

Can You Discipline Employees for Workplace Outbursts? NLRB Says It Depends on the Setting



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Imagine that an employee in a workplace meeting stands up, and in a profanity-laced tirade, calls the manager in the meeting several names not fit for print. Most employers would immediately discipline, if not fire, that employee for violations of any number of workplace rules, such as insubordination and disrespectful behavior. In a recent ruling, *Lion Elastomers LLC II*, the National Labor Relations Board (Board or NLRB) says, “Not so fast, employers.”

The Backdrop

Section 7 of the National Labor Relations Act (NLRA) protects employees’ rights to self-organize, form and join labor organizations, bargain collectively, and—important to this discussion—“engage in **other concerted activities** for the purpose of collective bargaining **or other mutual aid or protection.**” Most people associate this language solely with unions and union activities—imagine Norma Rae standing on top of the textile tables with the handwritten “Union” sign in the air—but this provision reaches more broadly to **any** concerted activity for the purposes of improving working conditions (such as wages, hours, and other work-related conditions), not just those aimed at forming unions or working on behalf of a union.

As noted by the Board, “disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses,” and many protected activities involve butting heads with the employer regarding the way an employer is running its business vis-à-vis the employees. With that, the Board determined in a series of cases that an employer cannot simply claim insubordination as a basis for firing or disciplining an employee who speaks out; rather, how the employee spoke out and the circumstances surrounding the actions mattered. Out of this backdrop came several cases that applied varying standards for determining if an employer’s discipline of an employee for inappropriate outbursts was protected for social media, in-person, and picket-line activities.

Then, in 2020, the Board issued an opinion in *General Motors LLC*, in which an employee had been terminated after verbally accosting a supervisor with profanity, making a racially offensive caricature, and playing loud music that contained profane, racially-charged, and sexually-offensive lyrics during a meeting. In *General Motors*, the Board adopted a single standard, called the *Wright Line* standard after the case of the same name. The standard required the NLRB General Counsel to show initially that the employee’s Section 7 activity was a motivating factor in the discipline. If the Board can make this showing, the employer could rebut the Board’s case by showing that it would have taken the same action even

without Section 7 activity, such as if the employer disciplines other employees for similar behavior in the absence of protected activity.

On May 1, 2023, following some changes to the political makeup of the NLRB, the Board revisited its decision from *General Motors* in the *Lion Elastomers LLC II* case.

Lion Elastomers LLC II: Settings Matter

In *Lion Elastomers LLC II*, the NLRB addressed the employer's discipline of an employee, who was also a union member. The employee had verbal altercations with management on two occasions—once while being questioned about grievances he had filed on behalf of other employees, and a second one from a safety meeting in which he was alleged to have made misleading, inflammatory, and disruptive comments.

Expressly overruling the *General Motors LLC* case, the Board in *Lion Elastomers LLC II* determined that the motive of the employer was not the relevant factor. Instead, the NLRB returned to a settings-specific approach—meaning that different standards are used in different settings. For cases like this one where conduct is directed toward management in the workplace, the Board will look at (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 provoked in any way by an unfair labor practice. Where an outburst is made over social media or among other employees, the Board will look at the "totality of the circumstances" to determine whether the conduct is protected. And when the employee conduct at issue is on a picket line, the Board will question whether, under all of the circumstances, the conduct might coerce or intimidate employees in the exercise of rights (for example, if a picketer threatens another employee who is not striking).

Of particular note, the Board rejected the idea that an employer has complete freedom to police the civility of employees when they are engaged in Section 7 protected activity. In other words, an employee who yells profanity at a supervisor in front of other employees after receiving news about changes to hours or pay may be protected by the NLRA, whereas an employee who similarly yells profanity or is rude or disrespectful for reasons unconnected to the terms of employment may not be protected because of this ruling.

The Board also noted that it did not find this case to conflict in any way with the antidiscrimination laws by which employers must abide and therefore did not have to decide whether the standard would have to be reassessed in that scenario. The Board left open the issue as to whether the setting-specific inquiry would need to be amended in a case where its use would cause a conflict with antidiscrimination law.

Key Takeaways

A few key pointers for employers from this decision

- Don't think that a union-free workforce means the NLRA and the Board decisions don't apply to you. The NLRA applies to concerted activity that includes challenges to workplace conditions, such as wages, hours, and other workplace circumstances even in the absence of a union.
- If an employee engages in behavior that is rude, disrespectful, insubordinate or profane toward management, before taking action, consider whether the outburst was in response to a circumstance that is protected by Section 7. For example, the employee in *Lion Elastomers LLC II* had been challenging the workplace safety of the employer in a safety meeting. If the outburst is in such a setting, you should carefully consider how you respond.
- The Board distinguished outbursts from abusive or threatening conduct. Abusive or threatening conduct is not protected by the NLRA.