct occurred in meetings with management, on social media, or on the picket line.[378] This application will reduce the complexity of the Board's analysis while ensuring that employees will continue to have the ability to exercise their right to engage in concerted activity without retaliation based solely on their participation in those activities.[379]

374. *See* Vann & Logan, *supra* note 13.
375. *See id.*
376. McDermott, *supra* note 21, at 6.
377. *See id.*
378. *See* Atl. Steel Co., 245 N.L.R.B 814, 816 (1979).
379. *See id.*