



NLRB Rules That Employers Need Not Tolerate Sexist, Racist, Or Abusive Conduct By Employees Engaged In Otherwise Protected Activities

Insights

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In a critical reversal of Board precedent, the NLRB just unanimously held that employees engaging in abusive conduct in the course of protected concerted activities are not automatically shielded from discipline under the National Labor Relations Act (NLRA). This welcomed decision will make it less challenging for employers to terminate employees who engage in abusive, sexist, and racist behavior in the course of protected activity, including union activity. What do employers need to know about this significant ruling?

Board Will Apply a More Reliable Standard

In its July 21 decision, the Board ruled that cases involving employee discipline or discharge for abusive misconduct in the course of protected concerted activities will now be decided under the Board's *Wright Line* analytical framework. Under this standard, the General Counsel bears the initial burden of establishing that the employee was disciplined or discharged because of protected activity. Accordingly, the General Counsel must make an initial showing that:

1. The employee engaged in activity protected by Section 7 of the NLRA;
2. The employer knew about the activity; and
3. The employer's decision was motivated by that knowledge. To establish this element, the General Counsel must present sufficient evidence to establish a causal link between the protected activity and the adverse action.

If those elements are met, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of protected activity.

Overtured Standards

The Board's decision overrules a number of cases outlining the standard for determining when abusive conduct forfeits legal protection including *Atlantic Steel* (1979) (employee outbursts in conversations with management); *Desert Springs Hospital Center* (2016) and *Pier Sixty LLC* (2015) ([employee social media posts and conversations among employees](#)); and *Clear Pine Mouldings* (1984) (employee picket-line conduct). These holdings, the Board noted, "have failed to yield predictable, equitable results... [and] have conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws."

The Board went on to note that, until now, standards for analyzing abusive conduct “have been wholly indifferent to employer’s legal obligations to prevent hostile work environments on the basis of protected traits.” Thus, employers that disciplined abusive employees in an effort to take corrective action in compliance with applicable antidiscrimination laws were often penalized under the previous standard for doing so to the extent that the abusive conduct was in the course of protected activities.

Going Forward

Applying a *Wright Line* framework to discipline and discharge cases involving abusive conduct in the course of protected activities not only “promises more reliable, less arbitrary, and more equitable treatment of abusive conduct” than under the prior three setting-specific standards, but also moves closer to harmonizing the NLRA with employers’ obligations under anti-discrimination laws. “Absent evidence of discrimination against Section 7 activity,” the Board noted, “we fail to see the merit in finding violations of federal labor law against employers that act in good faith to maintain civil, inclusive, and healthy workplaces for their employees.”

Therefore, the Board concluded that, it “will no longer stand in the way of employers’ legal obligations to take prompt and appropriate corrective action to avoid a hostile work environment on the basis of protected characteristics.” However, the Board noted that “if the evidence as a whole establishes that the reasons given for the employer’s actions are pretextual – that is, either false or not in fact relied upon – the employer fails by definition to show that it would have taken the same action for those same reasons.”

The Board’s decision is retroactive to all pending cases in which it would have considered – under one of the setting-specific standards – whether employees who engaged in abusive conduct in the course of Section 7 activity forfeit NLRA protection.

What Should Employers Do Now?

- Review and, if necessary, update your conduct and antidiscrimination policies.
- Ensure that all employees have received and acknowledge receipt of those policies.
- Train all employees, supervisors, and managers on your antidiscrimination and related conduct policies.
- Ensure that employees and supervisors have a safe and effective means of reporting violations of these policies to the appropriate human resources staff.
- Thoroughly investigate all allegations of abusive behavior, including sexually charged and racist misconduct.
- Be consistent in the application and enforcement of your antidiscrimination and conduct policies.
- Make sure that disciplinary and termination notices appropriately and clearly state when the adverse action is in response to abusive conduct in violation of company policies.

- Document any hostile or abusive conduct at union grievance meetings. Consider additional witnesses at any such meetings that are expected to become heated or concern controversial matters.

Conclusion

Fisher Phillips will continue to monitor these developments at the NLRB and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the author, or any attorney in our [Labor Relations Practice Group](#).

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