THE NLRB CHAMPIONS "CIVILITY" IN THE WORKPLACE IN *GENERAL MOTORS*: ALTRUISM OR DUPLICITY? – THE UNION PERSPECTIVE

*Marcus Reed**

INTRODUCTION

Charles Robinson (Robinson) was a full-time skilled trades union committeeperson at the General Motors (GM) facility in Kansas City, Kansas.[1] This position entailed that he speak on behalf of all the employees in his bargaining unit for matters related to the terms and conditions of employment, i.e., contractual disputes surrounding the collective bargaining agreement (CBA), grievances, disciplinary matters, safety issues, and collective bargaining for future contracts. In addition to his local union service, Robinson served as a delegate to the union's international constitution.[2]

Robinson was a zealous representative who never hesitated to fervently hold management accountable for decisions that affected the members of his bargaining unit,[3] and his unwavering posture created a contentious relationship between himself and management.[4] In three instances related to this note, Robinson was suspended for the use of profane and racially insensitive language towards his managers during collective bargaining meetings.[5] However, as the adage goes, there are always two sides to each story. The question was whether Robinson was effectuating his duties as a fervent and zealous union advocate or whether his conduct crossed the line and interfered with management's legitimate rights to maintain discipline in their facility.

The National Labor Relations Act (NLRA or Act) provides that covered private sector employees have 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

* J.D. Candidate, University of Toledo College of Law (May 2022). First and foremost, I want to thank Professor Joseph Slater for sharing his unrivaled knowledge of labor law and for mentoring me in my goal to become a union-side labor attorney. I also want to thank Professor Nicole Porter for helping me navigate the Title VII issues that presented themselves throughout my research. Most importantly, I want to thank my father for his service as a career firefighter and past president of the International Association of Firefighters (IAFF) Local 249. His service to his union and dedication to protecting the rights of workers sparked my interest in labor law.

1. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 2 (July 21, 2020).
2. *Id.* at 12 (citing to the Administrative Law Judge's attached opinion).
3. *Id.*
4. *Id.*
5. *Id*. at 14, 16, 19.

bargaining or other mutual aid or protection . . . ."[6] Prior to *General Motors*, Section 7 was interpreted to provide employees significant leeway for offensive language or conduct during Section 7 protected activity,[7] so long as the language or conduct was not violent or threatening,[8] did not cause any major disruptions in the workplace,[9] did not interfere with the employer's ability to maintain order,[10] and was not so severe as to render an employee unfit for duty.[11]

Section 7 protected activity can look very different in different settings. For example, employees can be engaged in forming or assisting a union both inside the workplace and on their off time, as the Section's protection does not cease once an employee clocks out. In other instances, an employee may also be engaged in Section 7 protected activity while on a picket or strike.[12] Since the workplace, a labor strike, and an employee's off time are vastly different in their own respects, the National Labor Relations Board (NLRB or Board),[13] the independent agency tasked with enforcing the NLRA, adopted three separate tests to evaluate whether an employee's *res gestae*[14] conduct that occurs during a Section 7 protected activity remains protected or whether it falls outside the bounds of the Act's purview. *Atlantic Steel* (1979) was adopted as the Board's test to evaluate conduct

6. 29 U.S.C. § 157 (1947) (The rights afforded to employees in § 157 will collectively be referred to throughout this note as "Section 7 protected activity.").

7. NLRB v. Ben Pekin Corp., 452 F.2d 205, 207 (7th Cir. 1971) ("'not every impropriety committed during [Section 7] activity places the employee beyond the protective shield of the act' and 'the employee's right to engage in concerted activity may permit some leeway for impulsive behavior.'") (quoting NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965))); *see also* Boaz Spinning Co. v. NLRB, 395 F.2d 512, 514 (5th Cir. 1968) ("[L]abor disputes are ordinarily heated affairs, and that confrontations between management and employees . . . cannot be held to the standards of cool, analytical impartiality characteristic of the debating society.").

8. *See, e.g.*, Calmos Combining Co., 184 N.L.R.B. 914, 915 (1970) (holding that an employee lost Section 7 protection for his "continued intransigence [because his conduct] was not a part of the *res gestae* of the grievance discussion. Rather, the order to stop shouting [by his employer] was a reasonable and lawful order that should have been obeyed, and his refusal to do so was not related to [the employee's] . . . protected processing of the grievance.") (alteration in original).

9. Fresenius USA Mfg., Inc., 358 N.L.R.B. 1261, 1265 (2012) (finding that if the location of the conduct is one generally used for Section 7 protected activity, and the conduct is unlikely to cause disruptions in the workplace, the employee will generally retain protection of the Act).

10. Piper Realty Co. v. Stone, 313 N.L.R.B 1289, 1290 (1994) (reasoning that "although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect.") (referencing *Thor Power Tool Co.*, 351 F.2d at 587).

11. NLRB v. Illinois Tool Works, 153 F.2d 811, 815-16 (7th Cir. 1946) (articulating that "flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service" are the only "type of cases that the courts find that the protection of the right of employees to full freedom in self-organizational activities should be subordinated to the vindication of the interests of society as a whole.").

12. *NLRA and the Right to Strike*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/nlra-and-the-right-to-strike (last visited Aug. 26, 2021).

13. *Who We Are*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are (last visited Aug. 26, 2021).

14. *Res Gestae*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/res_gestae (last visited Aug. 26, 2021) (*Res gestae* is defined as "[t]he events or circumstances at issue, as well as other events that are contemporaneous with or related to them.").

in the workplace;[15] *Clear Pine Mouldings* (1984) was adopted as the test to evaluate conduct on the picket and strike line;[16] and as seen in *Pier Sixty* (2015), a totality of the circumstances test was used to evaluate conduct outside of the workplace, most notably, conduct on social media.[17] These cases are known as the NLRB's "setting-specific" tests.[18]

Although the setting-specific tests have been used by the NLRB and federal circuit courts for many decades, they have not been without criticism. The main criticism by employers is that the setting-specific tests fail to adequately provide equal legal consideration for the employer's legitimate right to discipline an employee for offensive conduct.[19] In their view, Section 7 has been interpreted too broadly. Employers have consistently lobbied the NLRB to hold that civility codes do not violate an employee's right to engage in Section 7 protected activity.[20] Employers believe civility codes are necessary to establish order and respect in the workplace and in no way chill[21] an employee's abilities to effectuate their rights under the NLRA.[22]

Employee groups vehemently oppose this view, arguing that although some workplaces may be civil to a certain degree, there are just as many modern

15. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979) ("The decision as to whether the employee has crossed that line depends on 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.").

16. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984) *enforced*, (holding that an employer could refuse to reinstate a striking employee if and only if "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." (quoting NRLB v. W.C. McQuaide, Inc., 552 F.2d 519, 528 (3d Cir. 1977)).

17. Pier Sixty, LLC, 362 N.LR.B. 505, 506 (2015) (deciding that conduct outside of the workplace will be analyzed under a "totality of the circumstances" test to determine if it will be protected by the NLRA), *enforced*, 855 F.3d 115 (2d Cir. 2017).

18. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 1 (July 21, 2020).

19. Kevin B. Leblang, *Offensive Employee Outbursts Are Not Protected Activity Under the NLRA*, KRAMER LEVIN (Aug. 5, 2020), https://www.kramerlevin.com/en/perspectives-searc h/offensive-employee-outbursts-are-not-protected-activity-under-the-nlra.html ("*General Motors* acknowledges that employers can have a legitimate nondiscriminatory interest in disciplining or discharging employees for abusive, profane and/or discriminatory behavior, even if related to Section 7 protected activity. Moreover, the decision synchronizes the Act with anti-harassment and anti-discrimination laws with which employers must comply, making it easier for employers to establish a harassment-free and positive work environment.").

20. Civility codes are workplace rules that dictate how employees can act and conduct themselves in the workplace. *See generally* Cheryl L. Behymer & Sheila M. Willis, *Don't Call It a Comeback: The "Return" of Workplace Civility Rules*, FISHER PHILLIPS (Mar. 1, 2018), https://www .fisherphillips.com/resources-newsletters-article-dont-call-it-a-comeback-the-return (highlighting the history of civility codes in the workplace).

21. The term "chill" used in this note refers to the concept that certain employer actions can discourage an employee from exercising the rights guaranteed to them under the NLRA.

22. *See generally* Behymer & Willis, *supra* note 21.

workplaces where employees face uncivil,[23] dangerous,[24] and discriminatory[25] working conditions. The basic argument is that civility codes decrease the employee's ability to effectively advocate for their rights while also expanding the employer's ability to discipline or terminate the employee for conduct deemed uncivil by the employer. If an employer can determine whether an employee's conduct is civil, the employee will be less inclined to raise an issue about safety or discrimination out of fear of retaliation. Thus, civility codes chill the employee's right to engage in Section 7 protected activity.[26]

Another criticism of the setting-specific tests is that a broad interpretation of the NLRA, which offers significant protections to an employee for their conduct during Section 7 protected activity, is no longer suitable for the realities of the modern workplace.[27] These critics believe that the modern workplace differs drastically from the industrial realities of the early years of the NLRA that necessitated the significant leeway.[28] At the forefront of this criticism is the possible conflict between the NLRA and employers' legal obligations under Title VII of the Civil Rights Act,[29] which prohibits discrimination in the workplace based on an "individual's race, color, religion, sex, or national origin."[30]

In *General Motors*, the Trump Board[31] took these criticisms as an opportunity to readdress the proper standard that they believed would balance an employee's

---

23. Christine Porath and Christine Pearson, *The Price of Incivility*, HARV. BUS. R. (Jan. – Feb. 2013), https://hbr.org/2013/01/the-price-of-incivility (finding that from 1999-2013, "98% [of employees] have reported experiencing uncivil behavior. In 2011 half said they were treated rudely at least once a week–up from a quarter in 1998," and explaining the costs associated with incivility from the "boss from hell.").

24. *See, e.g.*, Michael Sainato, *'I'm not a robot': Amazon Workers Condemn Unsafe, Grueling Conditions at Warehouse*, THE GUARDIAN (Feb. 5, 2020, 3:00 AM), https://www.theguardian.com/technology/2020/feb/05/amazon-workers-protest-unsafe-grueling-conditions-warehouse (describing employee experiences with Amazon ignoring their calls to remedy unsafe, grueling, and dangerous working conditions).

25. Maryam Jameel & Joe Yerardi, *Workplace Discrimination is Illegal. But Our Data Shows It's Still a Huge Problem*, VOX (Feb. 28, 2019, 8:29 AM), https://www.vox.com/policy-and-politics/2019/2/28/18241973/workplace-discrimination-cpi-investigation-eeoc (referencing employees' stories of discrimination from supervisors such as referring to Black workers as "monkeys". However, even with the high rate of discrimination by employers towards their subordinates, the article notes that only about 15% of employees who raise a race discrimination claim receive relief).

26. *See generally* Joshua Olszewski-Jubelirer, *The NLRB's Misguided Reasoning on Civility Codes*, ON LABOR (June 7, 2018), https://onlabor.org/the-boeing-companys-misguided-reasoning-on-civility-codes.

27. *See, e.g.*, Pier Sixty, LLC, 362 N.LR.B. 505, 510 (2015) (Johnson, M., dissenting in part).

28. *Id.*

29. *See* Constellium Rolled Prods. Ravenswood, LLC v. NLRB, 945 F.3d 546, 551 (D.C. Cir. 2019) (employer argued that "the Board ignored the Company's obligations under federal and state anti-discrimination laws to maintain a harassment-free workplace.").

30. 42 U.S.C. § 2000e-2(a)-(c) (1991); *see also* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020) (holding that sex discrimination includes discrimination based on sexual orientation and gender identity).

31. Throughout this note, I will refer to the NLRB Board that decided the *General Motors* case, which was comprised of Chairman Ring and Members Kaplan and Emanuel, as the "Trump Board" because all three Board members were appointed by President Trump. *See* Lynn Rinehart & Celine McNicholas, *Three Republican-Appointed White Men Are Now Deciding Whether You Have Rights*

right to protection under Section 7 and an employer's right to maintain discipline. Ultimately, they heeded the calls of employers and overruled the setting-specific tests, effectively eradicating all NLRB precedent establishing leeway for employees engaged in Section 7 protected activity in favor of the *Wright Line* standard. This standard provides greater deference to the employer in their decision to discipline or discharge an employee for their conduct.[32]

The *Wright Line* standard was generally used in mixed-motive cases where the employer was motivated by "legitimate and illegitimate factors" in the determination to discipline or discharge an employee.[33] For example, the *Wright Line* standard would have applied in a case where a union president engaged in contemporaneous contract negotiations with the employer was also disciplined for poor work performance. Here, the discipline is not clearly connected to the Section 7 protected activity (contract negotations), but the employer's true motivation for disciplining the employee is unclear without further investigation. Under the *Wright Line* standard, the NLRB would have to determine whether an illegitimate antiunion motive (retaliation because the employee was engaged in contentious contract negotiations as union president) or a legitimate business justification (the employee's poor work performance) was the true motive behind the disciplinary action to determine if an unfair labor practice (ULP) was committed.[34]

The *Wright Line* standard differs significantly from the NLRB's setting-specific tests. As discussed, the setting-specific tests were historically used to determine whether an employer committed an ULP for disciplining or terminating an employee for conduct that had a direct and obvious connection to the employee's protected activity. For example, the *Atlantic Steel* setting-specific test would be applied where an employee was disciplined for yelling at a manager for their breach of contract during a collective bargaining meeting.[35]

Under the *Wright Line* standard, an employee must first establish a causal connection between the protected activity and the employer's decision to discipline or terminate the employee.[36] Essentially, the Board must determine whether it is reasonable to believe that an employer's stated reason for discipline (poor work performance) was pretextual or the true motive. If a connection is established, an employer can rebut the presumption by proving that they would have taken the

---

on the Job, ECON. POL'Y 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/ (noting that "the NLRB has only Republican appointees for the first time in its 85-year history, and the three Republicans are all white men–two lawyers who represented corporations before coming to the NLRB, and one former Republican congressional staffer.").

32. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 10-11 (July 21, 2020).

33. Kelly Robert Dahl, Note, *Price Waterhouse, Wright Line, and Proving a "Mixed Motive" Case Under Title VII*, 69 NEB. L. REV. 869, 895 (1990).

34. *See generally* Sarah L. Manning, Wright Line*: The Burden of Proof in Dual Motive Cases Under Section 8(a)(3)*, 13 CUMB. L. REV. 239 (1982).

35. Roemer Indus., Inc., 362 N.L.R.B. 828, 834 n.15 (2015) ("Where 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. This is because the causal connection between the protected activity and the discipline is not in dispute.").

36. Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *aff'd,* 462 U.S. 393 (1983).

same disciplinary action regardless of the employee's involvement in protected activity.[37]

This note will examine the Trump Board's recent decision in *General Motors* and illustrate the chilling effects the ruling has on an employee's Section 7 rights as well as union effectiveness overall. More specifically, the note will articulate the union perspective on why the *Wright Line* standard is improper for evaluating whether an employer has the authority to discipline an employee for conduct that is part and parcel of an employee's protected activity.

Part I will discuss the statutory scheme of the NLRA and how the statute contemplates leeway for an employee's conduct while engaged in Section 7 protected activity. *Part II* will analyze the seminal setting-specific tests which were routinely and effectively employed to determine whether an employee lost Section 7 protection for alleged conduct which was part of the *res gestae* of their protected activity. *Part III* will examine the Administrative Law Judge's (ALJ) ruling and his application of the *Atlantic Steel* test to the *General Motors* case, which led to exceptions being filed to the Trump Board. *Part IV* will examine the Trump Board's rationales for abolishing the setting-specific tests in favor of the *Wright Line* standard and offer counterarguments and criticisms from the union perspective. *Part V* will address the Trump Board's true motives behind the decision to adopt *Wright Line* in the *res gestae* context. Finally, Part VI will address the fate of the *General Motors* decision. The note concludes that the Trump Board's adoption of the *Wright Line* standard in the *res gestae* context should be overturned because it weighs too heavily employers' concerns about civility and discrimination and significantly understates employees' rights under the NLRA.

I. HISTORY OF THE PROTECTIONS THE NLRA AFFORDED TO WORKERS ENGAGED IN SECTION 7 PROTECTED ACTIVITY

Under Section 7 of the NLRA, employees have the right to join and form labor organizations, engage in concerted activity for the mutual aid and protecton of their fellow employees, and engage in collective bargaining with their employers.[38] The NLRB was established shortly after the NLRA to protect employee rights laid out in Section 7 and to hold employers accountable for violations of employee rights under Section 7 by enforcing the unfair labor practices (ULP) established under Section 8.[39] Section 8 of the NLRA established five ULPs where an employer would violate an employee's Section 7 rights.[40] The two categories of ULPs relevant to this discussion are Section 8(a)(1), which prohibits an employer from interfering with, restraining, and coercing an employee in exercising the rights afforded in Section 7 activity, and Section 8(a)(3), which

37. *Id.*

38. 29 U.S.C. § 157 (1947).

39. *Our History*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/ (last visited Aug. 26, 2021).

40. 29 U.S.C. § 158(a)(1)-(5).

prohibits an employer from retaliating against an employee for their involvement in Section 7 activity.[41]

Although the NLRA's mandate may seem clear, its sweeping language gave the NLRB and courts license to interpret the various meanings of the Act's provisions over the last several decades.[42] Consequently, employees in the modern workplaces of the United States are still advocating for their rights under the NLRA in a constant tug-of-war with employers, politicians, courts, and the NLRB.

Representative Hartley, co-sponsor of the Taft-Hartley Act which amended the NLRA, stated that Section 7 was intended to "write equity into the law, to make the relationship between labor and management equitable, to place them on an equal basis."[43] In *Hawaiian Hauling Services*, the NLRB declared that "[t]he relationship at a grievance meeting is not a 'master-servant' relationship but a relationship between company advocates on one side and union advocates on the other side, engaged as equal opposing parties in litigation."[44] This concept has been colloquially referred to as the "equality principle."[45]

The equality principle is in line with the Supreme Court's understanding that federal labor law "gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."[46] The NLRB expressed that if employers could simply terminate an employee for their involvement in Section 7 protected activity when they used offensive language or engaged in conduct the employer saw as insubordinate or simply offensive, collective bargaining would no longer be between two equals, but rather a master and a servant, rendering Section 7 futile.[47] If Section 7 were to actually work, an employee could not be expected to conduct themselves in a perfect and polite manner during emotional, high-stakes, and confrontational situations that are often determinative of their livelihoods.[48]

---

41. § 158(a)(1), (3).

42. Julius G. Getman, *The NLRB: What Went Wrong and Should We Try to Fix It?*, 64 EMORY L.J. 1495, 1495-96 (2015) (noting that the failure of the NLRA to bring about equal collective bargaining and employee rights can be attributed to the "fictional" expertise of the NLRB and the reality that courts were not on the sideline as intended, rather they became activist courts making "key policy decisions" that are in conflict with the statutory language of the NLRA.).

43. 93 Cong. Rec. A1069 (1947) (statement of Rep. Hartley).

44. Hawaiian Hauling Serv., Ltd., 219 N.L.R.B. 765, 766 n.6 (1975) (quoting Crown Cent. Petroleum Corp., 177 N.L.R.B. 322 (1969), *enforced*, 430 F.2d 724 (5th Cir. 1970)).

45. ROBERT M. SCHWARTZ, THE LEGAL RIGHTS OF UNION STEWARDS 23-27 (6th ed. 2017); *see also* Carol A. Glick, Note, *Labor-Management Cooperative Programs: Do They Foster or Frustrate National Labor Policy?*, 7 HOFSTRA LAB. L.J. 219, 224 (1989) ("Collective bargaining, the keystone of the NLRA, is premised on an equilibrium between labor and management.").

46. Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 285 (1974).

47. Consumers Power Co., 282 N.L.R.B. 130, 132 (1986) ("The Board has long held, however, that there are certain parameters within which employees may act when engaged in concerted activities. The 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.").

48. For example, if an employee, in a moment of anger and frustration, called their boss an "asshole" because the employer refused to address their claim of sexual assault (protected activity under Section 7), it would not be equitable to allow the employer to terminate the employee for

II. SETTING-SPECIFIC TESTS

Since Section 7 did not enumerate the exact types of conduct that were to be protected, the NLRB possessed the authority to determine the section's protective limits. In 1965, the Seventh Circuit provided helpful guidance for the NLRB when they held that an employee's conduct "cannot be considered in a vacuum" nor "be separated from what led up to it" in the determination of whether the conduct would be protected under Section 7.[49] Because the Act's language suggests broad protections for employees engaged in enumerated protected activity, there was no bright-line test to determine the Act's boundaries. The NLRB thus relied on multifactor, totality of the circumstances-type approaches.

Generally, when an employee was disciplined for conduct that occurred during Section 7 protected activity, the NLRB held that the relevant inquiry was whether the conduct of the employee was so opprobrious as to lose the Act's protection.[50] Thus, if an employer disciplined an employee for conduct (i.e., yelling) that occurred during Section 7 protected activity, and the conduct did not exceed the protections of Section 7, the employer violated Section 8(a)(1) & (3) of the NLRA.

The NLRB made clear that the Act affords employees "a certain degree of latitude" for intemperate behavior.[51] For example, the NLRB held that the Act protected "offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activit[y]" because "the language of the shop is not the language of 'polite society.'"[52] Although some leeway is necessitated for an employee to effectuate their rights under Section 7, the Act is not absolute in the protections it grants employees. As a general matter, when an employee's conduct was determined to be indefensible, abusive, egregious, or flagrant, that employee lost the protection of Section 7.[53] Below are the three major tests previously employed by the NLRB to determine the boundaries of Section 7 protection.

A. *The* Atlantic Steel *Test*

The *Atlantic Steel* test was used to examine conduct in the workplace. The multifactor nature of *Atlantic Steel* allowed the Board to consider all the surrounding circumstances that led to the conduct before deciding whether it was protected under Section 7. In its decision, the Board examined (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's

---

violating a workplace rule preventing profanity even though the employer violated the employee's rights by refusing to address the claim of sexual assault.

49. NLRB v. Thor Power Tool Co., 351 F.2d 584, 586 (7th Cir. 1965); *see also* Emarco, Inc., 284 N.L.R.B. 832, 834 (1987) (stating that "with regard to the ongoing nature of the labor dispute, the remarks of the Charging Parties . . . cannot be considered in a vacuum.").

50. Roemer Indus., Inc., 362 N.L.R.B. 828, 834 n.15 (2015).

51. Stanford N.Y., LLC, 344 N.L.R.B. 558, 564 (2005) (quoting Winston-Salem J., 341 N.L.R.B. 124, 126 (2004), *enforcement denied,* 394 F.3d 207, 208 (4th Cir. 2005)).

52. Dreis & Krump Mfg., Inc., 221 N.L.R.B. 309, 315 (1975).

53. Plaza Auto Ctr., Inc. v. NLRB, 664 F.3d 286, 291-92 (9th Cir. 2011).

outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.[54]

B. *The* Clear Pine Mouldings *Test*

Strikes have been described as "a battle waged with economic weapons."[55] The Third Circuit in 1939 stated that –

> [h]ot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in [section 13 of the National Labor Relations] Act . . . that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike.[56]

This expansive and unchecked understanding of the right to strike, however, did not continue into the modern age. The NLRB adopted a standard that allowed employers to refuse to reinstate a striking employee who engaged in conduct that, under the circumstances, "reasonably tend[ed] . . . to coerce or intimidate employees in the exercise of rights protected under the Act."[57] In practice, this standard protected conduct that was generally confrontational,[58] impulsive,[59] and offensive[60] as long as it did not coerce or threaten non-striking employees or bystanders.[61] But where the offensive behavior, even if lacking concrete threats, creates a reasonable likelihood of violence, the Board had often refrained from protecting such conduct.[62]

---

54. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979).

55. Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939).

56. *Id*.

57. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984), *enforced*, 632 F.2d 721 (9th Cir. 1980).

58. Chicago Typographical Union No. 16, 151 N.L.R.B. 1666, 1669 (1965) ("One of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees.") (citing NLRB v. United Furniture Workers of Am., 337 F.2d 936, 940 (2d Cir. 1964)).

59. Allied Indus. Workers No. 289 v. NLRB, 476 F.2d 868, 879 (D.C. Cir. 1973) ("Impulsive behavior on the picket line is to be expected especially when directed against nonstriking employees or strike breakers.") (quoting Montgomery Ward & Co. V. NLRB, 374 F.2d 606, 608 (10th Cir. 1967)).

60. NMC Finishing, Inc., 317 N.L.R.B. 826, 827-28 (1995) (Employer violated section 8(a)(3) for terminating a striking employee who carried a sign that read "Who is Rhonda F Sucking Today?" in reference to an employee working during the strike.); *see also* Calliope Designs, Inc., 297 N.L.R.B. 510, 521 (1989) (Employer violated section 8(a)(3) for terminating a striking employee who referred to a non-striking worker as a "whore" and a "prostitute.").

61. A. Duie Pyle, Inc., 263 N.L.R.B. 744, 745 (1982) (holding that "an employer is not entitled to discharge a striker for engaging in threats unless the threats are accompanied by 'physical acts or gestures' that would provide added emphasis or meaning to the striker's words sufficient to warrant finding that the striker should not be reinstated to his job at the strike's end.").

62. Catalytic, Inc., 275 N.L.R.B. 97, 98 (1985) ("We are, of course, mindful that in certain circumstances a profane epithet unaccompanied by an overt or indirect threat might also be coercive or intimidating if it raises the reasonable likelihood of an imminent physical confrontation.").

C. *Totality of the Circumstances Test*

Assuredly, the drafters of the NLRA did not contemplate the advent of social media, but they did contemplate the right for employees to engage in concerted protected activity outside of the workplace.[63] With the convenient and far-reaching capabilities of social media, workers and labor unions have flocked to various social media platforms as a valuable medium for conducting union activity, engaging with fellow workers, and expressing grievances about their employers.[64] In light of this, employers have shown a keen interest in regulating employee conduct outside of the workplace and on their personal social media accounts.[65] Unsurprisingly, issues have arisen where employers attempted to discipline employees for conduct that occurred not only on their social media accounts, but that contained protected activity under Section 7.[66] The NLRB understood that there were practical differences between employee conduct on social media, in the workplace, and on the strike line, and created a standard that accounted for those realities.[67]

The Board adopted a totality of the circumstances test to determine whether an employee's conduct on social media or, more generally, outside of the workplace was "so egregious as to exceed the Act's protection."[68] Some courts were not convinced that this standard properly accounted for employer rights,[69] but with the rapid and constant advancement of social media and its capabilities, it is only reasonable for courts to provide the Board with the deference required to properly balance all rights required under the NLRA.[70]

III. THE ADMINISTRATIVE LAW JUDGE'S (ALJ) APPLICATION OF *ATLANTIC STEEL* TO ROBINSON'S CONDUCT IN *GENERAL MOTORS*

In *General Motors*, the ALJ appropriately applied *Atlantic Steel* to evaluate Robinson's conduct as it was part of the *res gestae* of his protected activity and

63. 29 U.S.C. § 157 (1947).

64. *See generally* Alex White, *Social Media for Unions*, ALEITHIA MEDIA AND COMM. (Dec. 2010), http://www.back2ourfuture.org/wp-content/uploads/2014/06/Social_Media_For_Unions.pdf.

65. *See generally* Kathleen McGarvey Hidy, *Social Media Policies, Corporate Censorship and the Right to be Forgiven: A Proposed Framework for Free Expression in an Era of Employer Social Media Monitoring*, 22 U. PA. J. BUS. L. 346 (2020).

66. *See generally* Christine Neylon O'Brien*, I Swear! From Shoptalk to Social Media: The Top Ten National Labor Relations Board Profanity Cases*, 90 ST. JOHNS L. REV. 53 (2016).

67. Three D, LLC, 361 N.L.R.B. 308, 310 (2014) (reasoning that "as a general matter, the *Atlantic Steel* framework is not well suited to address issues . . . involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties.").

68. Pier Sixty, LLC, 362 N.L.R.B. 505, 506 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017).

69. NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123-24 (2d Cir. 2017).

70. Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992) ("[T]he NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers."); NLRB v. RELCO Locomotives, Inc., 734 F.3d 764, 779-80 (8th Cir. 2013) (noting that the court will "enforce the Board's order if it 'has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole, even if we might have reached a different decision had the matter been before us de novo.'").

occurred in the workplace. Under this test, the ALJ was tasked with resolving whether Robinson's conduct was so egregious as to lose the protection of the Act by analyzing "(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."[71]

A. *First Suspension – ALJ Found* Atlantic Steel *Factors Weighed in Favor of Protection for the Use of Profane Language*

Robinson approached his manager to voice his concern about an agreement he believed the union had with management to provide overtime coverage for employees required to miss their shifts to attend cross-training.[72] Robinson's manager told him that they did not have an agreement and were not required to provide overtime coverage.[73] Because Robinson believed they were not bargaining in good faith, he told his manager that the employees would not engage in cross-training if management did not uphold their end of the deal.[74] His manager told Robinson that he had no authority to direct the employees and that management would conduct cross-training how they saw fit.[75] Robinson responded by telling his manager to "shove [the training] . . . up your fucking ass."[76]

As Robinson was walking away, his manager stated that he was putting Robinson on notice that he may be disciplined.[77] In an outburst of anger from his manager's unwillingness to abide by their agreement, Robinson said, "we're not going to do any fuckin' cross-training if you're going to be acting that way," and "you want to play games with me? That's what we'll do, okay?"[78] After consideration of all the facts, the ALJ determined that Robinson's use of profanity was not so egregious as to lose the protection of the Act, meaning GM violated Section 8(a)(1) and 8(a)(3) by suspending him.[79]

The location of discussion factor weighed in favor of Section 7 protection because, although the altercation occurred on the shop floor outside of a manager's office, the machinery was too loud for employees to hear and the only witnesses were management.[80] Where an employee's outburst does not disrupt production or the work of other employees, the Board generally affords protection.[81] The ALJ

71. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979).

72. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 13 (July 21, 2020) (citing to the Administrative Law Judge's attached opinion).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 13.

77. *Id.* at 21.

78. *Id.*

79. *Id*. at 20.

80. *Id.*

81. Fresenius USA Mfg., Inc., 358 N.L.R.B. No. 138, slip op. at 6 (2012) (Conduct that occurs in a place unlikely to disrupt production favors continued protection).

also noted that there was no evidence to conclude that Robinson's momentary outburst affected management's ability to maintain discipline.[82]

Next, the ALJ found that the subject matter factor also weighed in favor of protection because the verbal altercation was directly connected to Section 7 protected activity.[83] Robinson was expressing his bargaining unit's belief that management breached a verbal agreement to provide overtime coverage, which undoubtedly constituted activity protected under Section 7.[84]

The ALJ also concluded that the nature of the outburst factor weighed in favor of Section 7 protection.[85] Where an employee's outburst is "single, brief, and spontaneous," even if somewhat offensive, the employee maintains the protections of the Act.[86] The ALJ once again weighed the rights of the union representative to be a zealous advocate against the rights of management to maintain order.[87] Although Robinson did use profanity, his outburst did not include any threats of violence, nor was there any evidence that any member of management feared for their safety.[88] The ALJ noted that Robinson's comment where he told his manager that he could "shove [the training] . . . up [his] 'fuckin' ass'" was a figure of speech and not a threat.[89]

Lastly, the ALJ held that the provocation factor weighed slightly in favor of protection.[90] Where an employee uses profane or offensive language in response to an employer's ULP, the employee retains protection under the Act.[91] Even where the employer's actions do not constitute an ULP, an employer's purposeful obstruction or provocation by other means may be sufficient to constitute provocation under *Atlantic Steel*.[92] Here, although there was no evidence that the refusal to provide overtime coverage was a legitimate ULP, the refusal to discuss

---

82. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 20 (July 21, 2020) (citing to the Administrative Law Judge's attached opinion).

83. *Id.*

84. *Id.*

85. *Id.* at 21.

86. Kiewit Power Constructors Co., 355 N.L.R.B. 708, 710-11 (2010), *enforced*, 652 F.3d 22 (D.C. Cir. 2011) (Protection of the Act may be lost in "cases where employees engaged in concerted actions that exceeded the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the conduct is so violent or of such character to render the employee unfit for further service.").

87. *Gen. Motors LLC*, slip op. at 21.

88. *Id.* at 21-22 (citing to the Administrative Law Judge's attached opinion).

89. *Id.*; *see also* Kay Fries, Inc., 265 N.L.R.B. 1077, 1089 (1982) (finding that the comment "[f]uck the $80" and "shove the $80 up your fucking ass" was not a threat, but a figure of speech indicating management should keep the money, and therefore, did not lose the Act's protection).

90. *Gen. Motors LLC*, slip op. at 22 (citing to the Administrative Law Judge's attached opinion).

91. NLRB v. M & B Headwear Co., 349 F.2d 170, 174 (4th Cir. 1965) ("An employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment."); *see* Care Initiatives, 321 N.L.R.B. 144, 152 (1996) (articulating that "an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee.") (quoting N.L.R.B. v. South West Bell Telephone Co., 694 F.2d 974, 978 (5th Cir. 1982)).

92. Overnite Transp. Co., 343 N.L.R.B. 1431, 1437-38 (2004) (A supervisor essentially provoked the employee by engaging in a complete and hostile refusal to address a union steward's request for information regarding a possible discharge grievance).

the situation reasonably provoked Robinson's legitimate belief that it was an ULP and breach of their agreement.[93]

B. *Second Suspension – ALJ Found* Atlantic Steel *Factors Weighed Against Protection for the Use of Racial Discriminatory Language*

Robinson's second suspension occurred after a meeting where he raised concerns over the subcontracting of workers, another clear example of Section 7 protected activity.[94] After the refusal of his managers to answer his questions, Robinson raised his voice out of frustration. His manager told Robinson that he was speaking too loudly and that he was being "intimidating."[95] Robinson responded by saying in a faint voice, "[s]ir, you want me to talk like this, sir, so I don't be intimidating you?"[96] Management's witnesses testified that Robinson grew more aggressive and was acting unprofessionally.[97] But Robinson characterized the way management accused him of intimidating them for simply asking important questions to be racist, and said that management "always made me out like I was threatening and intimidating them in meetings because I'm Black, and because of my size."[98]

To highlight his frustration with what he believed to be discrimination, Robinson responded, "[y]es, Master, Your Master Anthony" and "[i]s this what you want me to do, Master Anthony? Is that what you're telling me to do, be a good black man?"[99] The ALJ described the language as "reminiscent of a slave talking to his master."[100] After analyzing all the facts, the ALJ held that Robinson's conduct was so opprobrious as to lose the Act's protection, meaning GM did not violate Section 8(a)(1) or 8(a)(3) for suspending Robinson.[101]

The ALJ in this instance found that the location of discussion factor weighed in favor of protection.[102] The meeting was behind closed doors, only members of the union and management attended, and there was no disruption to the workplace.[103] Additionally, the ALJ found that the subject matter factor also

93. *Gen. Motors LLC*, slip op. at 22 (citing to the Administrative Law Judge's attached opinion).
94. *Id.*
95. *Id.* at 15.
96. *Id.*
97. *Id.*
98. Josh Eidelson & Hassan Kanu, *It's Now Even Easier to Fire U.S. Workers for What They Say*, BLOOMBERG (July 30, 2020, 6:14 AM), https://www.bloomberg.com/news/articles/2020-07-30/it-s-now-even-easier-to-fire-u-s-workers-for-what-they-say (This statement was made by Robinson in an interview with Bloomberg News).
99. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 21-22 (July 21, 2020) (citing to the Administrative Law Judge's attached opinion).
100. *Id.* at 16.
101. *Id.* at 22.
102. *Id.*
103. *Id.*

weighed in favor of protection.[104] The meeting was directly related to the terms and conditions of employment which afforded Robinson Section 7 protection.[105]

The ALJ found that the nature of the outburst factor weighed only moderately against protection,[106] noting that because Robinson used "slave vernacular" by calling management master and inferring that management wanted him to act like a slave,[107] Robinson's conduct was not in response to the protected activity, but rather out of personal animosity towards his manager.[108] The ALJ ultimately concluded that Robinson's actions negatively affected other attendees and their ability to conduct their work, rendering Robinson unfit to further carry out his duties at that meeting.[109]

Lastly, the ALJ found that the provocation factor did not weigh in favor of protection.[110] Even though Robinson raised his voice because he believed management breached the CBA, the ALJ reasoned that there was no breach because Robinson's request for information was only a few days old, and there was no indication that management's insistence that Robinson narrow his request before answering questions about subcontracting was an ULP.[111]

C. *Third Suspension – ALJ Found* Atlantic Steel *Factors Weighed Against Protection for Continually Playing Profane Music*

Robinson's third suspension occurred following a regularly scheduled meeting between management and the Union to discuss a new classification of workers that would directly impact Robinson's bargaining unit.[112] Robinson informed management that he disagreed with the new classification and was planning to take the issue to the union chairman.[113] The ALJ found that the nature of the outburst and lack of provocation weighed heavily against protection; for this reason, Robinson lost protection of the Act and GM did not violate Section 8(a)(1) or 8(a)(3) for the suspending him.[114]

Since this meeting took place in the same conference room as the subcontracting meeting, the ALJ found that the location of discussion factor weighed in favor of protection.[115] Similarly, because the regularly scheduled meeting was designated to discuss manpower issues and directly related to the CBA, the subject matter factor weighed in favor of protection.[116]

---

104. *Id.*
105. *Id.*
106. *Id.* at 22-23.
107. *Id.* at 23.
108. *Id.*
109. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 2 (July 21, 2020) (citing to the Administrative Law Judge's attached opinion).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

Contrarily, the nature of the outburst factor weighed against protection. Robinson's first comment to management that he would "mess [them] up" did not constitute a direct threat because it was not made in a "menacing or aggressive" fashion, nor did anyone present at the meeting leave the room or seek security.[117] This expression was compared to a comment made in *Kiewit* where the employee said to management, "it's going to get ugly and you better bring your boxing gloves."[118] The ALJ determined that the phrase was a figure of speech related to the protected activity.[119] However, Robinson continued to push the bounds of the protection provided by Section 7, and the ALJ determined that playing offensive and profane music for a span of fifteen minutes during a professional meeting for the sole purpose of annoying management was a clear example of the sort of flagrant and egregious conduct that would render an employee unfit for further service and remove the Act's protection.[120] In the context of the meeting, playing offensive music for fifteen minutes was not brief and spontaneous, but it was obnoxious, wholly unjustified, and not part of the *res gestae* of his protected activity.[121]

The ALJ also found that there was no provocation that led to his outburst.[122] The ALJ did not believe that Robinson's true reason for his conduct was his belief that management was violating the CBA, but that he played the music as a self-serving way to harass his manager.[123] When an employee's outburst is unprovoked, obscene, and insubordinate, discipline will generally be upheld.[124]

Following the ALJ's ruling, the NLRB's General Counsel, on behalf of Robinson, filed exceptions to the ALJ's holding. The General Counsel excepted to the holding that Robinson's conduct in the second meeting was not protected by the Act under the *Atlantic Steel* test.[125] GM filed exceptions not only to the ALJ's holdings that some of Robinson's conduct was protected by the NLRA, but they

---

117. *Id.*

118. *Id.* at 24 (citing Kiewitt, 355 N.L.R.B. 708, 710 (2010) (noting that the absence of a direct threat weighs in favor of protection)).

119. Kiewitt, 355 N.L.R.B. 708, 716, *enforced*, 652 F.3D 22 (D.C. Cir. 2011); s*ee also* American Tel. & Tel. Co., 211 N.L.R.B. 782, 83 (1974) ("we have long recognized that the disagreements which arise in the collective-bargaining setting sometimes tend to provoke commentary which may be less than mannerly, and that the use of strong language in the course of protected activities supplies no legal justification for disciplining or threatening to discipline an employee acting in a representative capacity, except in the most flagrant or egregious of cases.").

120. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 24 (July 21, 2020) (citing to the Administrative Law Judge's attached opinion).

121. *Id.*; *see also Kiewitt*, 355 N.L.R.B. at 716 (holding that remarks which were "intemperate" but brief and spontaneous reactions were protected under Section 7); Clara Barton Terrace Convalescent Ctr., 225 N.L.R.B. 1028, 1034 (1976) (activity protected unless "the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure.").

122. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 24 (July 21, 2020) (citing to the Administrative Law Judge's attached opinion).

123. *Id.*

124. Marico Enters., 283 N.L.R.B. 726, 732 (1987) (Employee's unprovoked, extreme, and abusive conduct was found to be egregious and disruptive enough to warrant discharge).

125. Gen. Motors LLC, slip op. at 2.

went beyond the scope of the case and requested that the full Board overrule setting-specific tests and all cases that held "profane and racist outbursts did not lose their protection under the NLRA," even though *Atlantic Steel* was the only test at issue in *General Motors*.[126] Following these exceptions, the Trump Board requested amicus briefs on the issue of the utility of the setting-specific tests.[127] Ultimately, after receiving numerous briefs from organizations on all sides of the issue, the Trump Board abolished all the setting-specific tests in favor of the *Wright Line* standard.[128]

IV. *GENERAL MOTORS* – RATIONALES AND REBUTTALS FOR THE IMPLEMENTATION OF THE *WRIGHT LINE* STANDARD OVER THE SETTING-SPECIFIC TESTS

In a "long-awaited decision" for employers,[129] the Trump Board overruled decades of precedent affording protections to employees engaged in Section 7 protected activities.[130] The Trump Board proffered four main rationales for their consequential decision in *General Motors* to adopt the *Wright Line* standard and scrap the setting-specific tests: (1) the NLRB has mistakenly assumed in their previous setting-specific tests that causation is automatically established where conduct occurs during or in close proximity to protected activity and the *Wright Line* standard would properly remedy this misconception;[131] (2) that the setting-

126. Brief for the Equal Employment Opportunity Commission as Amici Curiae Supporting Charging Party, Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 7 (July 21, 2020), at 5 (highlighting the exceptions filed by GM) [hereinafter EEOC Amicus Brief].

127. *Id.* at 6 (asking "(1) under what circumstances should profane language or sexually or racially offensive speech lose protection; (2) whether the leeway traditionally granted Section 7 activity to account for 'the realities of the industrial life and the fact that disputes over wages, hours, and working conditions' are likely to engender ill feelings and strong responses should extend to profanity or racist or sexist language; (3) whether the NLRB should continue to consider 'the norms of the workplace, particularly whether profanity is commonplace and tolerated," and whether the NLRB 'should consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior'; (4) whether the NLRB should reconsider its standard for racially or sexually offensive language used on the picket line, and whether the picket line context is relevant; and (5) what relevance should be accorded 'antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection' of the NLRA, and how should the NLRB accommodate both an employer's duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights.").

128. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 7 (July 21, 2020).

129. Garrison & Dorson, *NLRB Decision Gives Employers More Freedom to Address Offensive and Abusive Conduct*, NAT'L L. REV. (Jul. 27, 2020), https://www.natlawreview.com/article/nlrb-decision-gives-employers-more-freedom-to-address-offensive-and-abusive-conduct.

130. Robert M. Schwartz, *Trump Labor Board Upends Special Protection of Union Stewards*, LABOR NOTES (Sept. 9, 2020), https://labornotes.org/2020/09/trump-labor-board-upends-special-status-union-stewards.

131. Gen. Motors LLC, slip op. at 1 ("The Board has assumed that abusive conduct and the Section 7 activity are analytically inseparable. In other words, the Board has presumed a causal connection between the Section 7 activity and the discipline at issue, rendering the *Wright Line* standard–typically used to determine whether discipline was an unlawful response to protected conduct or lawfully based on reasons unrelated to protected conduct–inapplicable. As a result, the Board has not taken into account employers' arguments that the discipline at issue was motivated

specific tests have produced inconsistent and inequitable results;[132] (3) that the setting-specific tests ignore employers' right to maintain order and respect in the workplace;[133] and (4) that the setting-specific tests have protected conduct under the NLRA that would otherwise open employers to liability under anti-discrimination statutes such as Title VII.[134]

The Trump Board promised that using the *Wright Line* standard in this context would result in "more reliable, less arbitrary, and more equitable treatment of abusive conduct" than was seen with the setting-specific tests.[135] Reliability and equity are facially reasonable objectives, but a closer look indicates the Trump Board was actually paving a clear path for employers to discipline employees for their Section 7 protected conduct, regardless of the surrounding circumstances, which is a move the NLRB and federal courts have flatly rejected.[136] This section will address each rationale the Trump Board proffered to support their decision to adopt the *Wright Line* standard and provide the union perspective on why these rationales are incorrect.

A. *Presuming Antiunion Motivation is Appropriate Under Section 8(a)(3) in* Res Gestae *Cases*

Under the setting-specific tests, antiunion motive was presumed, and the employee only lost protection if their conduct exceeded the bounds of Section 7.[137] The Trump Board disagreed with this analysis, and argued that because "the General Counsel alleges discipline was motivated by Section 7 activity and the

---

solely by the abusive form or manner of the Section 7 activity or that the employer would have issued the same discipline for the abusive conduct even in the absence of Section 7 activity.").

132. *Id.* ("These setting-specific standards aimed at deciding whether an employee has or has not lost the Act's protection, however, have failed to yield predictable, equitable results.").

133. *Id.*

134. *Id*. ("In some instances, violations found under these standards have conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws.").

135. *Id.* at 10.

136. Josh Eidelson & Hassan Kanu, *It's Now Even Easier to Fire U.S. Workers for What They Say*, BLOOMBERG (July 30, 2020, 6:14 AM), https://www.bloomberg.com/news/articles/2020-07-30/it-s-now-even-easier-to-fire-u-s-workers-for-what-they-say (Former NLRB Chairman, Gaston Pearce, said that "the employer's ability to establish a defense" under *Wright Line* "will be a hundred times easier."); *see also* Roemer Indus., Inc., 362 N.L.R.B. 828, 834 n.15 (2015) ("Where 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."); NLRB v. Starbucks Corp., 679 F.3d 70, 78 (2d Cir. 2012) (noting that employees engaged in Section 7 activity are granted "some leeway for impulsive behavior.").

137. Honda of America, 334 N.L.R.B. 746, 747 (2001) ("Nevertheless, an employee's otherwise protected activity may become unprotected 'if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language.'") (quoting Am. Hosp. Ass'n 230 N.L.R.B. 54, 57 (1977)); *see also* United Cable Television Corp., 299 N.L.R.B. 138, 142 (1990) (In order for an employee engaged in Section 7 activity to forfeit their Section 7 protection, the employee's conduct must "be so 'flagrant, violent, or extreme' as to render [the employee] unfit for further service.") (quoting Dreis & Krump Mfg., 221 N.L.R.B. 309, 315 (1975), *enforced*, 544 F.2d 320 (7th Cir. 1976)).

employer contends it was motivated by abusive conduct, causation is at issue."[138] With causation at issue, they concluded that it was necessary to separate the abusive conduct from the Section 7 activity to discern motivation in the determination of whether the employer committed a ULP.[139]

The Trump Board cited *NLRB v. Great Dane Trailers, Inc.*, as support for the proposition that the setting-specific tests improperly and unfairly inferred antiunion motivation in *res gestae* cases, even in the face of a legitimate business justification proffered by the employer.[140] It argued that proof of antiunion motive is required to be proved under Section 8(a)(3), even where an employee was disciplined while engaged in Section 7 protected activity.[141] But the Court's rule established in *Great Dane Trailers* does not clearly support the proposition that proof of antiunion motive is always required in Section 8(a)(3) cases.

In *Great Dane Trailers*, the Supreme Court created two separate categories of actions to determine whether it is appropriate to infer that an employer acted with antiunion motive.[142] In the first category, the Court considers whether an employer's action was "inherently destructive of important employee rights," and if it was, the Board could then properly infer antiunion motive, even if a legitimate business justification was cited.[143] In the second category, if the employer's action caused a "comparatively slight" adverse impact on the employee's right, then "an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."[144]

It is important to note that the ULPs in *Great Dane Trailers* were related to the employer's collective retaliation against the entire bargaining unit rather than a single disciplinary case as in *General Motors* where the discipline was for conduct that occurred during Section 7 protected activity. The Supreme Court has not clarified how this standard applies to other Section 8(a)(3) cases. Essentially, "[i]t is anyone's guess what conduct is, and what conduct is not, 'inherently destructive'; you might as well ask a Great Dane."[145] Nonetheless, under the standard established in *Great Dane Trailers,* the Court contradicts the Trump Board's assertion that proof of antiunion motive is *always* required in Section 8(a)(3) cases.

The Supreme Court plainly stated that antiunion motive can be inferred where an employer's conduct is "inherently destructive" to employee's Section 7 rights even if the employer provides a legitimate business justification. If it is left to employers to determine what is Section 7 protected activity and what is "uncivil" or "offensive" conduct, employees will become increasingly hesitant to exercise

138. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 1-2 (July 21, 2020).
139. *Id.*
140. *Id.* at 9.
141. *Id.*
142. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).
143. *Id.*
144. *Id.* (emphasis in original).
145. Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 FLA. ST. U. L. REV. 52, 77-78 (2004).

their rights under the NLRA out of fear of retaliation and discipline. If employers were able to freely discipline employees engaged in Section 7 activity, citing any variation of broad workplace rules, it is very likely that such actions would have an inherently destructive chilling effect on every employee's Section 7 rights.[146]

Previously, under the setting-specific tests, any disciplinary action for conduct that did not exceed Section 7's protection would have been found to have an inherently destructive chilling effect on Section 7 rights and the employer would have violated Sections 8(a)(3) and (1). Thus, under the *Great Dane* test, and the general understanding of Section 7 and its purpose, the Board would be correct to infer antiunion motive under the setting-specific tests where an employee was disciplined for conduct during their Section 7 protected activity. The employer is not without recourse. If the employee's conduct was severe and the employer did not provoke the conduct, the Board would likely determine the conduct was unprotected and allow for discipline, as was seen in the *General Motors* case.

More importantly, federal courts have not once repudiated or refused to enforce an NLRB holding in a *res gestae* case that both inferred antiunion motive under the setting-specific tests and that found the employer in violation of Section 8(a)(3) – strengthening the argument that a showing of antiunion motive is not required in cases where the employer disciplines an employee for conduct that was part of the *res gestae* of their Section 7 protected activity.[147]

1. Res Gestae *Cases Should be Decided Under Section 8(a)(1) Which Does Not Require Showing of Antiunion Motivation*

Generally, when an employer disciplined an employee for conduct that occurred during protected activity, and the employee's conduct did not exceed Section 7 protection, the NLRB found that the employer violated both section 8(a)(1) and 8(a)(3).[148] In the alternative to the Trump Board's argument that antiunion motive must be shown under 8(a)(3), the discipline or termination of an employee for their *res gestae* Section 7 conduct is more properly categorized as Section 8(a)(1) ULP. Under this analysis, "anti-union motive is not an element of a Section 8(a)(1) violation."[149]

For example, in *Lutheran Heritage*, the Board noted that they have "repeatedly recognized that mere maintenance of overbroad work rules can violate

146. Bettcher Mfg., 76 N.L.R.B. 526, 527 (1948) ("If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.").

147. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 4 n.6 (July 21, 2020).

148. *See, e.g.*, NLRB v. Pier Sixty, LLC, 855 F.3d 115, 117 (2nd Cir. 2017) (finding that the employer "violated Section 8(a)(3) and (1) by discharging Hernan Perez because of his protected, concerted comments made in a posting on social media").

149. PAUL M SECUNDA, ET AL., MASTERING LABOR LAW 107 (2014).

Section 8(a)(1)."[150] Under this standard, rules that could be "reasonably construe[d]" by an employee to restrict the exercise of their rights under the NLRA violated 8(a)(1).[151] But in *Boeing Co.*, the Trump Board overruled *Lutheran Heritage* in favor of a balancing test that weighs both employer and employee rights in the determination of whether workplace rules violate the NLRA.[152] The Trump Board then held that long contested civility codes are lawful in all instances, even if they have an adverse impact on an employee's ability to engage in Section 7 rights.[153]

The Trump Board is correct that employers generally have the right to establish workplace rules regulating conduct,[154] but in *Boeing*, the Trump Board neglected to draft into their new standard the almost nine decades of precedent establishing that employees must be granted leeway in the manner they can advocate for their rights under Section 7, regardless of what the employer feels is appropriate.[155] Professor Michael Duff, national legal expert on the NLRA, argues that allowing each employer to determine what constitutes civil versus uncivil conduct grants employers too much authority to "police threats to their own power."[156] He says that ultimately, employers "are in control," and "man, you don't raise your voice to the master."[157]

Understanding that it is the role of the NLRB to decide when an employee loses Section 7 protection, the NLRB should overrule the Trump Board's *Boeing* decision, and adopt a correct standard that makes clear that an employer cannot discipline an employee for conduct that occurs during Section 7 protected activity unless the Board decides the conduct lost the Act's protection.[158] Otherwise, an employer has license to interfere in and violate an employee's Section 7 rights by disciplining them for any conduct the employer does not find acceptable.[159] As

150. Lutheran Heritage, 343 N.L.R.B. 646, 649 (2004), *overruled by* 365 N.L.R.B. No. 154 (2017).

151. *Id.* at 650.

152. *See* Boeing Co., 365 N.L.R.B. No. 154 at 4.

153. *Id.* (holding that "rules requiring employees to abide by basic standards of civility" are always "'lawful to maintain.").

154. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967) (noting the "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy").

155. *See* discussion *supra* Parts I, II.

156. Eidelson & Kanu, *supra* note 99 ("Companies often abuse their power when deciding what sorts of speech to punish, an affiliate of the Services Employees International Union argued in a filing in the GM case last fall. The union cited an example of a Black school security assistant in Wisconsin who was terminated for repeating a racist slur in the process of explaining to a student why it was offensive. (The employee was rehired after a protest walkout by students and outcry from figures including the artist Cher.)").

157. *Id.*

158. *General Counsel Abruzzo Releases Memorandum Presenting Issue Priorities*, NLRB (Aug. 12, 2021), https://www.nlrb.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue. (The new NLRB General Counsel has indicated that they will seek to overturn the Boeing decision) [hereinafter Abruzzo Memo].

159. Walter E. Oberer, *Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act of Balancing Hostile Motive Dogs and Tails*, 52 CORNELL L. REV. 491, 492-93 (1967) (The purpose of Section 8(a)(1) supports the idea that employers should not have the authority to police their own power

seen by the *Boeing* case, the Trump Board, in anticipation of a case like *General Motors*, overturned precedent in many areas of private sector labor law that paved the way for the holding. The argument that antiunion motive is required in all cases and that antiunion motive can never be inferred is not one founded in deeply rooted understandings of the NLRA, but it is founded on recent, volatile, and partisan changes in labor law that have no basis under established private sector labor law.

Under the new employer defense in *Wright Line*, and the rules established in *Boeing* and its progeny, if an employer can point to an established civility code or an overly broad non-disparagement rule prohibiting conduct an employer deems "offensive" as a rationale for terminating an employee, even if the employee's outburst was provoked, or used to make an important point, the Board will likely not hold that an employer committed an ULP under Section 8(a)(1) or (3). Employee conduct will now be evaluated in a vacuum that only considers the language of a rule written by the employer with no consideration for the surrounding circumstances or fact that the employee was engaged in protected activity.[160] The Trump Board has effectively abrogated all previous precedent establishing leeway and protection for employees who engage in impulsive, intemperate, and offensive behavior during Section 7 protected activity, rending Section 7 essentially void of any meaningful protection.

B. *The Setting-Specific Tests Do Not Produce Inconsistent Results*

The Trump Board argued that the NLRB's setting-specific tests produced inconsistent and inequitable results.[161] But the fact that these tests produce varying outcomes is not novel or surprising for a legal standard that evaluates fact specific cases. And it is even less surprising considering that the political makeup of the NLRB at any given time influences how members adjudicate ULP cases.[162] More importantly, even assuming that it is true that the setting-specific tests did result in inconsistent or inequitable results, the Board's holdings would not be any less consistent or equitable under the *Wright Line* standard.

---

through broad workplace rules that apply to Section 7 protected activity the same as the general workplace. "Section 8(1): This is a blanket unfair labor practice, to protect the rights cited in section 7 . . . employers will doubtless find methods of interference, etc., which are not specifically recited in the other unfair practices, but are just as effective in impeding self-organization and collective bargaining. Thus, subdivisions (2), (3), and (4) and [sic] are not exclusive, and, furthermore do not limit the general scope of subdivision (1).").

160. *See* NLRB v. Thor Power Tool Co., 351 F.2d 584, 586 (7th Cir. 1965) (An employee's challenged conduct that occurs during Section 7 protected activity "cannot be considered in a vacuum" nor "separated from what led up to it").

161. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 4 (July 21, 2020) ("The Board has not assigned specific weight to any of the factors generally, and it has chosen in specific cases to give certain factors more or less weight without adequately explaining why.").

162. *See generally* William N. Cooke & Frederick H. Gautschi II, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 INDUS. & LAB. REL. REV. 539 (1982) (evidencing that the political ideology of the President appointing Board members is indicative of how members adjudicate unfair labor practice charges after their appointments. Republicans generally adopt pro-employer rules and policies, while Democrats generally adopt pro-labor rules and policies.).

Under the *Wright Line* standard, an employee must establish a prima facie ULP case by showing that (1) they were engaged in protected activity; (2) the employer knew of the protected activity; and (3) the employer held animus towards the union or protected activity.[163] Once an employee establishes these elements, the burden shifts to the employer to prove that they would have disciplined or terminated the employee regardless of the employee's involvement in protected activity.[164] In *Transportation Management,* the Supreme Court added a third shift in the burden, and stated that if the employer provides a legitimate reason for the discipline, the Board can properly infer antiunion motive if the employee can show the employer's stated reason for discipline was simply pretext for the employer's antiunion motive.[165]

The first question the General Counsel must ask is how much evidence, at the prima facie stage, does an employee need to present to prove that the employer's "official stated" reason for discipline was, in reality, pretext for antiunion animus? The Obama Board held that the General Counsel did not need to show specific, particularized evidence of animus towards the employee's involvement in protected activity or the union in order to satisfy the animus requirement in the prima facie stage.[166] Just prior to the Board's adoption of the *Wright Line* standard in the *res gestae* context, the Trump Board changed the General Counsel's evidentiary burden to make it more difficult to establish the that the employer's "official stated" reason was pretextual. In *Tschiggfrie*, the Trump Board held that the General Counsel is required to show specific, particularized evidence of antiunion animus to establish a prima facie case, ensuring that an employee will have a difficult time raising ULP claims.[167]

To understand why the *Wright Line* standard is not the correct standard for cases where the discipline is directly tied to protected Section 7 activity, it is important to know what types of evidence an employee can provide to prove pretext. In the context for which *Wright Line* was established, where the protected activity and alleged misconduct do not occur at the same time, an employee could use the temporal proximity or the suspicious timing of discipline to establish the employer's animus towards their protected activity.[168] However, temporal

163. Joel Dillard, *Bump, Set, & Spike: Labor Discrimination Volleyball*, https://www.joeldillard.com/wright-line-labor-discrimination-volleyball.shtml (last visited June 22, 2021) (comparing the burden shifting framework of the *Wright Line* standard to the various plays available in volleyball).

164. Wright Line, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *approved in* 462 U.S. 393 (1983).

165. *See* NLRB v. Transp. Mgmt. Corp., 426 U.S. 393, 398 (1983); Camaco Lorain Mfg. Plant, 356 N.L.R.B. No. 143, slip op. at 4 (2011).

166. Com. Air, Inc., 362 N.L.R.B. 379, 379 n.1 (2015) ("Under *Wright Line*, proving that an employee's protected activity was a motivating factor in the employer's action does not require the General Counsel to make a particularized showing of animus towards the disciplined employee's own protected activity.").

167. Tschiggfrie Props., Ltd., 368 N.L.R.B. No. 120, slip op. at 7 (Nov. 22, 2019). *But see* Abruzzo Memo, *supra* note 159 (suggesting that the Biden NLRB will reconsider the Trump Board's heightened "animus requirement for the General Counsel's prima facie burden in Wright Line cases.").

168. *See, e.g.*, Parkview Lounge, LLC d/b/a Ascent Lounge, 366 N.L.R.B. No. 71, slip op. at 2 (Apr. 26, 2018), *enforced*, 790 Fed. App'x 256 (2d Cir. 2019).

proximity cannot be used as evidence of pretext in the Section 7 protected activity context because the alleged misconduct occurs during the protected conduct. Thus, employees are left with two types of evidence to prove pretext: (1) direct statements of antiunion animus (also known as "smoking gun" evidence); and (2) disparate application of discipline for the same conduct.[169]

As for direct statements of antiunion animus, a careful employer is not likely to provide a smoking gun statement admitting that an employee's protected activity motivated their decision to implement discipline, so an employee will rarely be able to rely on this type of evidence. Prior to the Trump Board, disparate use of discipline had been successfully used by employees to show that an employer's stated reason for their discipline was simply pretextual.[170] But in *Electrolux Home Products, Inc*.,[171] the Trump Board signaled that the use of disparate discipline as evidence for establishing pretext may no longer satisfy the elements of a prima facie case under *Wright Line,* dealing another devastating blow to workers.[172]

Dissenting Board Member Lauren McFerran went as far to say that the majority in *Electrolux Home Products, Inc*., was on the verge of abandoning the Supreme Court's rule in *Transportation Management* and made clear that this holding "marks the first time in history the Board has declined to find a violation of the Act when there is clear reason to infer an antiunion motive and *no* evidence – other than hypotheses spun by the majority itself – of *any* other lawful motive."[173] Although the Trump Board champions *Wright Line* as a fair and equitable test, an employee is left with few, if any, avenues to prove antiunion animus under the heightened evidentiary standard, even when antiunion animus is apparent on the face of the claim.

169. Pontiac Care & Rehab. Ctr., 344 N.L.R.B. 761, 767 (2005) (noting that pretext "is sometimes, if not often, inferred from a blatant disparity in the manner i[n] which an alleged discriminate is treated as compared with similarly situated employees with no known union sympathies or activities (i.e., disparate treatment).").

170. Relco Locomotives, Inc., 358 N.L.R.B. 229, 229 (2012), *enforced*, 734 F.3d 764 (8th Cir. 2013) (finding employer's stated reason for discharge was simply pretext for union animus where employer told employee to "shut up and sit down" during a captive audience meeting).

171. *See* Electrolux Home Prods., Inc, 368 N.L.R.B. No. 34, slip op. at 7-9 (Aug. 2, 2019) (McFerran, M., dissenting in part) (criticizing the Majority for not finding pretext because of disparate treatment where the employer told an employee to "shut up" because "she did not know what she was talking about," during a captive audience meeting, and a few months later where the employee was terminated for failing to complete a simple work task, even though the employer had never terminated an employee for their first instance of insubordination and failed to provide an explanation for the disparity in treatment).

172. *Id.* ("[T]his decision calls into question the Board's longstanding tenets regarding pretext and marks the first time in history the Board has declined to find a violation of the Act when there is clear reason to infer an antiunion motive and *no* evidence–other than hypotheses spun by the majority itself–of *any* other lawful motive. . . . I hope that this case is an aberration and not a sign that the majority intends to fundamentally alter the role of pretext in the *Wright Line* framework.").

173. *Id.* at 9.

C. *The Trump Board Overstated Conflicts Between the Setting-Specific Tests and Anti-Discrimination Statutes, Such as Title VII, as a Rationale for Adopting* Wright Line

Title VII prohibits workplace discrimination based on race, color, religion, sex, national origin, sexual orientation, and gender identity.[174] In the context of picket lines, collective bargaining meetings, union elections, and interactions between workers and management dealing with terms and conditions of employment, tensions are often high. Although the majority of the time employees are energetic, but respectful, while engaged in the protected activity, there have been a few notable instances where employees have resorted to discriminatory remarks in an attempt to voice their frustration with their employer.[175] In these few instances, the NLRB found an employer who terminated the employee for the use of discriminatory language during protected activity to be in violation of Section 8.[176]

Beyond an alleged desire to foster civility in the workplace, the Trump Board also raised concerns about the possible conflicts between the NLRA, Title VII, and similar anti-discrimination statutes.[177] The D.C. District Court sparked the discussion of the possible conflict in the remand of their *Constellium* case.[178] There, the D.C. District Court ordered the Board to consider a possible conflict between Constellium's obligations under Title VII and the Board's interpretation of the NLRA, an argument the Board did not address in their original decision.[179]

In *Constellium*, an employee was terminated for writing "Whore Board" on the company's overtime sign-up sheet in response to the employer's failure to bargain with the union over the implementation of a new overtime policy.[180] The Board found that the employee's use of the term "Whore Board" was protected activity stemming from a breach of the CBA and ordered the reinstatement of the employee.[181] The employer appealed the case to the D.C. District Court on the grounds that the word "whore" could constitute discrimination based on a person's sex, which is prohibited under Title VII.[182] The main argument on appeal was that if the employer was not permitted under the NLRA to terminate the employee for the discriminatory conduct, the NLRB was prohibiting them from effectuating

174. 42 U.S.C. § 2000e-2(a)-(c)*; see also* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1754 (2020).

175. *See* discussion *infra* Section IV.C.i.

176. *Id.*

177. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 3 (July 21, 2020) (The Trump Board asked the parties and amici "[w]hat 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 employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?").

178. Constellium Rolled Prods. Ravenswood, LLC v. NLRB, 945 F.3d 546, 548-49 (D.C. Cir. 2019), *denying enforcement*, 366 N.L.R.B. No. 131, slip op. at 1 (July 24, 2018).

179. *Id.*

180. Constellium Rolled Prods. Ravenswood, LLC, 366 N.L.R.B. No. 131, slip op. at 1-2 (July 24, 2018).

181. *Id.* at 2-3.

182. *Constellium Rolled Prods. Ravenswood, LLC*, 945 F.3d at 548.

their legal obligations under Title VII to take remedial action to prevent further discrimination, creating a conflict between the two statutes.[183] But, contrary to the Trump Board's characterization, the court's remand did not support the Trump Board's claim that the setting-specific tests were indifferent to employer's duties under Title VII,[184] only that the Board was required to address that argument.[185]

1. *Even if the NLRB Has Protected Discriminatory Conduct, the Conduct Would not Generally Create an Actionable Claim Under Title VII*

In *General Motors*, the Trump Board claimed that the NLRB's setting-specific tests are "wholly indifferent to employers' legal obligations to prevent hostile work environments."[186] Yet, the Board failed to cite any case law that has "held activity or conduct protected by the NLRA violated anti-discrimination laws."[187] Labor law attorney Ira Gottlieb further criticized the Trump Board's position, arguing that

> a conflict between protected speech and antidiscrimination law will seldom, if ever, arise. That is because most board cases involving such issues are about non-sexual (and non-racial) use of harsh or profane language, and/or involve a single or small number of objectionable statements that do not, by themselves, fit the definition of a hostile environment, that again calls for a totality of the circumstances approach.[188]

In contrast to the Trump Board's position, the *Atlantic Steel* test is in line with the requirements of Title VII. Title VII, just like the NLRA, was not drafted with the goal of creating a "general civility code" for the American workplace.[189]

To constitute an actionable claim under Title VII, the discriminatory conduct must be so severe or pervasive as to alter the working conditions of the plaintiff.[190]

---

183. *Id.* at 548-49.

184. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 7 (July 21, 2020).

185. This note unequivocally denounces discrimination based on a person's race, sex, religion, national origin, sexual orientation, gender identity, or any other statutorily protected trait. It also acknowledges that the Trump Board is certainly correct in their assertion that the NLRB is required to accommodate and integrate both Title VII and the NLRA to effectuate the Congressional objectives of both statutes. See Can-Am Plumbing, Inc. v. NLRB, 321 F.3d 145, 153 (D.C. Cir. 2003) (quoting Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.")).

186. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 7 (July 21, 2020).

187. Ira L. Gottlieb, *NLRB Decision Runs Over Workers' Rights*, DAILY J., https://www.dailyjournal.com/mcle/742-nlrb-decision-runs-over-workers-rights (Last visited Jan. 22, 2021).

188. *Id.*

189. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

190. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'")); *see also* Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment–an environment that a reasonable person would find hostile or abusive–is beyond Title VII's purview.

Under Title VII, the Supreme Court has held that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII."[191] Additionally, they have held that "offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[192] In determining whether conduct is reasonably severe or pervasive, courts also look at the discriminatory conduct in the context which it occurs. In *Oncale*, the Supreme Court made clear that in all harassment cases courts must engage in a "careful consideration of the social context in which particular behavior occurs and is experienced by its target."[193]

Atlantic Steel also accounts for whether conduct is severe or pervasive. Under the nature of the outburst factor, the Board must determine whether an employee's conduct is "extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure,"[194] and whether it is so "'flagrant, violent, or extreme' as to render [the employee] unfit for further service."[195] This totality of the circumstances analysis tracks closely to that used by courts to determine whether discriminatory conduct is severe or pervasive under Title VII.

Despite the setting-specific tests properly accounting for the requirements of Title VII, the Trump Board highlighted a few cases where they believe the NLRB protected conduct that would be found to be severe or pervasive under Title VII.[196] For example, the Trump Board criticized the decision in *Constellium,* where the Board held that an employee who wrote "Whore Board" on an overtime sheet retained protections under Section 7.[197] The term "whore" has two distinct meanings, (1) to describe a person as a "promiscuous or immoral woman" or (2) to describe someone as pursuing a "unworthy, or idolatrous desire."[198] In context, the Board held that "Whore Board" was intended to refer to employees who signed the overtime sheet as a someone who would choose money over their loyalty to their union, and was not used as discriminatory term based on a person's sex.[199] This decision tracks with the courts title VII precedent that has held that terms like "bitch" are not necessarily tied to sex and can hold various meanings depending on context.[200] For example, the Seventh Circuit held that if the term "bitch" is used

---

Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

191. *Meritor Sav. Bank*, 477 U.S. at 67.

192. *Faragher*, 524 U.S. at 788.

193. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998) (articulating that this analysis must consider "surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.").

194. Union Fork & Hoe Co., 241 N.L.R.B. 907, 908 (1979).

195. United Cable Television Corp., 299 N.L.R.B. 138, 142 (1990) (quoting Dreis & Krump Mfg., 221 N.L.R.B. 309, 315 (1975)) (alteration in original).

196. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 6 (July 21, 2020).

197. Constellium Rolled Prods. Ravenswood, LLC, 366 NLRB No. 131, slip op. at 2-3 (2018), *enforcement denied* 945 F.3d 546 (D.C. Cir. 2019).

198. *Whore*, MERRIAM-WEBSTER (2021).

199. *Constellium Rolled Prods. Ravenswood, LLC*, slip op. at 3.

200. Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167-68 (7th Cir. 1996), *abrogated on other grounds by* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)

to express personal animosity rather than to discriminate based on the person's sex, a claim would not be actionable under Title VII.[201]

The Trump Board also criticized the Board's handling of *Cooper Tire & Rubber Co.*, once again arguing that the Board protected conduct prohibited under Title VII, even though the Eighth Circuit ultimately rejected this argument. In *Cooper Tire*, the Board ordered the reinstatement of a white employee who was terminated for shouting, in a nonthreatening manner, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon[,]" at replacement employees crossing the picket lines in busses,[202] some of whom were Black.[203] The Eighth Circuit enforced the NLRB's holding, against the employer's objections, by noting that such offhand comments do not constitute a hostile work environment.[204] The Eighth Circuit's holding was consistent with its own case precedent and that of its sister circuits.[205] If the comments made by the striking employee were more severe, pervasive, or made in a threatening manner, the Eighth Circuit would have held there was a hostile work environment under Title VII, and the Board would have held that the employee lost section 7 protection under the *Clear Pine Mouldings* test.[206]

The Trump Board also criticized the board's handling of *Pier Sixty*, where the Board held that a restaurant employee maintained Section 7 protection for his social media post about an upcoming union election that read, "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!!!!!!!"[207] In the *General Motors* decision, the Trump Board sided with *Pier Sixty,* dissenting Member Harry Johnson who said that the employee's comments in the social media post were "not merely obscenities," but constituted an "epithet," a "slur," and a "vicious attack" on the restaurant manager's family, even though there was no evidence presented on the record that evidenced an actual intent to threaten the family.[208]

(stating that the mere fact that a defendant used a "pejorative term" that is more likely to be directed toward a female than a male does not alone establish unwelcome sexual conduct, and that "[w]hen a word is ambiguous, context is everything.").

201. *Id.* (finding that the use of the term "sick bitch" was used not because of the plaintiff's sex, rather because of their "failed relationship").

202. Cooper Tire & Rubber Co., 363 N.L.R.B. No. 194, slip op. at 7-10 (May 17, 2016).

203. *Id.*

204. Cooper Tire & Rubber Co. v. N.L.R.B., 866 F.3d 885, 891 (8th Cir. 2017).

205. *See* Smith v. Fairview Ridges Hosp., 625 F.3d 1076, 1085 (8th Cir. 2010) (finding a comment about fried chicken was not sufficient to create hostile work environment.); Reed v. Proctor & Gamble Mfg. Co., 556 Fed App'x 421, 433 (6th Cir. 2014) (Comments about fried chicken and watermelon were insufficient to establish hostile work environment).

206. Dowd v. United Steelworkers of America, 253 F.3d 1093, 1102 (8th Cir 2001) (affirming jury's verdict against employees where replacement workers "were subjected to racial slurs and threats of physical violence each time they drove into and out of the plant . . . picketers threw tacks down in the pathway of the plaintiffs' cars and spat on their car windows . . . [and] plaintiffs were fearful for their personal safety.").

207. Pier Sixty, LLC, 362 N.L.R.B. 505 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017).

208. *See Fuck*, DICTIONARY.COM, http://dictionary.reference.com/browse/fuck (last visited July 25, 2021) (stating that the word "fuck" followed by a pronoun, such as in *Pier Sixty*, "fuck his mother

More concerning than Member Johnson's erroneous characterization regarding the purpose of the employee's union-related social media post is his refusal to account for similar language and conduct by management in determining whether the employee's conduct was protected by Section 7.[209] On numerous occasions, the executive chef of the same restaurant "scream[ed] profanities such as 'motherfucker'" at the employees and would often ask employees questions like "[a]re you fucking stupid?" or "[w]hy are you fucking guys slow?"[210] In another instance, the general manager referred to a chef as a "'fucking little Mexican' and a 'motherfucker' who should 'eat shit.'"[211] Even in light of the discriminatory, offensive, and threatening work environment that the employees were subjected to, Member Johnson was adamant that the employee's social media post, which simply used variations of the word "fuck," somehow went "beyond" the type of profanity used in the workplace.[212]

The Trump Board cannot champion "civility" in the workplace while simultaneously ignoring, or better put, condoning, employer conduct that is meant to harass, demean, and discriminate against employees. In *General Motors*, the Trump Board disguised their true intention of stripping workers of their Section 7 rights under the guise of civility. Professor Christine O'Brien, expert on statutory conflicts and the NLRA, stated,

> [i]n 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 Sixty*.[213]

As misguided as the comments made in cases such as *Constellium*, *Cooper Tire*, and *Pier Sixty* are, the Trump Board provided no evidence to support their claim in *General Motors* that the NLRB has protected language or conduct that would otherwise be actionable under Title VII. In fact, the Trump Board agreed with

---

and his entire family," can indicate an expression of "anger, disgust, peremptory," which is categorically different than a threat). *But see* Pier Sixty, LLC, 362 N.L.R.B. 505, 509 (2015) (Johnson, M., dissenting), *enforced*, 855 F.3d 115 (2d Cir. 2017); Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 8 (July 21, 2020) (The Trump Board agreed with *Pier Sixty* dissenting Member Johnson that the employee's conduct should have not received protection from Section 7.).

209. Traverse City Osteopathic Hosp., 260 N.L.R.B. 1061, 1061-62 (1982) (The Board took into account the norms of the workplace including whether and to what extent profanity was commonly used).

210. Pier Sixty, LLC, 362 N.L.R.B. 505, 506 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017).

211. *Id.*

212. *Id.* at 509 (Johnson, M., dissenting).

213. Christine Neylon O'Brien, *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*, 12 WM. & MARY BUS. L. REV. 167, 213 (2020).

dissenting Member Lauren McFerran in their invitation for amicus briefs that no federal court of appeals has "repudiated the Board's tests in this area."[214]

To cover for the lack of concrete evidence, the Trump Board relied on the supposed "vehemence of judicial criticism," of which was from only a small fraction of judges.[215] The Trump Board's new rule ignores the reality that even federal courts disagree, significantly, on what conduct is sufficient to raise a Title VII discrimination claim.[216] Practically, the NLRB cannot be expected to adjudicate Title VII under the NLRA to a level of perfection that federal courts have struggled to achieve.[217] Rather, the Board can, to the best of its ability, keep the NLRA in line with Title VII as it is interpreted and applied, which they have effectively done thus far. *Constellium*, *Cooper Tire & Rubber Co*, and *Pier Sixty* illustrate that the NLRB's setting-specific tests are consistent with Title VII, case law, and the Supreme Court's rule in *Oncale*.[218]

2. Atlantic Steel *Is Not at Odds with Employer's Legal Obligations to Remedy Discrimination Under Title VII*

Even if cases such as *Constellium*, *Cooper Tire*, and *Pier Sixty* did not raise actionable Title VII claims, the Trump Board does have a valid legal concern that the Board's setting-specific tests may prohibit employers from taking measures to prevent further discriminatory conduct, as required under Title VII.[219] In *Vance v. Ball State University*, the Supreme Court held that an employer can be liable for the discriminatory conduct of a coworker or third party if they know of the harassment and fail to take reasonable steps to prevent further discrimination.[220] This means that once an employer is aware of discrimination, even if not sufficient to raise a claim under Title VII, they must still take reasonable steps to prevent continued discriminatory conduct.

Under the setting-specific tests, employers have posited that they were caught in a perpetual Catch-22, where they must either (1) discipline the employee and risk an ULP charge under Section 8 of the NLRA; or (2) open themselves to liability under Title VII for not taking reasonable steps to prevent further

---

214. Gen. Motors LLC, 368 N.L.R.B. No. 68, slip op. at 1 n.6 (Sept. 5, 2019) (The NLRB's call for amicus briefs).

215. *Id.*

216. Kate Tornone, *Supreme Court Won't Resolve Circuit Split on Sexual Harassment Standard*, HRDIVE (Dec. 9, 2020, 2:10 PM), https://www.hrdive.com/news/clear-circuit-split-on-sexual-harassment-requires-scotus-review-employee/589579/.

217. Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth., 826 F.2d 114, 121 (D.C. Cir. 1987) (holding, in reference to the Fair Labor Standards Act, that "to reconcile the tensions that will at times exist between the . . . objectives set forth in the Act . . . we are bound to defer to the agency's decisions balancing those objectives unless, in the context of the particular adjudication, the agency's decision is not reasonable, . . . or 'neither rests on specific congressional intent nor is consistent with the policies underlying the Act.'").

218. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998).

219. *Gen. Motors LLC*, slip op. at 7 (July 21, 2020) (citing the EEOC's amicus brief).

220. Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) ("If the harassing employee is the victim's co-worker, the employer is liable only of it was negligent in controlling working conditions."); *see also* 29 C.F.R. § 1604.11(e) (2009).

discrimination in their attempt to avoid an ULP.[221] But this argument is a false dichotomy.[222] In fact, the NLRA does allow employers to take action to remedy discriminatory conduct. Employers can provide warnings and trainings, as long as they are used on an equal basis and not applied disparately against employees for engaging in Section 7 protected activity. Again, if the conduct is actually severe or pervasive, the employer would be allowed to discipline or terminate the employee under the setting-specific tests.[223]

For example, the Trump Board itself cited two cases where the NLRB had allowed an employer to give written warnings in response to offensive conduct.[224] In *Verizon Wireless*, an employee was given a written warning because they referred to a supervisor as "that bitch" and called other supervisors "fucking supervisors."[225] Likewise, in *DaimlerChrysler*, the Board permitted an employer to give a written warning where the employee said, "bullshit, I want the meeting now," "fuck this shit," and that he did not "have to put up with this bullshit," and then called the supervisor an "asshole."[226] But the Trump Board argued that in *Postal Service*, where the employer was not permitted to give a written warning to a union steward who called his supervisor "an ass" in a grievance discussion was somehow more extreme than the previous two cases and deserved discipline.[227] The conduct in *Verizon Wireless* and *DaimlerChrysler* was egregious, unrelated to the protected activity, and not spontaneous. But in *Postal Service*, the conduct was short lived, spontaneous, and clearly related to the employee's protected activity. A few offhand swear words used in a heated negotiation are not surprising, and certainly do not deserve to lose protection of the Act, but that is exactly what the Trump Board intended to achieve.

The Trump Board's indignation with these decisions is misplaced. The Trump Board is generalizing factually distinct cases in an attempt to paint the holdings as inconsistent.[228] In the cases the Trump Board criticizes, the NLRB properly allowed the employer to use a written warning, a reasonable form of discipline, where the employee exceeded the general leeway and protections of Section 7, but did not allow an employer to terminate an employee who used only

221. Molly Gibbons, Comment, *License to Offend: How the NLRA Shields Perpetrators of Discrimination in the Workplace*, 95 WASH. L. REV. 1493, 1519 (2020).

222. *See, e.g.*, AFGE, Local 2031 v. FLRA, 878 F.2d 461, 465 (D.C. Cir. 1989) (finding that a reprimand by the Federal Labor Relations Authority was acceptable in light of the racial nature of the employee's conduct, because the agency is given broad deference, if reasonable, to balance any conflicts with other statutes).

223. Ira L. Gottlieb, *NLRB Decision Runs Over Workers' Rights*, DAILY J., https://www.dailyjournal.com/mcle/742-nlrb-decision-runs-over-workers-rights (last visited Sept. 28, 2021).

("Of course, if an employee were to engage in such severe sustained misconduct while still somehow maintaining a plausible claim for NLRA protection, the employer should have no trouble convincing a board that it was justified in discharging that employee.").

224. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 5 (July 21, 2020).

225. Verizon Wireless, 349 N.L.R.B. 640, 641-43 (2007).

226. DaimlerChrysler Corp., 344 N.L.R.B. 1324, 1328-30 (2005).

227. *Gen. Motors LLC*, slip op. at 5 (citing Postal Service, 364 N.L.R.B. No. 62 (2016)).

228. *Id.* at 5-6.

short-lived profanity during protected activity.[229] These cases demonstrate that the NLRB is functioning properly in adjudicating whether an employee maintains the protection of the Act or whether the conduct was outside the bounds of leeway offered under Section 7. Bright line tests, or examining an employee's conduct in a vacuum, would eviscerate the legislative purpose of the NLRA to safeguard employees' right to engage in protected, concerted activity.[230]

3. *Employers Improperly Rely on the Remedial Provision of Title VII to Disproportionately Discipline Employees Engaged in Section 7 Protected Activity*

Title VII does not require an employer to terminate an employee for discriminatory conduct. Rather, an employer can satisfy their duties under Title VII by implementing reasonable remedies such as trainings, warnings, or notices that signal to the employee that further discriminatory conduct is prohibited.[231] Yet, employers have routinely terminated employees who, for the first time, have used profane, offensive, or discriminatory language while engaged in protected activity.[232]

In *Airo Die Casting, Inc*., an employer terminated a striking employee for yelling "fuck you [N-word]" to a Black non-striker, citing the anti-harassment policy.[233] But the record indicated that in the same workplace, a facilitator in charge of operations at the facility also used the same term without receiving any level of discipline.[234] The ALJ noted, rather politely, that the employer "had difficulty in enforcing its harassment policy evenly in the workplace."[235] In reality, the ALJ was rebuking the employer for maintaining a double standard, signaling

229. Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 977, 981-82 (2014) (Employer violated Section 8(a)(3) for terminating employee who called the owner a "fucking mother fucker" a "fucking crook," an "asshole," and "stupid."). The Trump Board often equates profanity with discriminatory conduct, but the NLRB has long held profanity to be protected, to a certain extent, when used in the course of protected activity. *See, e.g.*, Haw. Tribune-Herald, 356 N.L.R.B. 661, 680 (2011), *enforced*, 677 F.3d 1241 ("The Board has repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity.").

230. *Thor Power Tool Co.*, 351 F.2d 584, 587 ("[N]ot every impropriety committed during [otherwise protected] activity places the employee beyond the protective shield of the [A]ct.").

231. Baily v. Runyon, 167 F.3d 466, 468 (8th Cir. 1999) ("Title VII does not require an employer to fire a harasser . . . Rather, what an employer must do is take prompt remedial action reasonably calculated to end the harassment.")

232. *See, e.g.*, Plaza Auto Ctr., Inc., 360 N.L.R.B. at 973, 981 (Employer violated Section 8(a)(3) for terminating employee who called the owner a "fucking crook," an "asshole," and "stupid."); *see also* Eidelson & Kanu, *supra* note 99 (A biracial Starbucks employee, and staunch critic of the company's labor practices, was terminated for what the employer referred to as "racially insensitive comments." The employee actually made a joke about his "sub-par dancing skills as a half-black man and saying he disliked 'crackers.' (He meant the food, not the denigration of white people)." The employee ultimately reached a settlement with Starbucks after filing a complaint with the California Department of Fair Employment and Housing).

233. Airo Die Casting, Inc., 347 N.L.R.B. 810, 811 (2006) (alteration in original).

234. *Id.* at 812 (alteration in original).

235. *Id.*

that discrimination by supervisors is acceptable, but if you are an employee engaged in Section 7 protected activity, you will be disciplined to the fullest extent. Similarly, in *Constellium*, the record indicated that profanity and offensive language were commonplace in the facility.[236] Even supervisors and other employees began to adopt the phrase "whore board," but the employer did not find it necessary under the same anti-harassment policy to discipline those employees or supervisors.[237] While defending their desire to not protect discriminatory language in the workplace, the Trump Board disregards the trend where employers use anti-harassment and workplace policies disparately to discipline workers engaged in union activity, but remain lax in enforcement when supervisors or employees not engaged in union activity partake in the same conduct.

In 2016, the Equal Employment Opportunity Commission (EEOC), the principal agency that administers and enforces federal employment anti-discrimination laws such as Title VII,[238] published a report addressing the issue of employers over-disciplining employees for the use of discriminatory language in the workplace in attempts to fulfil their obligations under Title VII.[239] The report found that broad "zero-tolerance" harassment policies are detrimental to preventing discrimination and cause underreporting among employees.[240] The EEOC stated, "[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct."[241] For example, the EEOC proscribes that for severe sexual harassment, termination is a proportionate response, but for the use of derogatory epithets, a warning is acceptable for the initial use, while a suspension would be proportional if the harassment continued.[242]

Thus, to best effectuate the congressional mandates of the NLRA and Title VII, the Trump Board should have sought to ensure that employers were using proportionate and consistently applied discipline to remedy discrimination or harassment. But the cases presented by the Trump Board indicate that employers use anti-harassment, and similar policies, to retaliate against employees engaged in protected activity, while ignoring similar discriminatory conduct by supervisors or other employees.

The NLRB's previous setting-specific tests properly balanced an employer's responsibility under Title VII, while also maintaining the leeway an employee should be afforded under the NLRA.[243] Even the EEOC's amicus brief in the

---

236. *Id.*

237. *Id.*

238. *Overview*, EEOC, https://www.eeoc.gov/overview (last visited July 27, 2021).

239. Chai R. Feldblum & Victoria A. Lipnic, *U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE* (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

240. *Id.*

241. *Id.*

242. *Id.*

243. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1085-86 (1955) (The Board found an employer's refusal to reinstate a striking employee lawful where the employee repeatedly shouted slurs such as "yellow [n-word]," "dirty Jews," "yellow scabs," and referred to women as "prostitutes," "bitches,"

General Motors case explicitly stated that the EEOC was not advocating for the Trump Board to adopt a new test to determine whether conduct loses protection of the NLRA, only that the test properly account for employer obligations under Title VII.[244]

Despite no significant call to eradicate long-established and well-practiced precedent, the Trump Board took it upon themselves to replace all setting-specific tests with the *Wright Line* standard. It is fair to question why the Trump Board did not simply assign specific weight to each of the four factors in the *Atlantic Steel* test, a point they took issue within their opinion.[245] The Trump Board could have made clear that, under the "nature of the outburst" factor in the *Atlantic Steel* test, the Board must provide significant weight to an employer's obligations consistent with Title VII. The Trump Board's inconsistent and illogical arguments have raised red flags in the minds of some legal observers, which has led them to question the true motives hiding in the backdrop of the Trump Board's desire to suddenly adopt *Wright Line* in protected activity discipline cases after almost six decades of the NLRA and Title VII working effectively in unison.

V. THE TRUMP BOARD'S TRUE MOTIVES BEHIND THE ADOPTION OF *WRIGHT LINE* STANDARD IN *RES GESTAE* CASES

The Trump Board admitted that they believe the long history of protections established by Section 7 since the passage of the NLRA in 1935 are simply "overstated."[246] Even if this was not enough to convince an observer of the Trump Board's true motives, former NLRB Chairman Mark Gaston Pearce, who is Black and served on the NLRB under the Obama administration, saw through the Board's seemingly altruistic attempt to eradicate discrimination in the workplace for what it truly was, a "classic example of throwing out the baby with the bathwater."[247] Chairman Pearce believes that the Trump Board "conflat[ed] these cases because they want to exploit the inflammatory nature of racially offensive and profane speech to change the law on what should be protected speech."[248]

The Trump Board's ultimate goal is not ending racism or sexism in the workplace, but "instilling an attitude that if you want to keep your job you better be subservient, because you could lose your job if you engage in vocal protests of

---

and "whores" while physically assaulting women by "tampering with them," all unprovoked and over a several day strike.) (alteration in original).

244. EEOC Amicus Brief, *supra* note 127, at 5.

245. Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 4 (July 21, 2020).

246. *Id*. at 8.

247. Hassan A. Kanu, *NLRB's GM Ruling Gives Employers More Slack to Punish Speech*, BLOOMBERG LAW (July 21, 2020, 6:29 PM), https://news.bloomberglaw.com/daily-labor-report/nlrbs-gm-ruling-gives-employers-more-slack-to-discipline-speech.

248. Robert Iafolla, *Labor Board's Power Challenged in Offensive Speech Case*, BLOOMBERG LAW (Nov. 26, 2019, 6:10 AM), https://news.bloomberglaw.com/daily-labor-report/labor-boards-power-challenged-in-offensive-speech-case.

abysmal work conditions."[249] Others have noted that the Trump Board's *General Motors* decision "is the latest in a parade of decisions and rulemaking intended to impose obstacles in the path of workers exercising their rights to organize and maintain a voice in the workplace, and/or to clear the way for employers to deter and intimidate workers in that exercise."[250]

As the Board warned in *Bettcher Manufacturing* in 1948, if an employer could discharge an employee for a comment that they determined to be offensive, collective bargaining would no longer be between two equals.[251] The current Board has finally achieved what the early pioneers of labor equality feared: a return to the master-servant mentality.[252] Now, the NLRB is not required to examine the context surrounding the alleged misconduct or the long history of established employee rights and protections afforded by Section 7. The Trump Board abolished rights that employees have fought for with life and limb over many decades,[253] not because such action was required or supported by the NLRA, but because it was desired by employers.[254]

No matter how seemingly altruistic the Board's cause to establish civility in the workplace, the Board has given employers immense authority to subjectively prohibit conduct that has generally been acceptable under the NLRA and that is not contemplated under the purview of Title VII.[255] Even the House of Representatives Committee on Education and Labor found that the *General Motors* decision "made it easier for employers to retaliate against workers who protest discriminatory behavior in the workplace."[256]

The Trump Board cited former NLRB Member Harry Johnson's dissent in *Pier Sixty*, where he wrote that "employers are entitled to expect that employees

249. Kanu, *supra* note 248; s*ee also* Jameel & Yerardi, *supra* note 26 ("Almost 40 percent of people who filed complaints with the EEOC and partner agencies from 2010 through 2017 reported retaliation.").

250. Gottlieb, *supra* note 224.

251. Bettcher Mfg., 76 N.L.R.B. 526, 527 (1948).

252. Crown Cent. Petroleum Corp., 177 N.L.R.B. 322, 323 n.4 (1969), *enforced*, 430 F.2d 724 (5th Cir. 1970) ("[T]he 'master-servant' . . . does not carry over into a grievance meeting, but there is instead at such . . . meeting[s] only company advocates on one side and union advocates on the other side engaged as [equal] opposing parties in litigation.").

253. *See generally Labor Wars in the U.S.*, PBS, https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/ (last visited July 27, 2021).

254. *See generally* Garrison & Dorson, *supra* note 130.

255. *See* Eidelson & Kanu, *supra* note 99 (American Federation of Teachers union president, Randi Weingarten, believes that now "[e]mployees who are fighting back against racism will be fired if an employer thinks a word is not genteel enough . . . [i]t's a way of thwarting speech, and it's a way of thwarting activism."); Ziskiw v. Mineta, 547 F.3d 220, 228 (4th Cir. 2008) ("[W]hile no one condones boorishness, there is a line between what can justifiably be called sexual harassment and what is merely crude behavior. Profanity, while regrettable, is something of a fact of daily life. Flatulence, while offensive, is not often actionable, for Title VII is not 'a general civility code.' . . . The occasional off-color joke or comment is a missive few of us escape. Were such things the stuff of lawsuits, we would be litigating past sundown in ever so many circumstances.").

256. HOUSE OF REPRESENTATIVES COMM. ON EDUC. AND LABOR, CORRUPTION, CONFLICTS, AND CRISIS: THE NLRB'S ASSAULT ON WORKER'S RIGHTS UNDER THE TRUMP ADMINISTRATION 6 (2020).

will coexist treating each other with some minimum level of common decency."[257] It is noble to aspire for inclusion and equality in the workplace as Member Johnson so eloquently articulated, but systematically stripping employees of their rights afforded by the NLRA, which allows employees to address concerns of discrimination and to engage in concerted activity for the benefit of their fellow employees, is clearly not the way to achieve this goal.[258]

If the Trump Board's goal was to bring the NLRA in line with Title VII, they overshot the mark.[259] If working towards civility was the Trump Board's true intention, they would have equally condemned the many employers that were engaged in racial and sexual discrimination against their employees, in the same cases they cited, as fervently as they chastised employees engaged in Section 7 protected activity who used the same or similar language. But following the *General Motors* decision, employees know that their employers will not be held to the same standard of civility and decency as they are.[260] Ultimately, the Trump Board was not on a mission to establish civility in the workplace, but rather they were

> on a mission . . . [to] chill employee rights and expression when, predictably and naturally, they are at their most vital and exuberant, manifested in the course of engaging in protected activity, pushing back on employer's mistreatment of workers and/or violations of their obligations. The result-oriented largely advisory opinion cannot be accurately explained in any other way.[261]

VI. FATE OF THE *GENERAL MOTORS* DECISION

Following the election of President Biden, the NLRB has gained a 3-2 democratic, pro-worker majority,[262] and Jennifer A. Abruzzo, a Democrat and staunch pro-union lawyer, has been confirmed as the General Counsel of the

---

257. Pier Sixty, LLC, 362 N.L.R.B. 505, 510 (Johnson, M. dissenting in part), *enforced*, 855 F.3d 115 (2d Cir. 2017).

258. Brief for the National Treasury Employees Union Regarding Speech During Protected Union Activity Supporting Charging Party, Gen. Motors LLC, 369 N.L.R.B. No. 127 (2020), at 9 ("In sum, there is no basis for the Board's suggestion that wholesale changes of the existing test are warranted for certain types of speech.").

259. *Compare* Ash v. Tyson Foods, Inc. 546 U.S. 454, 456 (2006) (holding that where a supervisor called two Black employees "boy," the question of whether the employer is liable for a violation of Title VII "may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."), *with* Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 7 (2020) (arguing that the NLRB's multi-factor tests, including *Atlantic Steel*, which examines surrounding circumstances to determine whether an employee's conduct exceeded the bounds of Section 7 protection are inherently in conflict with employers' duties under Title VII.)

260. Nestlé USA, Inc., 370 N.L.R.B. No. 53, slip op. at 10, 12-13 (2020) (Employer told employees to not discuss discriminatory conduct by managers and "coercively interrogat[ed] employees about their protected activity," and even suspended and terminated employees who raised concerns about the discriminatory conduct of their managers.).

261. Ira L. Gottlieb, *NLRB Decision Runs Over Workers' Rights*, DAILY J., (last visited Aug. 26, 2021), https://www.dailyjournal.com/mcle/742-nlrb-decision-runs-over-workers-rights.

262. *Pro-Worker Majority Restored at NLRB in a Summer of Progress for Labor*, IBEW MEDIA CTR. (Aug. 20, 2021), http://www.ibew.org/media-center/Articles/21Daily/2108/220819_Restored.

NLRB.[263] With this democratic majority, the NLRB is gearing up for major shifts in labor law rules. Shortly after her appointment in July 2021, General Counsel Abruzzo released an official memorandum that provided clear and meaningful insight into the priorities of the NLRB under President Biden.[264] General Counsel Abruzzo stated that the Trump Board "overrul[ed] many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers."[265] She believes that to "[e]nsure[] that employees have the right to exercise their fundamental Section 7 rights both fully and freely[,]" the cases overturned by the Trump Board need "centralized consideration."[266]

Importantly, among the cases enumerated in the memorandum for reconsideration by General Counsel Abruzzo was the *General Motors* decision.[267] Soon after the release of the memo, it became clear that General Counsel Abruzzo would get her chance to argue to the NLRB that *General Motors* should be overturned and that the setting-specific tests should be reinstated.

Currently, there are two cases in the pipeline that properly raise this issue for appeal to the Board. The first case is still being heard by an ALJ, but the General Counsel's office intends to argue that *General Motors* should be overturned to the extent that the it would apply to the facts of the case.[268] Once the argument is made, the General Counsel can then appeal the ALJ's decision regarding the application of *General Motors* in the case to the Board.[269]

Ironically, the second case that will allow the General Counsel to argue that the *General Motors* decision should be overturned involves a General Motors Cadillac dealership. In the initial case, the NLRB was tasked with evaluating whether a union steward lost protection of the NLRA under the *Atlantic Steel* test for calling the owner and President of the dealership a "stupid jack off" after the President told the steward to "get the fuck out before I throw you out" during a discussion about union related activity.[270] In 2019, prior to *General Motors*, the NLRB held that Cadillac of Naperville violated Section 8(a)(3) and (1) as all four factors of the *Atlantic Steel* weighed in favor of the union steward engaged in Section 7 protected activity.[271] The initial Board decision was appealed to the D.C. District Court of Appeals, but on September 20, 2021, at the request of the NLRB, the court remanded the discharge issue to the Board to apply the *Wright Line* standard as required under the intervening *General Motors* decision.[272] Since the

263. *The NLRB Welcomes Jennifer Abruzzo as General Counsel*, NLRB (July 22, 2021), https://www.nlrb.gov/news-outreach/news-story/the-nlrb-welcomes-jennifer-abruzzo-as-general-counsel.

264. Abruzzo Memo, *supra* note 159.

265. *Id.*

266. *Id.*

267. *Id.*

268. Iafolla & Eidelson, *Google's NLRB Case Creates Chance for New Rules on Worker Speech* (Sept. 9,2021), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/true/X5VNFHNO000000?bna_news_filter=true#jcite.

269. *Id.*

270. Cadillac of Naperville, Inc., 368 N.L.R.B. No. 3, slip op. at 2 (2019).

271. *Id.*

272. Cadillac of Naperville, Inc. v. NLRB, No. 19-1150, 2021 WL 4228453, at *1 (D.C. Cir. Sept. 17, 2021).

case properly raises the issue of the correct standard of review for *res gestate* cases, the democratic controlled Board could decide to overturn *General Motors* and reinstate the *Atlantic Steel* and other setting-specific tests.[273]

VII. CONCLUSION

When the Board ultimately reconsiders the *General Motors* decision, the NLRB should reinstate the setting-specific tests, including *Atlantic Steel*, but in a slightly modified form. To address the legitimate tensions between the NLRA and anti-discrimination statutes, such as Title VII, the NLRB should add a factor into the setting-specific tests, or clarify under existing factors, that an employer is permitted to take reasonable, proportional, and equitable remedial action to prevent further discrimination as required under Title VII. The modified setting-specific tests will reestablish the proper balance between the rights of employers and employees, which the *Wright Line* standard in the *res gestae* context fails to do. The modified tests will maintain leeway for offensive outbursts, including profanity and offensive language, but will allow the Board to more closely scrutinize sexist or racist language or conduct under the principles established in Title VII case law.

The *Wright Line* standard has no place in determining whether conduct that is part of the *res gestae* of an employee's Section 7 activity maintains protection under the NLRA.[274] The setting-specific tests, even if imperfect, are fully capable of properly balancing employee and employer rights under both the NLRA and Title VII, and should therefore be reinstated, in a modified form, as the standards for determining whether employee conduct that is part of the *res gestae* of an employee's Section 7 activity remains protected under the NLRA.

273. Iafolla, *D.C. Circuit Gives NLRB Chance to Rethink Worker Speech Rules* (Sept. 17, 2021), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XEEIKP3O000000?bna_news_filter=daily-labor-report#jcite.

274. Roemer Indus., Inc., 362 N.L.R.B. 828, 834 n.15 (2015) ("Where 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. This is because the causal connection between the protected activity and the discipline is not in dispute.").