

National Labor Relations Board (NLRB) Overrules Precedent Protecting Abusive Language

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Long-standing NLRB precedent has protected abusive and harassing language when linked to protected union activity in most instances. Many cases have even excused racist and/or sexist language when used during an organizing campaign or while otherwise used while engaging in protected concerted activity. This put employers in the difficult position of either condoning language that could run afoul of Title VII of the Civil Rights Act or taking disciplinary action that the NLRB may consider running afoul of the National Labor Relations Act.

On July 21, 2020, the NLRB overruled prior precedent in *General Motors, LLC*, 369 NLRB No. 127 (2020) by holding that foul or abusive language in the workplace is not entitled to any special protection under the Act. Specifically, the Board held that when an employee is disciplined or discharged for using harassing or abusive language in the context of otherwise protected activity, the Board will apply the same standard as it does in other alleged unlawful discipline or discharge cases. Under *General Motors*, to hold the employer liable for an unlawful employment action there must be proof that 1) the employee engaged in protected activity, 2) the employer was aware of that activity, and 3) the employer had animus against that activity and that there was a causal connection between the adverse employment action and the protected activity. If this *prima facie* burden is met, the employer may demonstrate that it would have taken the same action even if the harassing or abusive language occurred outside the context of protected activity.

The bottom line is that the *General Motors* case makes clear that foul and abusive language is not protected merely because it is used in conjunction with an employee's protected concerted activity. Instead, the Board will review the employer's decision to determine if the protected concerted activity was a motivating factor in the discipline or discharge.

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