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Employee "Outbursts" May Not be Protected Under the National Labor Relations Act

The National Labor Relations Board (the Board) recently gave employers more leeway to discipline employees who engage in verbally abusive or profane conduct even while exercising their rights under the National Labor Relations Act (NLRA). In doing so, the Board overturned a patchwork of standards it had previously applied and established a unitary test under the Board's well-known *Wright Line* framework.

In *General Motors LLC*, 14-CA-197985 369 NLRB No. 127 (2020), a union committeeperson was suspended on more than one occasion for disrespectful, insubordinate and profane actions directed at managers, including threatening to "mess up" a manager and telling another manager to "shove it up [his] f-----' a--." Because the target of his conduct was management, the administrative law judge applied a four-factor analysis and concluded that the threat to "mess up" a manger was not protected by Section 7 of the NRLA but that the second comment was.

The employer appealed this decision to the Board, which invited third parties to comment on whether the four-factor analysis should continue to guide its decision in these areas. The Board ultimately concluded that it should not because the various tests "failed to yield predictable, equitable results" and, in some cases, "conflicted alarmingly with employers' obligations under federal, state and local antidiscrimination laws."

For example, the Board previously determined that shouting racial slurs towards black workers and using sexually harassing and demeaning language directed at female workers in the context of a picket line constituted protected activity. As a result, employers were often put in a no-win situation because they could not discipline employees involved in a labor dispute who otherwise were guilty of remarks that violated anti-discrimination policies.

After the decision in *General Motors*, however, the Board will apply the *Wright Line* test, which is a "familiar" standard that the Board uses frequently in other contexts. Under that test, an employer is only liable for an unfair labor practice if (1) the employee engaged in Section 7 activity; (2) the employer knew of that activity; and (3) the employee's Section 7 activity caused the discipline. Section 7 gives employees the right to engage in activities for their "mutual aid and

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protection." All employees, whether a member of a union or not, have Section 7 rights.

Although the Board's decision is welcome news for employers and clarifies what had been a murky standard, employers must still carefully evaluate employee conduct and remarks made in the context of Section 7 activity. Employers must be prepared to demonstrate that it was the profane nature of the remarks that caused the discipline and not that the employee was exercising his or her rights.

If you have any questions about how the modified standard affects your business, please contact Robert S. Driscoll or your Reinhart attorney.