

# National Labor Relations Board Raises Discipline Standards for Employees Who Exceed Otherwise Protected Activity

PUBLISHED ON  
**May 3, 2023**

---

The National Labor Relations Board (NLRB) continued its trend on May 1, 2023, by enhancing protections for workers and overruling President Trump-era precedent. The NLRB's decision in *Lion Elastomers LLC II* requires "setting-specific" analysis standards in cases where employees are disciplined or discharged for misconduct spawned from otherwise protected activity.

As background, the National Labor Relations Act (NLRA) generally provides workers the right to participate in various protected activities like strikes and manager confrontations. It also generally prohibits employers from retaliating against employees when they do so.

## 2020 Rule

The now-NLRB's three-member Democrat majority ditched 2020 precedent spawned from a case called *General Motors*. The *General Motors* Board imposed the *Wright Line* standard for all retaliation discipline and discharge cases. Under that standard, the NLRB had to show:

- (1) that the disciplined employee was engaged in NLRA-protected activity;
- (2) that the employer was aware of that activity; and
- (3) that the activity was a substantial or motivating reason for the employer's action.

The three-part test focused on the severity of the employee's misconduct and the context in which it took place.

## New Rule/Old Rule

The NLRB's opinion abandons the *Wright Line* standard in favor of the pre-2020 more fact-specific analysis. In overruling the 2020 precedent, the NLRB reasoned that labor disputes are often heated, and employees must be given some leeway for their behavior while engaging in NLRA-protected activity. The NLRB believes this leeway is necessary to safeguard NLRA rights. Instead of the *Wright Line* test, the three setting-specific standards now require:

- For outbursts in the course of managerial confrontations, the NLRB examines (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.
- For non-reinstatements after picket-line abuse, the NLRB considers whether the striker's abusive misconduct is such that, under the circumstances, it may reasonably coerce or intimidate others.
- For profane or threatening social media posts about workplace issues, the NLRB weighs the totality of the circumstances.

NLRB Chairman Lauren McFerran said of abandoning the *Wright Line* standard, "[t]o fully protect employee rights, conduct during protected concerted activity must be evaluated in the context of that important activity-not as if it occurred in the ordinary workplace context."

Given the NLRB's return to the setting-specific analysis, employers should be cautious about disciplining or terminating employees who engage in profanity or flirt the boundaries of protected activity. Conduct is protected if it does not rise to extreme behavior necessary to lose protection under the NLRA, and the bar for that has risen with the NLRB's recent ruling. Employers may want to consult with legal counsel for the first several discipline or discharge decisions under the new rules to ensure legal compliance.

The *Lion Elastomers LLC II* decision can be found [here](#).

If you have any questions regarding the NLRB's recent opinion or seek compliance advice on a discharge or discipline, please contact [Caleb P. Setlock](#) or any member of the [Barley Snyder Labor Team](#).

**DISCLAIMER:** The information in this alert should not be construed as legal advice to be relied upon nor to create an attorney/client relationship. Please note that the reader's or an industry's specific situation or circumstances will vary and, thus, for example, an approach that is advisable in one industry may not be appropriate in another industry. If you have questions about your situation or about how to apply information contained in this alert to your situation or industry, you should reach out to an attorney.

## WRITTEN BY:

---



**Caleb P. Setlock**

Associate

Tel: (717) 399-1567

Email: [csetlock@barley.com](mailto:csetlock@barley.com)