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TWENTY-FIRST CENTURY LABOR LAW: STRIKING THE RIGHT BALANCE BETWEEN WORKPLACE CIVILITY RULES THAT ACCOMMODATE EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS AND THE LOSS OF PROTECTION FOR CONCERTED ACTIVITIES UNDER THE NATIONAL LABOR RELATIONS ACT

CHRISTINE NEYLON O’BRIEN*

ABSTRACT

Employees who engage in protected concerted activities relating to work generally are shielded from discipline by Section 7 of the National Labor Relations Act (NLRA). Where otherwise protected work-related activity involves profanity or offensive speech or actions, whether in or out of the workplace, on a picket line, or on social media, such may violate employer civility rules and/or equal employment opportunity laws. Important interests are at stake, including for employers to maintain a safe, discrimination-free workplace; and for employees to exercise their right to communicate about workplace matters. This Article analyzes recent cases on the question when offensive employee conduct loses NLRA protection, highlighting the National Labor Relations Board’s reconsideration and revision of its standards in the General Motors case, July 2020. The Article analyzes the prior context-dependent tests applied by the NLRB to assess whether an employee should lose the protection of the Act, finding these tests more than adequate to balance the important public policies underlying both the NLRA and equal employment opportunity laws, as well as employer and employee rights to manage and work in a place

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with a desired level of consideration for others. The Article concludes that the Board’s new application of the forty-year-old Wright Line standard to these cases increases management rights and latitude at the expense of hindering employee rights to gather together to discuss and object to problems in the workplace.
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INTRODUCTION

This Article outlines the current state of the law regarding conduct that, while otherwise protected by Section 7 of the National Labor Relations Act, nonetheless involves workplace profanity or offensive speech, in person, online, or on a picket line, that potentially violates employer civility rules and equal employment opportunity laws. The Article considers recent cases on this important issue, highlighting the National Labor Relations Board’s own reconsideration of its standards as announced in its call for amicus briefs in the General Motors case, September 2019, and the NLRB’s 2020 resolution of the GM case. The author recommends a solution that balances the important public policies underlying both the NLRA and equal employment laws, and employer and employee rights to manage and work in a place with the desired level of consideration for others, whether in or out of the workplace and on social media.

1 29 U.S.C. § 157 (2018). Section 7 of the National Labor Relations Act (the Act) guarantees employees ‘the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,’ [as well as the right] to refrain from any or all such activities. Interfering with employee rights (Section 7 & 8(a)(1)), NLRB, https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1 [https://perma.cc/C34P-5K6B]. These rights apply to employees in the private sector whether they are unionized or not. See Employee Rights, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights [https://perma.cc/4M6B-E3LM]. All employees have rights to engage in concerted activities with co-workers regarding discussion of wages, hours and working conditions, as well as concerted activities for mutual aid or protection. See Protected Concerted Activity, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/our-enforcement-activity/protected-concerted-activity [https://perma.cc/JB8B-5AXY]. This includes protection from unfair labor practices, unjust discipline, and so forth. See Interfering with employee rights (Section 7 & 8(a)(1)), supra.

2 Gen. Motors LLC (Gen. Motors II), 368 N.L.R.B. No. 68, slip op. at 2–3 (Sept. 5, 2019) (3–1 decision) (throughout this Article, NLRB and Board are used interchangeably).

3 See infra Section VI.A.

4 See infra Conclusion and Recommendations.
I. A Case on Point: The D.C. Circuit Remands the Constellium Rolled Prods. Ravenswood, LLC, Case to the NLRB with Directions to Weigh the Title VII Equal Opportunity Impacts of Workplace Profanity in the Context of NLRA Protected Concerted Activity

In an industrial setting where the use of profane and vulgar language was common among employees and supervisors alike, a union represented a group of employees. When the long-term collective bargaining agreement expired, the union and the company failed to reach an agreement on a new policy for the assignment of overtime. In light of this impasse, the employer unilaterally implemented a new policy where employees would sign up for overtime seven days in advance and be subject to discipline for failure to work the overtime. The prior system involved soliciting employees in person or by telephone with no discipline for failure to work scheduled overtime, a much more employee-friendly system.

In reaction to Constellium’s implementation of this new policy, the union filed unfair labor practice charges at the National Labor Relations Board (NLRB), and more than fifty employees filed grievances. In addition, numerous employees engaged in a boycott of overtime work. Employee Jack Williams wrote ‘whore board’ on the posted overtime signup sheet the evening before it would be taken down for the week, insinuating that those who signed up for overtime were loyal to the employer and not the union. It was notable that employees and supervisors often called the overtime signup sheet the ‘whore board’ before Williams wrote that name on the top of the sheet. However, Williams’ action

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5 Constellium Rolled Prods. Ravenswood, LLC., 366 N.L.R.B. No. 131, slip op. at 1–2 (July 24, 2018), *reh’g denied*, 2018 WL 5128410 (Oct. 17, 2018). The District of Columbia Circuit Court of Appeals granted Constellium’s petition for review, and in its decision, the court remanded the case to the NLRB for proceedings consistent with its opinion. See Constellium Rolled Prods. Ravenswood, LLC v. NLRB, 945 F.3d 546, 552 (D.C. Cir. 2019) (2–1 decision).
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.* at 2.
12 *Id.*
resulted in a five-day suspension followed by his termination. The question in the Constellium case is whether Williams' action merited termination, or if it was protected concerted activity within the meaning of Section 7 of the National Labor Relations Act (NLRA).

At the Constellium facility, despite a general laxity toward profane and vulgar language in the workplace, the employer cited the following reason for suspending and subsequently firing employee Williams: he was “willfully and deliberately engaging in insulting and harassing conduct.” The Administrative Law Judge (ALJ) ruled there was no unfair labor practice, reasoning the employee was not engaged in the course of protected concerted activity relating to the overtime boycott. He found that although the employee communicated a group concern about the unilateral implementation of the new overtime policy, his written expression could not be protected by the Act because it constituted vandalism.

Thereafter, the NLRB engaged in an analysis, first considering whether the employee was engaged in a course of protected activity. The agency found that in writing “whore board,” “Williams was engaged in a continuing course of protected activity....” Next, the NLRB wrote that “the remaining question is whether [the employee’s] conduct cost him the protection of the Act.” “[W]hether pursuant to Atlantic Steel Co. or, alternatively, a totality-of-the-circumstances test,” the Board found that Williams’ conduct did not lose the Act’s protection.

First, the Board weighed the Atlantic Steel factors. Specifically, the Board applied the facts in Constellium to each of the four

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13 Id. An arbitrator found the discipline excessive, ordering Williams’ reinstated but without backpay. See id. at 10.
15 Constellium, 366 N.L.R.B., slip op. at 2.
16 Id.
17 Id.
18 Id. (emphasis added).
19 Id. at 3.
20 Id. at 1.
21 Id. at 3. The Atlantic Steel factors are: “(1) location; (2) subject matter; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by the employer’s unfair labor practice....” Id. After conducting its analysis, the Board ruled the employee’s conduct did not lose the protection of the Act. Id. (citing Atl. Steel Co., 245 N.L.R.B. 814 (1979)).
factors: as to 1) location: while in a high-profile location, the signup sheets were temporary; there was no evidence this activity disrupted the workplace, and thus the Board found “this factor is neutral, or leaning marginally in favor of loss of protection”; as to 2) subject matter: the Board found it was clear from proximity in time and location that the employee was protesting the change to overtime policy, and thus “this factor strongly favored continued protection”; as to 3) the nature of the employee’s outburst: the Board saw this as a one-time incident that was spontaneous, and thus this favored continued protection; as to 4) whether the employee’s conduct was provoked by an employer unfair labor practice (ULP): the Board found that the unilateral overtime policy implementation was actually not a ULP, the employer’s act precipitated the labor dispute and the union’s filing a ULP charge as well as the many grievances filed, led the employee to reasonably believe that the new policy was a ULP. The Board ruled that the provocation factor was neutral. After summing up the application of the facts to the four Atlantic Steel factors, the Board concluded that Williams did not lose the protection of the Act and the employer committed a ULP.

The employer, Constellium, suggested the alternative “totality-of-the-circumstances” test should apply because the “conduct did not occur during a workplace discussion with management.” Applying that test, the Board still found the employer discipline of Williams unlawful because the employee misconduct was not “so egregious as to lose the protection of the Act.” The Board referred to the dissent’s objection that the majority did not adequately consider arguments regarding the infringement of employer’s property rights that occurred when Williams defaced the overtime list with graffiti. The Board majority reasoned that both precedent and its analysis accounted for those

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22 Id.
23 Id. at 4.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id. at 5.
29 Id. (citing Consumers Power Co., 282 N.L.R.B. 130, 132 (1986)).
30 Id. at 5 (referencing Member Emanuel’s dissent).
concerns and concluded that the balance of interests relating to Section 7 rights of the employee and the employer’s property rights still favored the employee. Constellium filed a motion for reconsideration of the Board’s decision and order, and in an unpublished opinion, the NLRB denied Constellium’s motion.

The District of Columbia Circuit Court of Appeals granted the employer’s petition for review and the Board’s application to enforce its order. The three-member panel found “[t]he Board’s decision was based upon substantial evidence and did not impermissibly depart from precedent without explanation.” Under the deferential standard of review used for agency decisions, the court was bound to “uphold[ ] the decision of the Board unless it was arbitrary or capricious or contrary to law.”

Constellium raised another issue on appeal, that “the Board ignored the Company’s obligations under federal and state anti-discrimination laws to maintain a harassment-free workplace.” Rather than respond to the argument, the Board simply replied that the appeals court lacked jurisdiction to consider its argument because the Company did not timely raise its objection. The Court of Appeals disagreed, citing four specific instances in the record where the employer raised this concern during proceedings, and therefore the appeals court deemed the employer adequately “put the Board on notice that the issue might be pursued on appeal.” Because the Board did not respond to the merits of Constellium’s argument that a failure to discipline an employee for defacing company property could create liability

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31 See id. See also Braden Campbell, Worker’s ‘Arguably Vulgar’ Writing Protected, NLRB Says, Law360 (July 25, 2018, 6:34 PM), https://www.law360.com/articles/1066925/worker-s-arguably-vulgar-writing-protected-nlrb-says [https://perma.cc/N6X5-64CF] (discussing the Constellium Board’s majority and dissenting opinions).
34 Id. at 548.
35 Id. at 550 (quoting Oak Harbor Freight Lines, Inc. v. N.L.R.B., 855 F.3d 436, 440 (D.C. Cir. 2017)).
36 Id. at 551.
37 Id.
38 Id. at 551–52.
under equal employment opportunity law, the D.C. Circuit Court of Appeals ruled that it had “no choice but to remand the matter for the agency to address the issue in the first instance.” The court noted that where the NLRA “conflict[s] with another federal statute, the Board cannot ignore” it.

Thus, on the final day of 2019, a panel of the Court of Appeals for the District of Columbia Circuit unanimously remanded the Constellium case to the NLRB to consider the impact of the employer’s duty to comply with equal employment opportunity laws at the federal and state level and any potential conflict with the NLRA. The Board’s failure to address the merits of Constellium’s equal employment opportunity arguments necessitated the court’s remand. The next section addresses the NLRB’s efforts to seek feedback regarding the same issue in another recent case involving offensive workplace speech, General Motors.

II. THE PIVOTAL CASE: THE NLRB CALLS FOR INPUT BEYOND THE FACE-TO-FACE FACTS OF THE GENERAL MOTORS CASE INVOLVING PROFANITY IN THE CONTEXT OF OTHERWISE PROTECTED ACTIVITY, SIDESTEPPING ADMINISTRATIVE PROCEDURE ACT RULEMAKING

In September 2019, a Board majority solicited input on another workplace proficiency case, General Motors LLC. The

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39 Id. at 552.
42 Constellium Rolled Prods., 945 F.3d at 552.
43 See infra Part II.
45 Id. Then-member McFerran objected to the majority’s broad notice and called for input regarding revisiting the standards in past decisions not implicated on the facts in General Motors. See id. at 4. She advocated rulemaking as a more appropriate procedure for such reconsideration, noting that federal courts had enforced the Board’s decisions in two of the three questioned cases, while the third went unchallenged. See id. In addition, no federal court has rejected
the Board’s legal approach in these cases. *Id.* The majority of the NLRB justified its notice and call for briefs as it was:

[m]indful of ... criticism ... [for NLRB workplace protections of profane, racially or sexually offensive language as morally unacceptable and inconsistent with other workplace laws],

[and thus the Board invited] the parties and interested amici to file briefs to aid the Board in reconsidering the standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the Act. The Board asks the parties and amici to address either some or all of the following questions, as they see fit.

1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act? In *Plaza Auto*, although the nature of Aguirre’s outburst weighed against protection, the Board found that the other three *Atlantic Steel* factors favored protection, and it concluded that Aguirre retained the Act’s protection. And although the *Plaza Auto* majority did not say that the nature of the outburst could never result in loss of protection where the other three factors tilt the other way, it also did not say that it ever could. Are there circumstances under which the “nature of the employee’s outburst” factor should be dispositive as to loss of protection, regardless of the remaining *Atlantic Steel* factors? Why or why not?

2. The Board has held that employees must be granted some leeway when engaged in Section 7 activity because “[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986). To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?

3. In determining whether an employee’s outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. See, e.g., *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982). Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?

General Motors case involved an employee named Charles Robinson who served as a union committee person, and a delegate on the Union’s international constitution. Robinson represented bargaining unit members in meetings with management on contract issues, discipline, and bargaining relating to terms and conditions of employment. Robinson directed a profane outburst at his supervisor while Robinson served as a union representative, discussing overtime pay sought for required additional training. During their meeting, Robinson got physically close to the supervisor and engaged in a heated discussion overheard by other employees outside the meeting room. Robinson said, “You don’t run this. I do. And if you want to play ... this fucking game, we’ll play this fucking game.” Further, Robinson said “[f]uck you, and you can shove cross-training up your fuckin’ ass.” Robinson received a suspension for the rest of his shift plus three days. While Robinson engaged in concerted activity that was protected under the NLRA, the question remained whether his language and manner were egregiously offensive such that he lost the Act’s protection.

extent it permitted a finding in those cases that radically or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context—e.g., picket-line setting—when determining whether racially or sexually offensive language loses the Act’s protection? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?

5. What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee’s statements lose the protection of the Act? How should the Board accommodate both the employers’ duty to comply with such laws and its own duty to protect employees in exercising the Section 7 rights?

Id. at 2–3.


47 Id. at 2.

48 Id. at 3.

49 Id. at 4.

50 Id. at 5.

51 Id.

52 Id. at 6.

53 Id. at 1.
Upon his return to work after the initial suspension, Robinson attended a meeting about subcontracting out some work. In response to Robinson’s questions about work, hours, and shifts for the bargaining unit employees, the supervisor told him not to worry and warned that Robinson was “getting too loud.” Robinson requested documentation regarding costs that he had previously requested by email and the supervisor told Robinson he felt intimidated, and that Robinson was “acting unprofessional.” After the supervisor requested Robinson to again lower his voice, Robinson replied, “Yes, Master, Sir. Yes, Master, Sir.” Robinson received notice of another disciplinary action, and he then filed grievances relating to this second round of discipline.

After management discussions with Robinson on the desire to move from a one to a two-shift schedule, Robinson provided feedback that “these moves are going to be messed up” and “[i]t’s going to create chaos on the floor.” Some meeting participants were unclear whether Robinson’s statements were more of an opinion or a threat. At some point during a meeting with several managers, Robinson’s phone played music including that by Public Enemy, “Straight out of Compton,” “Fuck the Police” and “Dope Man,” that contained offensive lyrics and words such as “N****r,” “Fuck the police” and other profanity. Supervisors maintained the music was loud, obscene, threatening, and disruptive. During a disciplinary meeting, Robinson replied that

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54 Id. at 7.
55 Id.
56 Id. at 7–8.
57 Id. at 8. Robinson stated that he told management he is a Black man and that Black men talk with authority. Id. at 9 n.15.
58 Id. at 10.
59 Id. at 12.
60 Id.
61 Id.
62 Id. at 13. Robinson testified that only one song played, namely the relatively innocuous country tune, “Friends in Low Places,” sung by Garth Brooks. Id. The ALJ credited the management witnesses over Robinson’s testimony regarding the music Robinson played on his phone that contained objectionable words. Id. at 16.
63 Id. at 13–14.
such music is acceptable on the work floor because of the auto plant environment. The ALJ made credibility findings in favor of management witnesses over Robinson’s own testimony, failing to believe Robinson’s testimony “that he never threatened [his supervisor].” Since Robinson’s discipline on all three occasions occurred solely for his conduct during meetings with management officials, the ALJ announced the appropriate analysis as whether his conduct in those meetings was initially protected under the Act and, if so, whether he ultimately forfeited that protection. The ALJ utilized the NLRB’s Atlantic Steel Co. analytical framework that “allows the Board to balance employees’ rights with the employer’s interest in maintaining workplace order and discipline.” The four factors considered in the Atlantic Steel balancing test are: “1) the location of the discussion; 2) the subject matter of the discussion; 3) the nature of the employees’ outburst; and 4) whether the outburst was provoked by the employer’s unfair labor practices.” The ALJ in General Motors applied these four factors to each of the three incidents for which Robinson was disciplined to determine if the employer committed an unfair labor practice.

As to the first incident at the April 11, 2017 meeting, the ALJ concluded: 1) the location favored protection. Even though the first meeting occurred on the shop floor, it did not interrupt operations. 2) The subject matter concerned a work-related disagreement the ALJ determined to have originated in Robinson’s honest and sincere belief that the supervisor breached a verbal agreement on overtime coverage with the union. Thus, the ALJ found that the subject matter weighed in favor of protection. As to 3), the ALJ found that there is some leeway for impulsive

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64 Id. 15. It is noteworthy that the meeting was not on the work floor. Id. at 2.
65 Id. at 15.
66 Id.
67 Id. at 17.
68 Id. (citing Atl. Steel Co., 245 N.L.R.B. 814 (1979)).
69 Id.
70 Id.
71 Id. at 17–25.
72 Id. at 18.
73 Id.
74 Id.
behavior when engaged in protected concerted activity, and Robinson was zealously protecting the interests of unit employees.\textsuperscript{75} It did not exceed the employer’s right to maintain order and respect in the workplace.\textsuperscript{76} With respect to the final factor, the ALJ found that 4) while there was no evidence that the supervisor committed an unfair labor practice, this factor slightly favored protection based on Robinson’s honest belief that the refusal to pay overtime constituted an unfair labor practice as well as a breach of the agreement.\textsuperscript{77} The ALJ held that all four Atlantic Steel factors supported Robinson with respect to his April 11 conduct, and that the employer committed an unfair labor practice by unlawfully suspending him for directing a profane outburst at a supervisor during a discussion of work-related matters that were protected activity.\textsuperscript{78}

In the second incident, Robinson met with management on April 25, 2017, serving in his role as union representative discussing the subcontracting of work.\textsuperscript{79} Robinson was engaged in protected activity as the conversation related to collective bargaining issues and its impact on his constituents.\textsuperscript{80} Once again applying the Atlantic Steel factors, the ALJ found that: 1) the meeting place is a closed-door room weighed in favor of protection as it did not disrupt the workforce or interfere with management of production; 2) the subject matter weighed in favor of protection, as the conversation involved terms and conditions of employment; 3) the nature of Robinson’s outburst, calling supervisor Stevens “Master,” indicating that Stevens wanted him to act like a slave, was a “prolonged side tirade” against Stevens, and “moderately weigh[ed] against protection” for Robinson;\textsuperscript{81} and finally, 4) Robinson’s outburst was not provoked by an employer unfair labor practice.\textsuperscript{82} Thus, the ALJ found that two of four of the factors weighed against Robinson and he lost the protection of the Act, so that discipline issued relating to this meeting was not an unfair labor practice.\textsuperscript{83}

\textsuperscript{75} \textit{Id.} at 19.
\textsuperscript{76} \textit{Id.}
\textsuperscript{77} \textit{Id.} at 21.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} at 21–22.
\textsuperscript{81} \textit{Id.} at 22–23.
\textsuperscript{82} \textit{Id.} at 23.
\textsuperscript{83} \textit{Id.}
With respect to the third encounter, the ALJ found that Robinson’s October 17, 2017 meeting with management about manpower issues involved protected activity in light of the impact of a new classification of jobs, which would affect bargaining unit work and manpower.84 Once again, the meeting was closed-door and thus, in terms of the Atlantic Steel factors: 1) the place weighed in favor of protection; 2) the subject matter weighed in favor of protection, although the ALJ found “questionable” whether Robinson’s threat and disruptive, offensive music were protected; 3) the nature of Robinson’s outburst and “overall behavior” at the meeting were “sufficiently opprobrious” that they weighed against protection, and 4) Robinson’s conduct was not provoked by an employer unfair labor practice.85 The ALJ found that with two of the four factors weighing against Robinson, and with “the nature of the outburst weigh[ing] heavily against protection,” as well as the fourth factor, the employer was justified in suspending him.86

In light of the above, the ALJ in General Motors ordered the employer to cease and desist engaging in unfair labor practices and to make Robinson whole with back pay and interest compounded daily regarding the employer’s April 11 unfair labor practice of suspending him for protected concerted activity.87

Respondent General Motors filed exceptions to the ALJ’s decision, requesting in its brief that the NLRB overrule three of the Board’s earlier decisions regarding when “extremely profane or racially offensive language” will not cause employees to lose the NLRA’s protection.88 The Board pondered how much influence the context of the language or conduct should play, whether the

84 Id. at 23–24
85 Id. at 24–25.
86 Id. at 25.
87 Id. at 27.
88 Gen. Motors II, 368 N.L.R.B. No. 68, slip op. at 1–2 (Sept. 5, 2019) (referencing Plaza Auto Ctr., 360 N.L.R.B. 972 (2014) (involving face-to-face activity in work meeting), Pier Sixty LLC, 362 N.L.R.B. 505 (2015) (involving social media posting), enforced, 855 F.3d 115 (2d. Cir. 2017), and Cooper Tire & Rubber Co., 363 N.L.R.B. 194 (2016) (involving picket line speech), enforced, 866 F.3d 885 (8th Cir. 2017)). While the Board in General Motors did not mention it, the Pier Sixty case involved profanity that was sexually offensive. N.L.R.B. v. Pier Sixty, LLC, 855 F.3d 115, 118 (2d. Cir. 2017).
fact that such language was normal in that workplace should be relevant, as well as whether the Board should consider antidiscrimination laws in determining if the employee's language lost the protection of the Act.89

Member McFerran dissented in General Motors, highlighting the Board’s responsibility to interpret the Act in the context of the “realities of industrial life [including] the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.”90 McFerran objected to the Board majority’s call for input because it went well beyond the facts in the instant General Motors case involving workplace meetings, to reconsider other unrelated contexts such as picket lines and online posts.91 She objected to the Board’s calling for input in General Motors as seeking “a comprehensive rework of Board precedent outside the circumstances of the case at hand, [when] rulemaking would be the more appropriate procedure.”92 Alternatively, the Board could consolidate several cases with the varying fact patterns it wished to address, but she intoned that what the Board did was “impatient” in that it did not wait for these fact patterns to present themselves, and instead used the General Motors case to “address issues that are clearly not presented.”93

Member McFerran noted further that the Board uses two different tests for evaluating picket line and online conduct and that a third test applies to face-to-face activity, as evidenced in the instant case.94 She wrote that the Board majority misrepresented the extent of judicial criticism of the Board’s approach in this area, noting that no federal court has rejected the Board’s approach or its specific tests.95 Similarly, she found that the majority’s citation

89 Gen. Motors II, 368 N.L.R.B., slip op. at 2–3.
90 Id. at 4 (McFerran, M., dissenting) (citing Consumers Power Co., 282 N.L.R.B. 130, 132 (1986)).
91 Id. at 4.
92 Id. (citing to Member McFerran’s dissent for the same reason as when the Board majority pronounced new rules extending beyond the facts of the case in Boeing Co., 365 N.L.R.B. 154, at 33–34 (2017) (McFerran, M., dissenting). Id. at 4 n.5.
93 Id. at 4.
94 Id.
95 Id.
to an EEOC Task Force report and its recommendation with respect to the clarification and harmonization of the NLRA and EEO statutes with respect to the permissible content of workplace civility codes was inapposite. 96 Rather than the EEOC objecting to the NLRB’s rules, Member McFerran noted that the EEOC recognized that broad workplace civility rules could interfere with protected speech under the NLRA. 97 McFerran dissented because she thought that the Board could and should decide the General Motors case under existing precedent. 98 While the various stakeholders awaited the NLRB’s decision in General Motors after its receipt of amicus briefs, more such cases involving profanity and protected concerted activity continued to accumulate. 99 In addition, NLRB decisions based upon existing standards continued to be sustained as long as these decisions were based upon substantial evidence on the record as a whole, and the agency appropriately applied the law, as is discussed next. 100

III. THE SECOND CIRCUIT ENFORCES THE NLRB’S ORDER TO REINSTATE FOUR EMPLOYEES WHO REPLIED TO A GROUP EMAIL CONTAINING PROFANITY THAT CRITICIZED WORKING CONDITIONS AND MANAGEMENT IN MEXICAN RADIO CORP.

In another case involving email among restaurant employees in New York City, the Court of Appeals for the Second Circuit issued a summary order denying Mexican Radio’s petition for review, and enforcing the NLRB’s order. 101 After the hiring of a new general manager, four of Mexican Radio’s wait staff

96 Id. at 4 n.8.
97 Id.
101 Id. at 262.
lodged complaints with the company’s director of operations regarding the general manager’s disrespectful and demeaning treatment of employees, as well as the unsanitary conditions at the restaurant. When conditions did not improve, the employees contacted the state Department of Health, angering management. Thereafter a bartender/server resigned in an email that she sent to owners, managers, and certain employees, outlining the problems at the restaurant and management’s failure to address same, alleging mismanagement, tax fraud, and that the general manager had designs on the porters. The email contained obscenities and included a direction to employees to “stand up for their rights.” The four wait staff replied to all, agreeing with the email’s author and thereafter were fired over the next two days. The employer cited insubordination, false accusations against management and ownership, as well as use of inappropriate language.

The ALJ in Mexican Radio determined that the employees had engaged in NLRA-protected concerted activity when they supported the resigning employee’s email and that their email replies were not so opprobrious that they lost the protection of the Act. The ALJ found that the employer violated the Act by discipline and discharge of the four employees due to their emails because: they merely agreed to a nonpublic email from a former employee; did not describe their feelings or animosity toward the manager; never cursed or made any derogatory comments toward the managers; the email was part of an ongoing dialogue between workers and managers; the email did not cause a loss of reputation to the company; and finally, there was no disruption to business. The NLRB upheld the ALJ, while noting one additional employer violation.

The Second Circuit agreed with the NLRB, finding that the employees’ activity did not lose protection under either the

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102 Id. at 262–63.
103 Id. at 263.
104 Id.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id. at 263–65.
110 Id. at 263–64.
traditional face-to-face standard of *Atlantic Steel* or the more appropriate totality of the circumstances standard applied to social media in *Pier Sixty*. The appellate court reviewed the four factors from *Atlantic Steel*, finding, as the NLRB did, that: 1) the place of discussion factor, a limited email group, weighed in favor of the employees, 2) the subject matter of the email discussion involved conditions of employment weighing in favor of protection, 3) the nature of the outburst as illustrated in the employee replies to the original email illustrated protected statements with no animosity, cursing, or derogatory comments about management which again weighed in favor of employee protection, 4) regarding whether an employer unfair labor practice provoked the emails, there was evidence that the general manager’s response to employees was threatening, in that he remarked if the employees did not like it at the restaurant, they could look for another job and leave, and thus the Board found that the emails were provoked by an unfair labor practice, namely, the implicit threat of discharge. The Second Circuit found that the NLRB “appropriately focused on the [e]mployees’ replies,” rather than the initial email from the former employee, concluding that the employees did not add to negative or derogatory comments nor did the employees curse as the initial email did, and that all four *Atlantic Steel* factors weighed in favor of the employees.

In light of the examples in the preceding cases, where should employers and the NLRB draw the line on offensive speech

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111 Id. at 264.

112 Id. at 264–65.


114 There are many more cases involving profanity in the context of otherwise NLRA-protected concerted activity, and this issue is not going away. See, e.g., Alle Processing Corp., 369 N.L.R.B. 52 (2020) (involving NLRB order to reinstate food worker terminated for using profanity and raising his middle finger at a human resources representative after being pressured to sign union dues checkoff form he opposed and was legally entitled not to sign); Adam Lidget, *NLRB Tells Food Co. to Rehire Worker Irked by Union Dues*, LAW360 (Apr. 3, 2020, 7:32 PM), https://www.law360.com/articles/1260245/nlrb-tells-food-co-to-rehire-worker-irked-by-union-dues [https://perma.cc/7DTS-9XYY]; cf. Quicken Loans, Inc., 367 N.L.R.B. 112, 1–2 (2019) (NLRB ruling that worker did not
that potentially interferes with equal employment opportunity rights? To answer this question, the next sections review the relevant rules that the NLRB laid out regarding employee loss of protection under the NLRA, as well as analysis of the three cases that the Board requested comment on in the *General Motors* appeal.\(^{116}\)

### IV. BACKGROUND ON THE NLRB STANDARDS

#### A. The Atlantic Steel\(^{117}\) Standard

The *Atlantic Steel* case involved an employee’s use of obscenity to a supervisor on the production floor following a question concerning working conditions.\(^{118}\) When discussing a grievance, employee Kenneth Chastain used profane language to other employees, for example “motherfucker liar” and/or “lying son of a bitch” about their supervisor within the hearing of the supervisor.\(^{119}\) The question raised was whether this was protected concerted activity and thus the discharge an unfair labor practice, or was it insubordination for which employee Chastain could be fired.\(^{120}\) Under the standard pronounced in *Atlantic Steel*, whether the employee crossed that line with opprobrious conduct in the context of otherwise NLRA-protected conduct depends upon several factors: 1) the place of the discussion, 2) the subject matter of the discussion, 3) the nature of the employee’s outburst, and 4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.\(^{121}\) In *Atlantic Steel*, the Board upheld the employee’s engagement in protected concerted activity when in a restroom using profanity in context of bank customer).

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\(^{115}\) *See infra* Part IV.

\(^{116}\) *Gen. Motors II*, 368 N.L.R.B. No. 68, slip op. at 1 (Sept. 5, 2019) (3–1 decision).

\(^{117}\) Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979) (3–0 decision, 1 concurrence).

\(^{118}\) *Id.* at 814.

\(^{119}\) *Id.*

\(^{120}\) As the NLRB and an arbitrator before that noted, Chastain’s discharge was not for one incident. *Id.* at 816. Rather, his work record was checkered with thirty-two instances of tardiness, seven unexplained absences, as well as two prior suspensions and warnings, one involving profanity in front of women, despite being warned against using such language. *Id.* at 814.

\(^{121}\) *Id.* at 816.
dismissal, finding there was a reasonable basis for his discharge as his conduct was not covered by NLRA protections. Rather, Chastain’s obscene and insubordinate outburst on the work floor occurred without provocation and in a context where profanity “was not normally tolerated.” The takeaway from this case is that the Board’s Atlantic Steel test allows the NLRB to weigh four very relevant factors to balance when deciding if an employee’s workplace misconduct that is otherwise protected by the Act, should remain protected, or lose the Act’s protection.

B. The Lutheran Heritage Standard

The Lutheran Heritage NLRB opinion established that employer civility rules are unlawful if they explicitly restrict activities protected by the NLRA. Should the rules be facially neutral, they still may violate the NLRA if: 1) employees would reasonably construe the rule to prohibit Section 7 activity; 2) the rule was written in response to union activity; or 3) the rule was applied to restrict exercise of Section 7 activity.

Employer’s facially neutral civility “rules prohibiting ‘abusive and profane language,’ ‘harassment,’ and ‘verbal, mental and physical abuse’ were lawful because they intended to maintain order in the employer’s workplace and did not explicitly or implicitly prohibit Section 7 activity.” In considering whether the mere maintenance of certain work rules violates the NLRA, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” The Board in Lutheran advised further that in determining whether a challenged rule is unlawful, the Board must “give the rule a reasonable reading.” This reasonable reading starts with whether the rule explicitly restricts activities protected by Section 7, in

122 Id. at 817.
123 Id.
124 Id. at 816.
126 Id. at 646.
127 Id. at 646–47.
128 Id. at 646.
129 Id. at 654 (citing Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998)).
130 Id. at 646.
which case, the Board will find the rule unlawful. Absent explicit restriction of activity protected by Section 7, “the violation is dependent upon a showing of one of the following: 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) the rule was promulgated in response to union activity; or 3) the rule has been applied to restrict the exercise of Section 7 rights.”

In Lutheran, employee Vivian Foreman, a union supporter, and steward was disciplined for use of profanity and verbally harassing and abusing a supervisor in front of several co-workers, and verbally abusing a supervisor by using profanity in reference to her. The Board noted that: “[t]he question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case.”

In Members Liebman and Walsh’s partial dissent, they pointed out that: “[t]he Respondent’s rule prohibiting ‘abusive or profane language ... directed toward a supervisor’ and its rule prohibiting, inter alia, ‘verbally ... abusing ... a supervisor’ are ambiguous and hence overbroad. Neither rule provides specific examples of the prohibited speech.” Nonetheless, the Board found that “in the instant case, reasonable employees would not read the rule [to prohibit Section 7 activity].”

The takeaway from the Board’s 2014 Lutheran Heritage decision was that many facially neutral work rules could be construed as an impediment to employees’ ability to exercise their Section 7 rights. In subsequent years, the Board’s ‘reasonably construe’ standard expanded the scope of NLRA-protected activity and invalidated numerous work rules found in employee handbooks. The Board next altered its work rule standard in this area in 2017, as discussed next.

131 Id.
132 Id. at 647.
133 Id. at 655.
134 Id. at 647.
135 Id. at 650 (Liebman, M., and Walsh, M., dissenting in part).
136 Id. at 648.
138 Id. at 2.
139 See infra Section IV.C.
C. The Boeing Test for Employer Work Rules Overrules the Lutheran Heritage ‘Reasonably Construe’ Standard for Evaluating the Legality of Facialy Neutral Work Rules

In Boeing Co., the NLRB formulated a new standard to evaluate facially neutral employment policies. The rule in question at Boeing was a no-camera policy that prohibited employees from using cameras in the workplace without a valid business need, as well as an approved permit. Maintaining this employer policy, one of many employer work rules at Boeing, violated the NLRA, an NLRB ALJ found while applying the Lutheran Heritage ‘reasonably construe’ test. Upon Boeing’s appeal to the NLRB, the Board decided to overrule the Lutheran Heritage ‘reasonably construe’ standard. The Board stated that “[p]aradoxically Lutheran Heritage is too simplistic at the same time it is too difficult to apply,” and faulted the test’s inability to deal with “the complexities of industrial life.” For example, the Board noted that the ALJ below failed to weigh Boeing’s security need, illustrating one of the problems with the Lutheran Heritage test.

Under Boeing, workplace rules that may impact profane speech and conduct are now sorted into three categories. Category 1 rules are generally lawful (for example, the Board majority in Boeing referenced the no-camera rule in the instant case). Category 2 rules warrant individualized scrutiny determining whether the business justification outweighs interference with NLRA rights (for example, civility rules prohibiting criticism of employer). Category 3 rules are per se unlawful (for example, confidentiality rules prohibiting discussion of wages and working conditions). The Board announced a two-factor

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140 Boeing, 365 N.L.R.B., slip op. at 3.
141 Id.
142 Id. at 1.
143 Id.
144 Id. at 2.
145 Id.
146 Id.
147 Id. at 3–4.
148 Id. at 3.
149 Id. at 4.
150 Id.
analysis for assessing the language of facially neutral work rules: “(i) the nature and extent of the rule’s potential impact on NLRA rights; and (ii) legitimate justifications associated with the rule.”

The Board noted that while maintenance of rules may be lawful, the application of those rules to employees who have engaged in Section 7 activities may nevertheless violate Section 7 depending on the circumstances.

Member Pearce dissented in part, criticizing the overturning of 13-year-old precedent in favor of a new analysis, which he asserted is “[o]verly protective of employer interests and underprotective of employee rights.” Member McFerran also dissented in part to the Board decision in *Boeing*, finding the majority’s process “arbitrary and capricious,” and the result “alarmingly flawed.” Member McFerran objected to “secret rulemaking” without notice or comment, and overruling precedent when no party asked the Board to do such, acting *sua sponte* in order to install a new test that “simply fails to address the labor law problem before the Board: that employees may be chilled from exercising their statutory rights by overbroad employer rules.” As Member McFerran lamented, the Board majority adopted broad new rules that went beyond the facts in *Boeing*, for example, upholding the lawfulness of civility rules when there was no such rule involved in the *Boeing* case, without even asking for briefs from the public.

The key takeaway from the *Boeing* decision is that the NLRB established a new standard balancing test for assessing loss of protection where workplace rules are facially neutral. Rules are presumed lawful so long as employees are unlikely to interpret them as an impediment to their ability to exercise rights, as evaluated by a balancing test between employers’ legitimate

151 *Id.* at 3.
152 *Id.* at 4.
153 *Id.* at 23 (Pearce, M., dissenting in part).
154 *Id.* at 29 (McFerran, M., dissenting in part).
155 *Id.* at 26–31.
justification for work rules and how the rules adversely impact NLRA rights.\textsuperscript{158}

The \textit{Boeing} rule for assessing handbook rules is significantly more employer-friendly than \textit{Lutheran Heritage}, setting a renewed priority on employer interests.\textsuperscript{159} Nonetheless, as EEOC Commissioner Chai Feldblum outlined the issue to lawyers at an ABA conference post-\textit{Boeing}, where an employer civility rule is used “to punish someone for union activity—guess what?—that will be a problem.”\textsuperscript{160} One might note regarding the Board’s processes for revising policies by overturning precedent, that in \textit{General Motors}, at least the NLRB did solicit amicus briefs on whether the standards illustrated in three Board decisions should be changed or maintained, unlike the Board in \textit{Boeing}, which overruled \textit{Lutheran Heritage} without requesting any input.\textsuperscript{161} In addition, General Motors’ exceptions brief did urge the Board to overrule \textit{Plaza Auto}, \textit{Pier Sixty}, and \textit{Cooper Tire},\textsuperscript{162} and thus, when the \textit{GM} Board took the bait, so to speak, at least it was requested to do so by one of the parties, and not of its own initiative. The next section analyzes the factual context, rules applied, and outcomes in those three NLRB decisions.\textsuperscript{163}

V. THE 2014–16 TRILOGY OF DECISIONS THAT THE NLRB CALLED FOR INPUT ON IN \textit{GENERAL MOTORS}: \textit{PLAZA AUTO}, \textit{PIER SIXTY}, AND \textit{COOPER TIRE}

A. Plaza Auto Center, Inc.\textsuperscript{164}: \textit{The Board Considers Profanity in the Context of Face-to-Face Protected Concerted Activity} (2014)

In a disciplinary meeting with his supervisor, the owner of the Plaza auto dealership, and the office manager, a salesman

\textsuperscript{158} Id.
\textsuperscript{159} Id. at 2.
\textsuperscript{161} \textit{Gen. Motors II}, 368 N.L.R.B. No. 68, slip op. at 2 (Sept. 5, 2019).
\textsuperscript{162} Id. at 1.
\textsuperscript{163} \textit{See infra} Part V.
\textsuperscript{164} 360 N.L.R.B. 972 (2014) (2–1 decision).
named Nick Aguirre was faulted for “talking a lot of negative stuff ... [and] asking too many questions,” many of which related to working conditions and pay, including the computation of commissions. Tony Plaza, the employer, twice responded to Aguirre’s complaints that he could work elsewhere if he did not trust the employer. Aguirre knocked back his chair and replied “[you’re a] fucking crook,” a “fucking mother fucking,” “an asshole,” and stated that nobody liked the boss and that if he, Aguirre was fired, the employer will “regret it.” Aguirre was then fired.

The ALJ found that the employer committed violations of the Act by inviting the employee to quit after he voiced his protests that were protected under the Act. Nonetheless, the judge found that Aguirre lost the protection of the Act because of his “belligerent” statements and behavior, including profanity and menacing conduct. Upon appeal, the NLRB applied the standard from Atlantic Steel and analyzed the traditional four factors: 1) the place of the discussion; 2) the subject matter; 3) the nature of the outburst; and 4) whether the outburst was in any way provoked by a ULP. The NLRB overturned the ALJ’s decision that the obscene and threatening outburst was not protected, and found that the employer violated the Act by firing Aguirre. Upon appeal to the Ninth Circuit, the court agreed with the NLRB’s determination of three of the four factors from Atlantic Steel but determined that the Board erred in finding that the nature of the outburst factor weighed in favor of the salesman. The court remanded to the Board to have it “properly consider whether the nature of Aguirre’s outburst caused him to forfeit” the protection of the Act.

On remand from the Ninth Circuit, the NLRB ruled that Aguirre’s conduct fell short of belligerent, menacing, or physically aggressive actions that could cause the employee to lose

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165 Id. at 973.
166 Id. at 972–73.
167 Id. at 973.
168 Id.
169 Id.
170 Id.
171 Id. at 972.
172 Id. at 973.
173 Id.
174 Id.
protection. The Board reasoned that Aguirre’s “you’ll regret it” statement was not an express threat of physical violence, but rather was ambiguous about consequences, as the pushing of the chair was not physically aggressive because he needed to move the chair to leave the small room; he had met with his manager to complain about terms and conditions of employment; the employer’s interest in maintaining order was lowered as this was behind a closed door, and Aguirre was provoked by Plaza’s threat of termination.

The takeaway from Plaza Auto was that the NLRB, in balancing the Atlantic Steel factors, allowed that an employee who exceeded the normal boundaries of conduct on one factor could be outweighed by the weighting on the other three factors, especially where management provoked the out of boundary outburst. Thus, the employee’s conduct, while far from desirable, was still protected by the Act.


Employees at the Pier Sixty event venue were considering unionization due to perceived disrespect from supervisors and management. After a supervisor kept servers from talking during work while on break, a server named Perez used his phone and posted on Facebook this about a supervisor: “Bob is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!!! Vote YES for the UNION!!!!!!!” Perez deleted the post after the union election. The Human Resources Director had seen the post, investigated, and then fired Perez as the posts violated company policy.
While the ALJ found in favor of Perez using the Atlantic Steel factors, the test used by the NLRB in Pier Sixty to determine if the employee’s conduct lost the protection of the Act was a “totality of the circumstances” analysis, which the Board found preferable to the Atlantic Steel test in light of Perez’s use of social media.\footnote{Id. at 506 (noting Atlantic Steel factors not well suited to social media conduct); cf. Triple Play Sports Bar & Grille, 361 N.L.R.B. 308, 310 (2014).}

Factors weighed by the NLRB in Pier Sixty were: 1) whether the record contained any evidence of respondent’s anti-union hostility, 2) whether the respondent provoked employee’s conduct, 3) whether employee’s conduct was impulsive or deliberate, 4) the location of employee’s Facebook post, 5) the subject matter of the post, 6) the nature of the post, 7) whether respondent considered language similar to the post to be offensive, 8) whether respondent maintained a specific rule prohibiting such language, 9) whether the discipline imposed was typical of that imposed for similar violations—or disproportionate to his offense.\footnote{Pier Sixty, 362 N.L.R.B. at 506.} The Board’s analysis of the factors follows:

Factors 1–3: favor the employee.\footnote{Id.} Respondent demonstrated hostility toward union activity.\footnote{Id. at 507.} Factors 4–5: favor the employee.\footnote{Id.} He posted comments alone, on break, outside of the facility, and did not interrupt the work environment or its relationship with customers.\footnote{Id.} Further, the employee’s comments echoed others’ comments.\footnote{Id.} Factors 6–7: “the overwhelming evidence established that, while distasteful, the Respondent tolerated the widespread use of profanity in the workplace, including the words” that Perez used when referring to McSweeney’s family.\footnote{Id.} Thus, the NLRB held that none of these statements caused Perez to lose the protections of the Act.\footnote{Id.}

Factors 8–9: Respondent’s “Other Forms of Harassment” policy that was cited as a basis for his discharge, neither prohibits vulgar or offensive language in general nor did Respondent
allege Perez’s comments were directed at any protected classification listed in that policy.\textsuperscript{193} There had only been five written warnings for obscene language, and no discharge based solely on such a claim.\textsuperscript{194} Thus, the Board affirmed the ALJ’s finding in favor of Perez.\textsuperscript{195} Upon appeal to the Court of Appeals for the Second Circuit, the appellate court also ruled in favor of Perez, intimating that Perez’s behavior was on the very edge of protection.\textsuperscript{196}

We ... affirm the NLRB’s determination that Pier Sixty violated Sections 8(a)(1) and 8(a)(3) by discharging Hernan Perez since Perez’s conduct was not so “opprobrious” as to lose the protection of the NLRA. Our decision rests heavily on the deference afforded to NLRB factual findings, made following a six-day bench trial informed by the specific social and cultural context in this case. We note, however, that Perez’s conduct sits at the outer-bounds of protected, union-related comments.\textsuperscript{197}

The fact that swearing was rampant in the Pier Sixty work environment clearly aided Perez’s cause in light of the court’s reference to the “social and cultural context.”\textsuperscript{198} The fact that a union election was pending, that management was overtly anti-union, that Perez was pro-union, that the supervisor was discriminating with respect to enforcement of its rules, and that this unfair treatment provoked Perez all weighed in his favor.\textsuperscript{199}

The takeaway from Pier Sixty is that the NLRB’s “totality of the circumstances” test is geared to the fact that often the conduct in question is not all taking place at the worksite.\textsuperscript{200} Social media is a key means of communication among employees in the modern world, and abuse of such can be the basis for discipline and discharge.\textsuperscript{201} Nonetheless, just as with face-to-face conduct, employees are entitled to express themselves on social media in the context of protected concerted activity, especially when provoked by a supervisor.\textsuperscript{202} The Board will weigh all the

\textsuperscript{193} Id. at 507–08.
\textsuperscript{194} Id. at 508.
\textsuperscript{195} Id.
\textsuperscript{196} N.L.R.B. v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017).
\textsuperscript{197} Id. at 118.
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 122–24.
\textsuperscript{200} Id. at 124–25.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
relevant circumstances in order to determine first, if the employee was engaged in protected activity, and then whether the employee’s conduct, in light of the employer’s conduct as well as the context, means that the employee loses the protection of the Act.

C. Cooper Tire & Rubber Co.: The Board Considers Racist Remarks and Profanity in the Context of a Picket Line (2016)

During a work lockout due to stalled employer-union negotiations, nonunion and replacement workers performed the bargaining unit jobs, crossing over union picket lines. Notably, many of those crossing the picket line to replace the strikers were African American. As the replacements walked through the line, employee Burns yelled: “[g]o home,” “[g]et out of here,” “[g]o back where you came from.” Employee Runion and one other displayed their middle fingers as the vans with replacement workers drove past. Other picketers yelled, “scab cabs are coming,” “[p]iece of shit,” “[h]ope you get your fucking arm tore off, bitch!” After other vans passed, Runion yelled, “hey, did you bring enough KFC for everyone?” and yet another striker yelled: “[g]o back to Africa, you bunch of fucking losers.” Thereafter, Runion purportedly said: “[h]ey, anybody smell that? I smell fried chicken and watermelon.” Runion refuted that he made the last statements, but the employer concluded that he made them based upon a video of the picket line where Runion’s mouth was moving at the same time that the remark was heard on the tape.

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203 See Quicken Loans, Inc., 367 N.L.R.B. 112, at 1–2 (2019) (Board overruled ALJ and found terminated broker’s conduct was neither concerted nor aimed at mutual aid or protection since he was listening to a coworker’s personal gripes and expressing empathy, and none of it was aimed at Quicken’s policies or practices).

204 Id.

205 Cooper Tire I, 363 N.L.R.B. No. 194 (2016), enforced, 866 F.3d 885 (8th Cir. 2017) (3–0 decision affirming the ALJ decision).

206 Cooper Tire & Rubber Co. v. NLRB (Cooper Tire II), 866 F.3d 885, 889 (8th Cir. 2017).

207 Id.

208 Cooper Tire I, 363 N.L.R.B., slip op. at 4.

209 Id.

210 Id.

211 Id.

212 Id.

213 Id.
These statements led to the employee's discharge, and the employer stated the termination was based solely on his racially charged statements on the picket line.\footnote{Id.} The ALJ in \textit{Cooper Tire} found that, based upon the evidence, Runion made the remarks he denied.\footnote{Id.} During this same time, Runion also received a citation for jaywalking when he walked across the street against the light, temporarily impeding progress of another van.\footnote{Id.}

\textit{Cooper Tire} maintained a policy prohibiting unlawful harassment based upon race, color, religion, sex, age, or national origin.\footnote{Id.} Its purpose was to outline “the respect to which all Cooper employees are entitled as human beings; to work in an environment free of all forms of harassment and to be treated with dignity, respect and courtesy.”\footnote{Id.} Further, the employer’s policy defined harassment as “unwelcome comments or conduct relating to race, color, religion, sex, age or national origin, which fails to respect the dignity and feelings of any Cooper employee.”\footnote{Id.} The \textit{Cooper Tire} policy warned violators of discipline, including discharge.\footnote{Id.}

In \textit{Cooper Tire}, the NLRB adopted the standard from \textit{Clear Pine Mouldings},\footnote{Id. at 7 (citing Clear Pine Mouldings, 268 N.L.R.B. 1044 (1984), enforced, 765 F.2d 148 (9th Cir. 1985), cert. denied, 474 U.S. 1105 (1986)).} which held that “serious acts of misconduct” during a strike may disqualify a striker from the Act’s protection.\footnote{Id. at 7.} The NLRB in \textit{Cooper Tire} noted that \textit{Clear Pine} did not say that striker misconduct taking the form of verbal threats unaccompanied by physical acts would never result in loss of protection under the Act.\footnote{Id. at 7.} The NLRB found that, under the \textit{Clear Pine} standard, Runion’s conduct and statements did not tend to coerce or intimidate employees in the exercise of their rights under the Act, nor did they raise a reasonable likelihood of an imminent physical confrontation, both of which were hurdles for...
Runion to clear in order for Runion to retain the Act’s protection under the *Clear Pine* standard.224

The Court of Appeals for the Eighth Circuit upheld the NLRB Board’s decision in *Cooper Tire*, with one member of the panel dissenting.225 The appellate court endorsed the Board’s use of the *Clear Pine* standard to determine that Runion’s picket line conduct did not cause him to lose the protection of the Act, deferring to the Board’s interpretation that Cooper committed an unfair labor practice by discharging Runion.226 The majority noted that Cooper need not have fired Runion for his harassment pursuant to its Title VII obligations, rather, the employer need only take action to end the harassment.227 While Cooper Tire thought that the NLRB should have deferred to the arbitrator who found Runion’s statements *more* serious because they occurred on the picket line, rather than in a work context, the court found that such a determination was “inconsistent with established law.”228 Judge Beam dissented in *Cooper Tire*, arguing that the arbitrator’s decision was correct and that Runion’s racial bigotry should not be protected by the NLRA.229

The takeaway from *Cooper Tire* is that the NLRB will apply an objective test, outlined in *Clear Pine Mouldings*, to objectionable conduct on a picket line.230 The Board recognizes that picket lines involve confrontation between union members and employees, and that impulsive behavior against non-striking replacements is expected.231 If the striker’s conduct and statements do not tend to coerce or intimidate employees in the exercise of their rights under the Act, nor raise a reasonable likelihood of an imminent

224 Id. at 7–8.
225 *Cooper Tire II*, 866 F.3d 885 (8th Cir. 2017).
226 Id. at 891, 893. Nonetheless, the court noted its agreement with Judge Millett’s concurrence in *Consol. Commc’ns, Inc. v. NLRB*, 837 F.3d 1, at 20–24 (D.C. Cir. 2016) (Millett, J., concurring and objecting to Board decisions that go too far in forbearance of racially degrading conduct in service to employees’ exercise of their statutory rights). Id. at 896.
227 Id. at 892.
228 Id. at 894.
229 Id. at 894–98 (Beam, J., dissenting).
230 Id. at 889.
231 Id. (citing, inter alia, Chicago Typographical Union 16, 151 N.L.R.B. 1666, 1668 (1965) (expecting confrontation); Allied Industrial Workers 289 v. NLRB, 476 F.2d 868, 879 (D.C. Cir. 1973) (noting impulsivity to be expected on picket line)).
physical confrontation, the conduct may remain protected by the NLRA, according to the court in *Cooper Tire*, following the Board’s *Clear Pine Mouldings* test.232

VI. ANALYSIS OF THE APPLICATION OF THE THEN EXISTING RULES AND THE NLRB’S ANNOUNCEMENT TO APPLY THE *WRIGHT LINE* RULE IN *GENERAL MOTORS* AND THE IMPLICATIONS

In 2017, the then newly appointed NLRB General Counsel Peter B. Robb, issued a Memorandum, which provided priorities of the new administration. Specifically, he provided a list of significant legal issues that, if contained within yet to be decided cases, must be submitted to the NLRB Division of Advice. He identified those as cases that overruled precedent, involved one or more dissents, and so forth. The General Counsel specifically cited *Cooper Tire* and *Pier Sixty*, writing:

> examples of Board decisions that might support issuance of complaint, but where we also might want to provide the Board with an alternative analysis, include: ... Conflicts with other statutory requirements [(a)] finding racist comments by picketers protected ... because they were not direct threats (*Cooper Tire*) ... [and (b)] finding social media postings protected even though employee’s conduct could violate EEO principles (e.g., *Pier Sixty*).237

Shortly after the GC Memorandum, the standard for addressing facially neutral work rules changed with the *Boeing* case, thus allowing employers more leeway to install rules relating to civility and other legitimate management concerns.238 In a joint

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232 *Cooper Tire II*, 866 F.3d at 889–90.
233 General Counsel Peter B. Robb was confirmed on Nov. 17, 2017 for a four-year term. See NLRB, About General Counsel, https://nrlrb.gov/bio/general-counsel [https://perma.cc/M3JF-NAU3].
235 Id. at 1.
236 Id.
237 Id. at 2–3.
interview with General Counsel Peter Robb, and John Ring, Chairman of the NLRB, the General Counsel once again brought up the issue of the “perceived conflict ... between the NLRB and the EEOC’s interpretations of employer civility rules, workplace policies that generally call on employees to be respectful of one another.” In particular, the General Counsel focused on Cooper Tire and noted that he “very much disagrees” with the Board’s decision in that case, but will continue to follow existing law until he could “get a case up to the board sometime before too long to let them opine on that issue.” Thus, the General Counsel pronounced that he was looking for a case to provide an alternative analysis than that used by the Board in both Pier Sixty and Cooper Tire.

It is no wonder that the result in Cooper Tire raised the ire of President Trump’s appointee as General Counsel of the NLRB, as well as others on the employer side of labor relations. Why should employers have to retain employees who make such insulting, stereotypical, racial remarks that could create liability for the employer under equal employment opportunity laws? While Cooper Tire appears to be the case involving the most objectionable statements, in that they are illustrative of employee racism, a critical fact that differentiates the misconduct in Cooper Tire from other misconduct cases is that Runion’s remarks took place in the context of an employer lockout. Runion was a locked-out employee walking the picket line, and, after watching replacement workers safely driven across the line in vans to do the work, he made the admittedly offensive remarks that the employer asserted as the reason for his discharge.

A lockout is a preemptive move by an employer that has reached an impasse in bargaining with a union, such that it locks out employees before they have the chance to withhold their labor


240 Id.

241 Opfer & Iafolla, supra note 160.


244 Cooper Tire, 866 F.3d at 889.
in a strike and thus the employer controls the plan, and replaces the workers on its own terms.\textsuperscript{245} While a lockout is not an unfair labor practice per se, it does indicate that Cooper Tire was willing to engage in its own economic pressure tactics to defeat the existing bargaining unit’s attempt to make gains through collective bargaining. Even in a bargaining unit approved a strike, strikers seek to use their economic power to influence collective bargaining in their favor.\textsuperscript{246} They put themselves on the picket line and those who cross that line to perform the struck work undermine the efficacy of the strike and the picketers’ position. People crossing a picket line generally would not expect either respect or gracious treatment from strikers, because those crossing the line are classified traitors or scabs by the striking employees and the union that represents them.\textsuperscript{247} That said, both the union and the employer, in the context of a labor dispute, retain an obligation to protect equal employment opportunity rights of both employees and strikers, including the obligation to prevent a hostile work environment.\textsuperscript{248}

Another factor that protected Runion in Cooper Tire was the employer’s imposition of discriminatory discipline.\textsuperscript{249} Runion was not rehired when the strike was over, but other picketers who made racially offensive remarks were not discharged like Runion.\textsuperscript{250} The NLRB General Counsel noted that another employee who was African American called his supervisor a “dumb white hillbilly asshole” but his punishment was suspension, not discharge as in Runion’s case.\textsuperscript{251} So, despite an employer policy prohibiting racist remarks, a similar situation involving profanity and disrespect did not bring the severe discipline imposed on Runion in Cooper Tire.\textsuperscript{252} Arguably, Runion’s fried chicken and

\textsuperscript{245} See David P. Twomey & Stephanie Greene, Labor & Employment Law 790 (16th ed. 2020) (defining lockout as “economic pressure tactic of an employer during negotiations which consists of withholding of work, and which also may be an illegal attempt to discourage union activity”).

\textsuperscript{246} NLRB, Basic Guide to the National Labor Relation Act 10 (1997).

\textsuperscript{247} David P. Twomey, Labor & Employment Law 773 (14th ed. 2010).


\textsuperscript{249} Cooper Tire I, 363 N.L.R.B. No. 194, at 5 (May 17, 2016).

\textsuperscript{250} Id.

\textsuperscript{251} Id. at 6; see also Christine Neylon O’Brien, I Swear! From Shoptalk to Social Media: The Top Ten National Labor Relations Board Profanity Cases, 90 St. John’s L. Rev. 53, at 79–80 (discussing the basis for the ALJ’s Decision in Cooper Tire).

\textsuperscript{252} Cooper Tire I, 363 N.L.R.B., slip op. at 6.
watermelon remark to a strikebreaker was less opprobrious than the “dumb white hillbilly asshole” remark to a supervisor that did not result in discharge. And, as the appellate court noted, “[w]hile yelling, Runion’s hands were in his pockets; he made no overt physical movements or gestures .... [and] [t]here [was] no evidence the replacement workers heard Runion’s statements.” 253 Thus, using the second part of the Board’s Clear Pine criteria, Runion did not raise a reasonable likelihood of imminent confrontation.254 The replacements were well across the picket line and contained in vans at the time of Runion’s remarks.255

The NLRB stated in Triple Play Sports Bar & Grille that the Atlantic Steel framework should not apply to “employees’ off-duty, offsite” communications because Atlantic Steel “applies to employee misconduct in the workplace.” 256 In Cooper Tire, the Court of Appeals for the Eighth Circuit extended this interpretation to disqualify the use of Atlantic Steel’s balancing test to picket line misconduct, instead allowing the Board’s application of its own picket line precedents that provide employees more protection than they “would enjoy in the normal course of employment.” 257

The picket line at Cooper Tire was a situation where profanity and slurs occurred and, to some extent, were expected and tolerated. 258 Even if the Atlantic Steel test were applied to Runion’s conduct, albeit with a proviso that the picket line affords more protection for misconduct than on the work floor, arguably, Runion’s conduct could still have been protected. On the factors from Atlantic Steel: 1) the location of the discussion was a picket line, 259 and this factor would weigh in favor of protection for the conduct, in that picketing is protected concerted activity, and, in fact, more leeway should be allowed there than on the work floor; 260 2) the subject matter of the discussion was somewhat related to protected concerted activity, i.e., picketing to protest a lockout/strike, and the profane and offensive remarks were directed

253 Cooper Tire II, 866 F.3d at 889.
254 Id.
256 Cooper Tire II, 866 F.3d at 893–94 (citing Triple Play Sports Bar & Grille, 361 N.L.R.B. 32, 34 (2014)).
257 Id. (citing Consol. Comm’ns, Inc. v. NLRB, 837 F.3d 1, 20–24 (D.C. Cir. 2016)).
258 Id. at 889.
259 Id. at 894.
at those who were undermining the strike, thus one could argue that this factor weighed in favor of protection because the profanity was designed to discourage strikebreakers and improve the strikers’ chance of success; 3) the nature of Runion’s outburst involved profanity and offensive remarks, which would weigh against protection, however, if profanity was a normal part of what went on at the picket line, and it related to protected concerted activity, one could argue that on balance, unless the remarks exceeded the leeway granted to other strikers and strikebreakers, then the nature of the outburst factor would weigh in favor of protection; and regarding 4) whether the outburst was provoked by the employer’s unfair labor practices, one could argue that the outburst was not provoked by an actual unfair labor practice, however, it was provoked by employer economic pressure and the presence of replacement workers. Thus, this last factor from Atlantic Steel would weigh against protection. All things considered, if the Atlantic Steel test were applied to Cooper Tire, and the Board weighed the four factors, Runion’s conduct could also be protected, as two factors clearly weigh in his favor, one arguably weighs in his favor, and only one against, but even there, there are ameliorating facts.

This is not to say that the outcome in Cooper Tire, employees swearing at members of a different race or gender, and alluding to their target’s inborn legally protected characteristics, was a model scenario. However, just as in Plaza Auto, and Pier Sixty, the social and cultural environment that the employer creates or tolerates is part of the picture when the Board evaluates if the remarks were so opprobrious as to result in loss of protection under the NLRA.

One of Cooper Tires’ arguments was that it had recently been forced to pay off a harassment claim, and thus it was sensitive to the need to eliminate racially harassing behavior like Runion’s.
Notably, the Eighth Circuit found that “Runion’s comments—even if they had been made in the workplace instead of on the picket line—did not create a hostile work environment.” 270 Employees have the right to engage in protected concerted activity under the Act, and thus employer restrictions on language on a picket line should be carefully outlined so as not to infringe on that activity in a fashion that discriminates based upon union activity.

A straightforward solution to the quandary that employers find themselves in when trying to prevent violating employees’ labor law rights where they fear a conflict with equal employment opportunity laws goes back to the application of fair and evenhanded discipline. A commonsense approach would be to apply traditional progressive discipline to employees who make or write comments that infringe on equal employment opportunity rights, even if those comments might be within the context of otherwise protected activity. An employer could create a policy or work rule that outlines prohibited words or gestures and outlines progressive discipline for such violations. In order to eliminate allegations of discriminatory discipline based upon a termination at the first violation, employers should start with an oral, and then a written warning, then a suspension if infraction of rules persists, and finally terminate after the individual commits the misconduct one more time under the last chance rule. A legitimate disciplinary framework that gives specific examples of what conduct will, or will not, be tolerated, as well as a series of penalties that are just, would put all employees on notice of the consequences of making insulting and degrading remarks that impact protected characteristics.

In a very recent case from the Court of Appeals for the Eighth Circuit, Bazemore, a black woman, sued Best Buy because of a white worker’s “racist and sexually charged joke” in the presence of a small group of employees at work. 271 The company chose to issue a final written warning to the offending employee rather than fire her. 272 The appellate panel upheld the company’s action, finding that the retail chain store took measures short of firing the offender to curtail her inappropriate behavior.

270 Id. (citing Smith v. Fairview Ridges Hosp., 625 F.3d 1076, 1085 (8th Cir. 2010) (regarding similar comments to Runion’s)).
272 Id. at *3–4. A final written warning is the last step in Best Buy’s disciplinary process before it fires an employee. Id. at *4–5.
as soon as the company was aware of it. The court found that the unwelcome conduct was not imputable to the employer as the party who made the remark was a co-worker, not a supervisor of the complainant, Ms. Bazemore, and the employer acted promptly to address the issue. The appellate court noted, “Title VII does not prescribe specific action for an employer to take in response to racial or sexual harassment, or require that the harasser be fired.” The court found that Best Buy took action “reasonably calculated” to stop the harassment and that the employer had it within their discretion to decide upon the “exact disciplinary actions.” This Best Buy decision did not involve NLRA-protected concerted activity, but while speaking to the issue of an employer’s duty to prevent a hostile work environment, the court highlighted the disciplinary discretion that employers retain when responding to potential Title VII violations.

Legal advisors to businesses frequently choose to err on the side of preventing equal employment opportunity violations rather than worrying about potential violations of the NLRA. This is because the costs for violations under the NLRA are far less than the costs of remedies under Title VII, as the latter includes make-whole and punitive damages. The GM NLRB majority signaled their intent to reconsider Obama-era decisions in this area when they sought input in the General Motors case, and are likely to “make it easier for employers to part ways with workers who make offensive statements.” At the time the NLRB

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273 Id. at *1–5.
274 Id. at *8–9.
275 Id. at *9.
276 Id. at *9–12. The court noted that Best Buy’s actions to address the harassment did in fact end it. Id. at *12.
277 Id. at *12.
279 Id.
280 Id. (quoting Leigh Tyson, from management-side Constangy Brooks Smith & Prophete LLP). The Board was then comprised of three Republican members. See The Board, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board [https://perma.cc/E5SF-GU26], and Members of the Board Since 1935, https://www.nlrb.gov/about-nlrb/who-we-are/board/members-nlrb-1935 [https://perma.cc/HT5H-4VLF] (detailing political party affiliations of NLRB members,
sought amicus input in the \textit{GM} case, it was composed of all Republican appointees for the first time in eighty-five years, as the Economic Policy Institute pointed out upon the expiration of Democrat Lauren McFerran’s term in December 2019.\footnote{See Lynn Rhinehart & Celine McNicholas, \textit{Three Republican-appointed white men are now deciding whether you have rights on the job}, THE ECON. POL’Y INST. (Dec. 17, 2019), https://www.epi.org/blog/three-republican-appointed-white-men-are-now-deciding-whether-you-have-rights-on-the-job/ [https://perma.cc/64S5-ESNK].} The NLRB’s current General Counsel, Peter Robb, went on the record that he “very much disagrees” with the Board’s 2016 \textit{Cooper Tire \\& Rubber Company} decision where the agency ordered the company to rehire a worker who made racist comments while on a picket line.\footnote{See Gurrieri, supra note 239.} It was no surprise that the NLRB’s then three-man Board,\footnote{Based on the then Republican NLRB composition, there was no possibility of dissent by a Democratic member.} as prodded by General Counsel Robb, would further restrict profanity and offensive behavior, whether face-to-face, on social media, or on a picket line. Yet this restriction was not necessary, especially when taking into account the industrial realities that the U.S. Supreme Court pronounced as the NLRB’s role.\footnote{NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). “The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.” \textit{Id.} at 266.}

The NLRB’s choice of the \textit{General Motors} case for reconsideration of this issue was interesting. It is difficult for an average observer to find much sympathy for employee/union representative Charles Robinson when reading the facts.\footnote{\textit{Id.} at 254–56.} The NLRB ALJ did not credit Robinson’s testimony concerning the happenings leading up to his numerous suspensions and his own conduct at a management meeting.\footnote{\textit{Gen. Motors II}, 368 N.L.R.B. No. 68, slip op. at 1 (Sept. 5, 2019).} Robinson’s conduct was scornful of individual supervisors, including profanity directed at one in particular, Stevens, whom he sought to exclude from one meeting.\footnote{\textit{Id.}}

including dates of appointment and expiration. Current Chairman Ring, and Members Emanuel and Kaplan are all Republican appointees). Democratic Member McFerran’s term expired on Dec. 16, 2019. Member McFerran was the lone dissenter to the Board majority’s request for feedback in the \textit{General Motors} case. Members McFerran and Kaplan were reappointed in late July, 2020. \textit{See supra} note 98 discussing NLRB membership and reappointments.
While Robinson functioned as a union steward, his role included engaging in protected concerted activity for the benefit of employees he represented.\textsuperscript{288} The role of a union steward at GM should not indemnify Robinson from suspension or even job loss where he egregiously abused others, including supervisors; instigated disruption in meetings by playing contentious music laced with profanity and racially antagonistic remarks, and lied about it under oath at a hearing; or in other ways sought to unduly interfere with legitimate employer objectives.\textsuperscript{289} The fourth factor in the \textit{Atlantic Steel} test looks to see if there was an unfair labor practice that provoked the employee’s outburst.\textsuperscript{290} Arguably, since the employer’s first suspension of Robinson (regarding the April 11th meeting) was not lawful, as the ALJ later found it was an employer unfair labor practice, this set the scene for Robinson’s subsequent bad attitude towards management and may have impacted his misconduct at the April 25th meeting which was proximate in time.\textsuperscript{291} However, two weeks had passed in the interim before the second meeting and thus, one might imagine that Robinson would have calmed down somewhat. The third such meeting that resulted in Robinson’s third suspension took place on October 6th of the same year, nearly six months after the first meeting, and thus was not proximate in time to the unfair labor practice following the April 11th meeting, and the ALJ found that Robinson’s conduct in the October meeting was not provoked by an unfair labor practice.\textsuperscript{292} It seemed highly unlikely that Robinson would have any more luck at the NLRB than he did with the ALJ. The ALJ found that two of General Motors’ suspensions of Robinson were warranted, using the \textit{Atlantic Steel} test and that only the first suspension involved an unfair labor practice.\textsuperscript{293} In the first incident, Robinson was representing the interests of bargaining unit members regarding overtime pay, and the ALJ ruled that Robinson’s conduct was “not as egregious” as that in \textit{Plaza Auto}, concluding that Robinson’s outburst did not lose the protection of the Act.\textsuperscript{294}

\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{291} \textit{Gen. Motors II}, 368 N.L.R.B., slip op. at 1.
\textsuperscript{292} Id.
\textsuperscript{293} Id.
\textsuperscript{294} Id.
A. The General Motors Decision—2020

As this Article went to press, the NLRB decided the General Motors case. The three Republican appointees, Chairman Ring and Members Kaplan and Emanuel, voted unanimously to discard the NLRB’s three context-related standards for loss of the NLRA’s protection of concerted activity due to profane and offensive workplace outbursts, social media posts, and picket lines. The Board held that henceforth all such cases should be analyzed using the Board’s forty-year-old Wright Line rule. This stalwart burden-shifting standard requires the NLRB’s General Counsel to make a prima facie case that the employee was engaged in Section 7 activity, which the employer knew about, and that the employer’s animus to the protected concerted activity motivated discipline of the employee. Thereafter, where the employer contends the discipline was motivated by the employee’s abusive conduct, the burden shifts to the employer to persuade that the employer would have executed the discipline even absent the Section 7 activity. Further, the Board’s holding in General Motors starkly declared that “[w]e overrule all pertinent cases to the extent they are inconsistent with this holding.”

The Board in General Motors summarized the positions of various amici and then adopted the position of the Respondent employer that the Board should drop its setting-specific standards. The GM Board criticized those standards, noting that the Atlantic Steel four-factor analysis of abusive conduct in the course of otherwise protected workplace conversations has produced inconsistent outcomes. The Board objected that the second Atlantic

296 Id.
298 Id. at 2 n.9 (citing Tschiggfrie Properties, Ltd., 368 N.L.R.B. No. 120, slip op. at 6, 8 (2019)).
299 Id. at 2 n.10 (citing Hobson Bearing Int’l, Inc., 365 N.L.R.B. No. 73, slip op. at 1 n.1 (2017)).
300 Id. at 2. The GM Board repeated this proclamation later in its opinion. Id. at 9, 9 n.22.
301 Id. at 4.
302 Id. at 6.
Steel factor, the subject matter of the outburst, always favored employees since the test only applied when the discussion involved Section 7 activity, and that the Board gave “little, if any, consideration to [an] employer’s right to maintain order and respect.”303 The GM Board concluded that the Atlantic Steel analysis was not effective, that the Board had not sufficiently explained the test’s application to various facts, creating an analysis that serves as “a cloak for agency whim.”304

With respect to the previously adopted totality of the circumstances test for social media posts and coworker discussions, the GM Board found more flexibility on factors to be considered than with the Atlantic Steel test, which only leaned itself to the same problems of inconsistency and unpredictability it noted with respect to the Atlantic Steel four-factor test.305 Finally, the GM Board determined that use of the Clear Pine test for picket line misconduct left the bar too low because it only results in loss of NLRA protection where the conduct involved “an overt or implied threat or where there is a reasonable likelihood of an imminent physical confrontation.”306 This test left “appallingly abusive picket-line misconduct to retain protection, including racially and sexually offensive language.”307 The GM Board also faulted the setting-specific standards as creating tension with equal employment opportunity laws designed to avoid harm rather than redress it.308

Chairman Ring penned an opinion piece for the Wall Street Journal one day after the Board issued its decision in General Motors.309 In justifying the agency’s reversal of “Obama-era standards that forced employers to reinstate abusive employees,” the NLRB Chairman noted several comments made on the picket

303 Id. at 5 (citing NLRB v. Starbucks Coffee Co., 679 F.3d 79, 73–74, 79–80 (2d Cir. 2012) (noting circuit court faulted NLRB for improperly disregarding the employer’s legitimate concern about employee swearing in front of customers)).

304 Id. at 6 (citing LeMoyne-Owen Coll. v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004)).

305 Id.

306 Id. at 10.

307 Id. (citing Cooper I, 363 N.L.R.B. No. 194, slip op. at 7–10 (2016)).

308 Id. at 11 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998)).

line in Cooper Tire. He chose not to clarify that the worst racist statement, “Go back to Africa” was not made by the employee who was terminated and sought relief under the rights and protections of the NLRA. Rather, that comment was part of the scene. The comment actually attributed to that employee was “I smell fried chicken and watermelon.” This racial inference to diet was clearly less hostile than the former offensive slur that the employee in question did not make. This does not excuse the latter comment, but it lessened the egregiousness in that it was singular and less confrontational.

In the same opinion piece, Chairman Ring declared: “the NLRB is now out of the business of deciding whether bad behavior is ‘bad enough.’” Yet the imposition of the Wright Line standard adopted by the GM Board still requires the Board to judge just what misconduct is sufficient to provide an employer defense that the employee would have been fired anyway, absent the NLRA-protected activity. The Chairman cast the GM decision as “an important advancement for civility and respect in this country’s workplaces.” Make no mistake; the GM decision is also an advancement for management rights to stifle objection to the status quo. It further restrains employee rights to engage in protected concerted activity to seek improvement in wages, hours, and working conditions. The decision makes it easier for employers to parse their need to protect employees from a hostile work environment as a reason to discharge union supporters. Interestingly, when Cooper Tire appealed to the Court of

310 Id.
311 Cooper Tire II, 866 F.3d 885, 895 (8th Cir. 2017).
312 Id.
313 See Ring, supra note 309.
314 Id.
316 See Ring, supra note 309.
318 Id.
Appeals for the Eighth Circuit, the court ruled that the employee’s comment/conduct on the picket line did not create a hostile work environment.319

Perhaps one positive thing about the GM Board’s pronouncement implementing the Wright Line test henceforth is that it is simpler than having three setting-based tests. That said, the setting or context should still matter under the Wright Line test. Where discriminatory discipline occurs in reaction to the exercise of protected concerted activity, this should give rise to an unfair labor practice finding unless the misconduct was so egregious that the employee would have been fired anyway. The context matters as well as the conduct of all employees and managers, or replacement workers in the case of a picket line.320 It is the nature of a picket line that tempers will flare when picketing locked out employees are confronted with replacement workers crossing the line to perform what picketers perceive as “their” work. If a boss is bullying an employee or swearing at him/her, the employee is more likely to retaliate in kind. And if the same occurs on social media, retorts to derogatory or defamatory remarks from others are likely to be met in kind. The GM Board specifically discounted earlier Board precedent recognizing “that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.”321 The Board in GM wrote that “this rationale is overstated and has largely swallowed employers’ concomitant right to maintain order, respect, and a workplace free from invidious discrimination.”322 The GM Board qualified that this perspective was limited to cases where there was no discriminatory discipline.323

The GM Board objected to the setting-specific standards because they worried that these standards did not require the Board to establish anti-union motivation, but rather presumed or inferred it in the face of discrimination against a union supporter.324 Such discrimination takes the form of harsher discipline imposed

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319 Id. (citing Cooper Tire II, 866 F.3d 885, 892 (8th Cir. 2017)).
321 Id. at 2 (quoting Consumer Power Co., 282 N.L.R.B. 130, 132 (1986)).
322 Id.
323 Id.
324 Id. at 14.
on a union supporter than another in similar circumstances. It is interesting that the Board, in applying the “totality of the circumstances” test in *Pier Sixty*, set out evidence of employer anti-union activity as the second factor. The GM Board discounted the Board’s earlier pronouncements that “[w]here an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee’s protected activity, *Wright Line* is inapplicable.” The GM Board disagreed with this, setting out that the causal connection between the protected activity and the discipline was, in fact, “properly in dispute.” In some respects, it seems that the GM Board feared that with the setting-specific standards, employers might be held to the same standards as employees with respect to profane or offensive conduct. They shudder at an employee’s use of profanity towards management in *Plaza Auto*, or *NLRB v. Starbucks*, a slur at a strikebreaker in *Cooper Tire*, but illustrate no similar outrage at the profanity directed at employees by managers on the eve of a union election in *Pier Sixy*.

In its parting shot, the GM Board decided to apply the *Wright Line* standard retroactively to pending cases relating to abusive conduct in connection with Section 7 protected activity. The Board acknowledged that some employees might have acted in reliance on the prior setting-specific standards and engaged in conduct [that would no longer be protected] but managed to find that such “ill effects are outweighed by the potential harm of producing results contrary to the Act’s principles and potentially

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325 See supra notes 185–99 and accompanying text discussing factors in *Pier Sixty*.
326 *Gen. Motors III*, 369 N.L.R.B., slip op. at 15 (citing Roemer Indus. Inc., 362 N.L.R.B. 828, 834 n.15 (2015)). The quote from *Roemer* continued to say: “This is so because the causal connection between the protected activity and the discipline is not in dispute.” *Id.*
327 *Id.*
328 See *id.*
329 *Id.* at 19 n.1 (outlining employee’s profanity at Plaza’s owner over alleged improper calculation of sales commissions).
330 *Id.* at 9 (citing NLRB v. Starbucks Coffee Co., 679 F.3d 70, 73–74, 79–80 (2d Cir. 2012)) (concerning off-duty employee swearing at a manager).
331 *Id.* at 19 n.3.
332 *Id.* at 19 n.2 (citing only the swearing directed at manager).
333 *Id.* at 17.
at odds with antidiscrimination law.”334 Once again, the GM Board leans towards protecting management at the expense of employee rights.335 Thus, cases that are in the pipeline or on remand to the Board, or to an ALJ, will require reconsideration and likely development of additional facts under the newly announced and yet retroactive forty-year-old Wright Line rule.336 It is unlikely that employees will fare better under the GM Board’s old/new standard rather than with the prior rules.

CONCLUSION AND RECOMMENDATIONS

There is not unbounded protection on speech and conduct just because of the Section 7 concerted activity involved.337 This was never the case.338 There were always limits on NLRA protected acts, and the context of the remarks or conduct should be part of the Board’s analysis,339 as well as the impact on other...
employees and on employers who are responsible for a workplace free from harassment. Both the union and the employer, in the context of a labor dispute, retain an obligation to protect equal employment opportunity rights of both employees and strikers, including the obligation to prevent a hostile work environment.  

In the post-GM labor law world, employers should set up rules that make clear that there will be progressive discipline for profanity and offensive conduct that conflicts with employee rights under equal employment opportunity law. This is necessary for the good of all, employers, unions, and employees. Employers should not be placed in a catch twenty-two situation where they are subject to suit for unfair labor practices under the NLRA and Title VII and other EEO violations that can be pursued by agencies, unions, and employees. Discipline need not be draconian to achieve the objective of eliminating harassing behavior. It does not have to mean discharge or even suspension upon the first offense. Progressive discipline works, employees learn what conduct and language is impermissible, and employer civility rules can put supervisors on notice what provoking conduct on the part

Roberts Wonders if Workers Can Sue Over ‘OK, Boomer,’ LAW360 (Jan. 15, 2020, 1:30 PM), https://www.law360.com/articles/1234662/roberts-wonders-if-workers-can-sue-over-ok-boomer. [https://perma.cc/26WH-3GJA]. Interestingly, the Supreme Court voted 8–1 in favor of the employee, ruling that he only needed to prove that age was a motivating factor in order to be able to sue, and eschewed a ‘but for’ standard of causation in cases of discrimination in federal employment cases. Babb v. Wilkie, No. 18-882, slip op. at 1 (Apr. 6, 2020). The ‘but for’ cause would still be required for a remedy. Id. at 14. There are currently a number of regulations for speech in the workplace built into the language of equal employment opportunity, labor, tort laws relating to workplace violence, defamation, and trade secret protection, among others. See Lisa Nagele-Piazza, What Employee Speech Is Protected in the Workplace?, SOC’Y FOR HUM. RES. MGMT. (July 23, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employee-free-speech-in-the-workplace.aspx [https://perma.cc/8RZE-53B8].

340 See generally supra text accompanying notes 257–70.
341 See supra Part VI.
342 Of course, many employees are subject to mandatory individual arbitration agreements which effectively remove these disputes from the public forum of an Article III court, in favor of private resolution by arbitrators.
of the supervisor could excuse an employee’s profane outburst. Regardless of the current NLRB’s excessive concern for management rights, what is good for the employee in terms of limits on profanity and offensive speech should be good for her boss as well.

Employers could use categories of words, outlined in an employer manual, if the employer wishes to regulate civility, much like comedian George Carlin wrote a monologue “Seven Words You Can Never Say on Television.” There is a difference between rude statements and hate speech. The latter should have severe consequences, but the former may not even be actionable if emitted by a supervisor to an employee without reference to a protected category such as race or sex, or the like. Some words no one should have to hear directed at them, especially when slurs undercut the rights of legally protected groups at work or on social media and some might argue, even on a picket line. That said, what should the consequences be for various levels of misconduct in these instances? There is a big difference between calling an employee a “boomer,” which term admittedly refers to an ageist stereotype, as opposed to using offensive racist or degrading sexual terms to refer to other employees.

What should the NLRB have done regarding the perceived conflict between federal workplace statutes, the NLRA, and equal employment opportunity laws? The setting-specific standards the Board was using were clearly workable and well known in the human resource and labor law spheres. As long as employers, as well as the Board and its ALJ’s, reference violations of equal employment opportunity as misconduct and treat it accordingly, and not in a discriminatory fashion that penalizes those who were engaged in protected concerted activity, the previous NLRB rules produced little or no conflict with EEO rights. The NLRB is entitled to deference in interpreting the application of the Act to changing industrial patterns. However,

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344 Provocation is a factor in both criminal and civil actions, which works to mitigate the consequences of assault by the defendant. The NLRB did not originate this concept in Atlantic Steel but they did place it in a workplace context under the NLRA.


347 Id.
to overturn sound precedent, and for the appellate courts to enforce such orders, the Board must outline rationale for such that is not arbitrary and capricious. The three Republican appointees to the Board, in deciding the General Motors case, took it upon themselves to overrule much sound precedent without adequate justification.\textsuperscript{348} To quote former Board Chair Wilma Liebman, dissenting in the IBM Corp. case, the majority changed the rule “not because they must, and not because they should, but because they can.”\textsuperscript{349} This decision reflects the reality of partisan politics with unnecessary flip-flopping on standards every time the political composition of the Board sways.\textsuperscript{350} There is no dissent in the GM case because the then three-member Board was all on the employer’s side. The GM Board prides itself with advancing civility in the workplace, but that is not the role of the NLRB. That is not even the role of the EEOC.\textsuperscript{351}

The bottom line for enforceability of NLRB orders in federal courts should be whether the Board attributed enough weight to misconduct that clearly violates equal employment opportunity laws when determining if the misconduct exceeds the protection of the Act. Misconduct that violates equal employment opportunity laws should have more severe consequences than profanity that is the equivalent of toilet or bathroom talk. At the same time, minor violations of civility rules that impinge upon equal employment opportunity amongst coworkers should be sanctioned in accordance with their severity. Standards for progressive discipline should be transparent and imposed in a nondiscriminatory manner. The right of employees to engage in concerted activities, including picketing for higher wages and better working conditions, and employee rights to be free from racial and sexual harassment, among others, must be balanced equitably in order for the important public policies behind the federal labor and employment

\textsuperscript{348} Lynn Rhinehart and Celine McNicholas, \textit{Three Republican-appointed white men are now deciding whether you have rights on the job}, ECON. POL. INST. (Dec. 17, 2019, 2:55 PM), https://www.epi.org/blog/three-republican-appointed-white-men-are-now-deciding-whether-you-have-rights-on-the-job/ [https://perma.cc/VN8S-KM3F].


\textsuperscript{350} See supra text accompanying notes 281–84.

\textsuperscript{351} Oncale v. Sundowner Offshore Serv., 523 U.S. 75, 75 (1998) (noting Title VII is not a general civility code for the American workplace).
law statutes to be effectuated.\textsuperscript{352} As opponents to the NLRB’s prior stance on this matter have noted, the NLRB should not act with blinders on regarding other statutes that may conflict with its rules.\textsuperscript{353} Just as arbitrators have been required to interpret equal employment laws within labor disputes,\textsuperscript{354} so too should the NLRB read the NLRA in a broader context to prevent labor law from infringing upon equal employment opportunity laws.

\textsuperscript{352} See generally Interfering with employee rights (Section 7 & 8(a)(1)), NLRB, \url{https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1} [\url{https://perma.cc/MZ3A-8AHG}].


\textsuperscript{354} See supra note 342 and accompanying text.