PUBLICATION

Are Employee Outbursts Protected Activity? Maybe.

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On Monday, May 1, 2023, in *Lion Elastomers*, NLRB Case No. 16-CA-190681, the National Labor Relations Board (NLRB or the Board) overturned an employer-friendly precedent dating from 2020 by finding that the termination of an employee for engaging in a profane outburst was "protected activity," and therefore protected by Section 7 of the National Labor Relations Act (NLRA). The NLRA also ordered that the employee be reinstated and receive backpay from the employee's date of termination.

The *Lion Elastomers* decision affords workers more protection from punishment even when the worker uses derogatory language in the course of exercising the right, under Section 7 of the National Labor Relations Act, to engage in "protected activity." Some common examples of what may constitute protected activity include: complaining to management about wages or benefits, discussing amongst employees of wages, wearing union insignia (under most circumstances), and attempting to organize or campaign for a union.

Under the now abandoned standard, the Board prescribed the use of its well-worn *Wright Line* test to weigh whether the punishment of workers that engaged in protected activity was fair. The *Wright Line* test provides for a burden-shifting paradigm similar to the one used in employment discrimination cases wherein the worker has the initial burden of showing that (1) the employee engaged in protected activity, (2) the employer knew of that activity, and (3) the employer had animus against the protected activity, which must be proven with evidence sufficient to establish a causal relationship between the adverse action and the protected activity. Under *Wright Line*, once the initial showing is made, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity.

The Board's *Lion Elastomers* decision revives the 1979 standard first set out in *Atlantic Steel Company*, 245 NLRB No. 814 (1979). *Atlantic Steel* requires consideration of the level of egregiousness of an outburst and the circumstances in which an outburst is made when determining whether a given outburst is protected activity under Section 7 of the National Labor Relations Act. Under *Atlantic Steel*, even a profane and derogatory outburst directed at an individual member of management may be considered protected activity so long as the outburst can reasonably be said to relate to the terms and conditions of employment (e.g., wages, benefits, hours, overtime, paid holidays, sick time, breaks, discipline policy, etc.).

The Board's May 1, 2023 ruling stems from a 2016 complaint filed against Lion Elastomers, a Texas-based rubber company. In 2020, the Board found that Lion Elastomers violated federal labor law by firing a worker for engaging in Section 7 protected pro-union activity. The NLRB relied on the precedent set in *Atlantic Steel Company* to determine that the worker's conduct (a profane outburst during a safety meeting) was not egregious enough for the worker to be stripped of the NLRA's Section 7 protections. Lion Elastomers appealed to the Fifth Circuit which then remanded the matter for reconsideration under the more employer-friendly precedent. Rather than reconsidering the matter under the employer-friendly precedent, the Board instead found that precedent and revived a trio of previously overturned Board decisions concerning employee behavior. Those now-revived decisions are (1) *Atlantic Steel Company*; requiring consideration of the level of egregiousness and context of an outburst, (2) *Pier Sixty, LLC*, 362 NLRB No. 59 (2014); holding that the use of "obscene and vulgar language" on social media about a manager was protected activity under Section 7, and

(3) *Clear Pine Mouldings*, 268 NLRB No. 1044 (1983); requiring consideration of the level of egregiousness and circumstances in the context of striking worker's conduct while picketing.

In this ever-changing legal environment, employers are cautioned to be circumspect before terminating or punishing employees for use of derogatory and/or profane language critical of management or company policy. Employers should ensure that managers and human resources professionals alike stay abreast of changes to labor and employment law and seek counsel whenever there is a question as to the legality of disciplining or terminating an employee.

The *Elastomers* decision is available here.