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EMPLOYER LAW BLOG

NLRB Reverses Course on Employee Outbursts

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On May 1, 2023, the National Labor Relations Board (NLRB) issue a decision wherein it overruled precedent established during the Trump administration regarding when, how, and why an employee outburst may or may not be protected under the National Labor Relations Act (NLRA). This decision will effectively make disciplinary decisions even more difficult for employers.

The case at hand involved an employer who disciplined an employee for his conduct during a "dysfunctional" safety meeting. According to the NLRB, tempers flared and arguments ensued between supervisors and the employee over work assignments and the employee's history of filing grievances. The employee was disciplined at or after the meeting. He ultimately claimed he was disciplined for engaging in union activity and filed grievances about the incident.

While the case was pending, the NLRB issued the *General Motors* decision in 2020. Through this decision, the NLRB overruled a trio of prior decisions that established a focus on the *settings* surrounding or the *context* of statements or conduct by employees in determining whether they engaged in protected activity under the NLRA.

In doing so, the NLRB at that time concluded the well-established *Wright Line* test should apply to all cases presenting such question, as opposed to three or more different multi-factor tests that focus on varying contexts for such incidents (*e.g.*, on the picket line, on social media, etc.).

Under the three-part *Wright Line* test, an employee must first make a prima facie case of discrimination by establishing: (1) the employee engaged in protected activity; (2) the employer knew of the activity; and (3) the employer had animus against the protected activity, such that there was a causal relationship between the adverse action and the alleged protected activity. Then, the burden shifts to the employer to show it would have taken the same action, regardless of the protected activity. At that point, the employee can attempt to show that the reason(s) proffered by the employer are pretextual.

This test was helpful to employers as it provided more clarity than the multi-factor, context-dependent tests previously used by the NLRB and it helped weed out claims of unfair labor practices when premised on alleged union activity during employee outbursts or other inappropriate conduct.

Now, however, through this case, the NLRB has reversed course again, abandoning the *General Motors* decision and re-adopting the setting-specific tests found in prior NLRB decisions. This marks yet another action by the current NLRB to unwind some of the employer-friendly case law that developed during the Trump administration.

For better or worse, we expect more decisions of this nature to come, so stay tuned for further developments.