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"NO MATTER WHY YOU'RE ANGRY, YOU CAN'T SAY THAT": NLRB FINALLY REINS IN ABUSIVE EMPLOYEE SPEECH

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Yesterday, the National Labor Relations Board freed employers to take disciplinary action against abusive speech by employees targeting managers, supervisors, and co-workers. In *General Motors LLC*, the Board swept away years of Obama-era precedents that had permitted employees to engage in profane, abusive, and even racist speech if that speech occurred in the context of exercising rights protected by Section 7 of the National Labor Relations Act – such as challenging disciplinary action in a meeting with company officials, complaining about working conditions in social medial posts, or walking a picket line. In their place, the Board restored the familiar *Wright Line* test from 1980, which focuses on whether the employer was lawfully motivated by the employee's offensive conduct or unlawfully motivated by the employee's protected activity.

In the Obama-era cases overturned yesterday, the Board had considered abusive conduct in connection with protected activity to be inextricably intertwined with that protected activity and therefore subject to protection under the NLRA. For example, in cases from 2014-2016, the Board had punished employers for discharging employees who: (1) called the owner of the employer a "f—king mother f—king" and a "f—king crook" while complaining about compensation; (2) attacked a manager on Facebook while encouraging unionization, calling him a "nasty mother f—ker" and saying "f—k his mother and his entire f—king family!!!!"; and (3) shouting racist slurs to black replacement workers from a picket line, including "Hey, did you bring KFC for everyone?" and "I smell fried chicken and watermelon."

The previous Board had justified its protection of such foul and offensive conduct by applying different tests in different contexts – creating uncertainty for employers and leaving them hamstrung in the face of sometimes intolerable conduct. For example, for verbal attacks in the workplace, the Board considered (1) the place of the discussion, (2) the subject matter, (3) the nature of the outburst, and (4) whether the outburst was in any provoked by the employer's unfair labor practices. For social media posts and most workplace conversations with co-workers, the Board looked at "the totality of the circumstances." And for verbal abuse from a picket line, the Board asked whether nonstrikers could have been "coerced" or "intimidated" by the abuse – a standard so lenient that it permitted almost any speech short of outright threats of violence.

In place of this bewildering and impractical array of context-specific tests, the Board will now apply one simple test when employees are disciplined or discharged for offensive speech that occurs in connection with protected activity under the NLRA: Was the employer motivated by the offensive speech, or by the protected activity?

Employers should welcome this return to common sense – and their restored ability to punish employees who engage in foul, profane, racist, or otherwise offensive speech targeting managers, supervisors or co-workers.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their employee policies. If you or your organization would like more information on this or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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MEET THE TEAM

L. Anthony George

Denver

anthony.george@bclplaw.com
+1 303 866 0287