> Client Alert

NLRB Decision Reinstates Protections in Certain Circumstances for Workers' Use of Foul or Disrespectful Language in the Workplace

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The National Labor Relations Board ("NLRB" or the "Board") recently issued a decision in *Lion Elastomers LLC II*, which restores protections for employees who make abusive or offensive statements during a labor dispute. This decision marks another instance in which the Biden-era majority has abandoned Board precedent established under the Trump Administration in order to bolster workers' Section 7 rights. Specifically, the Board's decision in *Lion Elastomers* overrules its prior decision in *General Motors LLC*, 369 NLRB No. 127 (2020), handed down less than three years ago by a Board whose membership was different (and more conservative) than the current Board. The *Lion Elastomers* decision reinstates previous Board precedent applying "setting-specific" standards for assessing employer responses to employees' abusive or offensive behavior during their protected Section 7 activities, rather than applying a one-size-fits-all approach to such matters. NLRB Chair Lauren McFerran recently defended the Board's decision to revert to pre-*General Motors* standards by commenting that the prior Republican majority had abdicated its duty to decide the "scope of what's protected" in implementing its decision in *General Motors*.

Section 7 Rights

Perhaps the most often cited provision of the National Labor Relations Act ("NLRA" or the "Act")—its Section 7—accords employees, regardless of union affiliation or membership, the right to engage in "protected concerted activity" for the purpose of collective bargaining or other mutual aid or protection, and the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to refrain from such activity. Simply stated, Section 7 allows employees to discuss freely the terms and conditions of their employment, *i.e.*, free from interference, discipline or retaliation by their employers.

The *Lion Elastomers* Decision

In *Lion Elastomers*, the Board was asked to review the employer's response to employee misconduct arising out of protected activity under Section 7 of the Act during the course of a labor dispute.

The majority opinion in *Lion Elastomers* explains that "labor disputes are often heated," and employees must be allowed some latitude in their conduct in order to safeguard their statutory rights, including to "vigorously and robustly debate

and challenge the statements of management representatives without fear of discipline or retaliation."

Thus, where the employee's misconduct occurs in connection with activities otherwise protected under Section 7, an employer's response will be measured based on the particular setting in which the speech or misconduct arose. In such circumstances, the Board has applied three different standards for evaluating employer discipline depending on the factual setting of an employee's conduct, *e.g.*, (i) on a picket line (whether the abusive picket-line conduct would reasonably have coerced or intimidated non-strikers), (ii) in discussions between and among employees such as those on social media (analyzing the totality of the circumstances), or (iii) during a confrontation with a manager or supervisor (*e.g.*, over safety concerns) (analyzing the place, subject matter, nature of the outburst, and whether it was provoked by management conduct constituting an unfair labor practice).

The *Lion Elastomers* decision essentially signifies that employees engaging in activities protected by Section 7 may be protected from discipline or discharge that, in ordinary circumstances, would be considered unacceptable workplace conduct, warranting discipline or discharge. Board precedent utilizing these context-specific standards prior to the *General Motors* decision held that an employee's profanity towards a supervisor, as well as an employee's statement in violation of anti-harassment and anti-discrimination laws, is an insufficient basis for discipline or discharge if the employee made such remarks in connection with workplace issues, collective bargaining or picket line activity, as protected by Section 7 of the Act.

However, where an employee engages in a protected activity and the misconduct occurs in the ordinary course of the employee's work (as opposed to those specifically connected to Section 7 activities), the Board will assess the employer's discipline under the familiar mixed-motive standard articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. den., 455 U.S. 989 (1982). Under the *Wright Line* burden-shifting framework, where the General Counsel initially establishes that a worker's protected activity factored into the employer's discipline decision, the burden shifts to the employer to produce evidence that it would have taken the same action in the absence of the protected activity, such as evidence that it consistently disciplined other employees who engaged in similar offensive or abusive conduct.

The impact of *Lion Elastomers* is likely going to frustrate employers' ability to discipline employees who engage in misconduct where the employee has arguably engaged in protected activity under Section 7 of the Act. To bring home this move toward further protecting employees' otherwise terminable conduct, the sole member of the Board who dissented from the majority opinion in *Lion Elastomers* put it this way: "the Board will now protect employees who engage in a full range of indefensible misconduct, such as profane *ad hominem* attacks and threats to supervisors in the workplace, posting social media attacks against a manager and his family, shouting racist epithets at other employees, or carrying signs sexually harassing a particular employee."

Next Steps for Employers

In light of the NLRB's decision in *Lion Elastomers*, employers must ensure that expectations and general standards of conduct are clearly stated in company policies and trainings governing the workplace. Employers should update their employee handbooks to address workplace conduct and its consequences appropriately. Employers will now need to more carefully navigate and weigh potential discipline for employee misconduct in light of an employee's broadened legal right to engage in activities protected under Section 7 of the Act.

Employers should also train managers and supervisors to evaluate employee misconduct and issue discipline based upon an employee's misbehavior based on the setting in which it occurs.

In considering the impact of the decision in *Lion Elastomers*, it is important to note that the decision and resulting new standard in no way impacts an employer's ability to enforce workplace standards of conduct where no activity protected by Section 7 has occurred.

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The Morrison Cohen LLP Labor & Employment team is here to help employers navigate their compliance with the NLRA as pertinent to employee discipline and related issues, and to assist in updating any employment policies governing meting out appropriate discipline and all other workplace issues.