

> Client Alert

Watch Your Mouth: NLRB Makes it Easier to Discipline (or Discharge) Workers over the Use of Foul or Disrespectful Language in the Workplace

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In a decision which some labor practitioners have awaited for years, the National Labor Relations Board (“NLRB or “Board””) has handed down its ruling in *General Motors LLC* (369 N.L.R.B. No. 127) (“*General Motors*”). The holding in *General Motors* makes it markedly easier for employers to discipline or discharge employees as a result of their use of abusive or offensive statements—including profane, racist, and sexually unacceptable remarks. Employer response to the use of such remarks in the workplace by employees is an issue which has plagued employers since the Board’s prior decisions in three different cases between 2015 and 2017, each of which held that employees’ Section 7 rights essentially outweighed an employer’s right to discipline or discharge an employee for what all reasonable observers would conclude is egregious, outrageous and unacceptable conduct in the workplace.

Section 7 of the National Labor Relations Act (the “Act”) accords employees the right to engage in “protected concerted activity” for the purpose of collective bargaining or other mutual aid or protection, 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. In recent years, it has with increasing frequency been referred to as employees’ right to free speech in the workplace to give effect to these organizational and related rights. In fact, in several recent decisions prior to *General Motors*, the Board held that unconscionable profanity leveled against one’s supervisor or even language that might be deemed violative of applicable laws which prohibit employment discrimination or workplace harassment under Title VII of the Civil Rights Act of 1964, as amended, and its analogs, was an insufficient basis to discipline or discharge an employee if the employee were able to contend that the inappropriate remarks were made in furtherance of discussion of workplace issues, collective bargaining or picket line activity. Needless to say, the Board’s pronouncements in these cases frustrated employers who believed that this legal standard prevented proper discipline, respect and workplace decorum and rendered management’s legitimate efforts to maintain such decorum and respectful behavior unlawful.

The case of *N.L.R.B. v. Pier Sixty*, 855 F.3d 115 (2d Cir. 2017) is a stark example of the prior trend. In that case, the United States Court of Appeals for the Second Circuit enforced a Board Order finding that an employee’s expletive-laced Facebook post about his manager (which also referenced his opinion that his co-workers should support a union) was protected speech and, no matter how repugnant to normal sensibilities, could not form the basis for his lawful discharge.

To the relief of many, the Board's July 21, 2020, [decision](#) in *General Motors* changed its prior standard for determining whether employees have been lawfully disciplined or discharged for making abusive or offensive statements—including profane, racist, and sexist remarks—while engaging in otherwise protected activity under Section 7 of the Act. And to be clear, these new standards are equally applicable to organized and non-union workplaces.

In its decision in *General Motors*, the Board concluded that cases involving offensive or abusive conduct in connection with otherwise protected activity will now be decided [again] under the familiar standard articulated in *Wright Line, A Division of Wright Line, Inc.* (251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)). *Wright Line*, almost 40 years ago, defined itself and the Board's evidentiary process as one which gave effect to the “mixed motive” standard of analyzing an employer's intent in its discipline and discharge of employees who were engaging in conduct anathema to the best interests of their employer but who were also involved in conduct falling under the umbrella of protected, concerted activity.

The mixed motive standard relies on a burden-shifting framework for all circumstances in which the Board's General Counsel alleges that an employer's discipline or discharge of an employee was motivated by protected Section 7 activity and the employer asserts, conversely, that the discipline or discharge was motivated by the employee's abusive words or improper conduct. Thus, under the *Wright Line* standard, the General Counsel must initially show that the worker's protected activity factored into the employer's discipline, and, if such proof exists, the employer must then show that it would have taken the same action even in the absence of the protected activity, by establishing, *e.g.*, consistent discipline of other employees who engaged in similar offensive, abusive conduct.

To fully understand the Board's analysis in *General Motors*, it noted that the employee in question had engaged in the following conduct:

- With respect to the employer's policy concerning overtime coverage for employees away on cross-training, the employee yelled at his supervisor that he did not “give a f*** about your cross-training,” that “we're not going to do any f***** cross-training if you're going to be acting that way,” and that his supervisor could “shove it up [his] f***** a**.”
- When the employee's manager told the employee that he was speaking too loudly, the employee lowered his voice and mockingly performed a caricature of a slave, and said, “Yes, Master, Your Master Anthony,” “Yes, sir. [...] [i]s that what you want me to do, Master Anthony?” and also stated that the manager wanted him “to be a good Black man.”
- At a meeting, when the employee kept repeating the same questions and his manager stated that they were going to move on, the employee said he would “mess [the manager] up.” When the manager asked if this statement was a threat, the employee replied that the manager could take it how he wanted. Later in the meeting, the employee began playing loud music from his phone that contained profane, racially charged, and sexually offensive lyrics.

While the above-referenced statements and conduct are extreme and repugnant, the NLRB's prior standard would likely have protected the employee from employer discipline. However, under *General Motors* and the return to the *Wright Line* standard, conduct such as that set forth above will no longer be protected, provided that employers are able successfully to prove that discipline or discharge would have been implemented in any event and regardless of whether the employee was engaged in protected activity at the time of the conduct in question.

In light of the NLRB's decision in *General Motors*, employers must ensure that the standards of unacceptable conduct, including foul language and especially that addressed to management, are clearly laid out in employee handbooks and uniformly applied, such that if and when an employee discharged for foul language asserts that his speech is protected by Section 7 of the Act, the employer can defend its legitimate action on the ground that the discharge would have occurred regardless of any such exercise of “free speech” or protected rights.

The Morrison Cohen LLP Labor & Employment team is here to help employers navigate the analysis and implementation of the NLRA as pertinent to employee disciplinary issues and otherwise, and to assist in updating any employment policies governing the use of foul language and all other workplace issues.