NLRB Revives *General Motors* test for Distinguishing Protected Activity and "Abusive" Conduct

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In the latest example of its policy shift favoring employers, the National Labor Relations Board (NLRB) again has reversed course in its interpretation of a key provision of the National Labor Relations Act (NLRA). On September 23, 2026, in the case of *Lion Elastomers LLC*, the Board reestablished a previously overruled test to determine when an employee's opprobrious conduct is unprotected under the NLRA.

Lion Elastomers I

The relevant dispute in *Lion Elastomers* arose at a July 2017 safety meeting, where a union representative asked his manager a series of pointed questions about safety and overtime. The representative repeated his questions but was not satisfied with the manager's answers. During the meeting, another employee got up to leave, leading the representative to say, “Go ahead and leave. We don't need you anyway.” At the end of the meeting, the representative asked the manager for a physical copy of the company's overtime policy. Thereafter, the manager became “visibly annoyed” and offered to help the representative access the policy on the internet. The representative then accused the manager of not doing his job, and the manager “became angry, stood up and argued briefly with [the representative].” In the ensuing argument, both parties asked each other whether they were being called a liar. The company later accused the representative of becoming “visibly agitated and us[ing] an elevated, accusatory tone while addressing others in the meeting.”

The union representative was disciplined shortly after the meeting, and later brought an unfair labor practice charge, contending that the discipline was retaliation for his protected activity at the meeting. In response, Lion Elastomers argued that the representative forfeited the NLRA's protections by engaging in disruptive conduct at the meeting. An Administrative Law Judge (ALJ) (and later the Board, which affirmed) sided with the representative and decided the issue by applying the four-part test announced in *Atlantic Steel Co*., 245 NLRB 814, 816 (1979). That test considers the following factors in deciding when an employee's “opprobrious conduct” is severe enough for the protections of the NLRA to be forfeited:

1. The place of the discussion.
2. The subject matter of the discussion.
3. The nature of the employee's outburst.
4. Whether the outburst was, in any way, provoked by an employer's unfair labor practice.

In balancing these factors, the ALJ concluded that — although unrelated to an unfair labor practice (Factor Four) — the representative's questions were appropriate in the context of a group meeting (Factor One), related to the terms and

conditions of employment (Factor Two), and were, in fact, an example of "heated speech" that is protected by the NLRA (Factor Three). After the Board affirmed the ALJ, Lion Elastomers filed a petition for review with the United States Court of Appeals for the Fifth Circuit.

An Intervening Change in Law

On July 21, 2020, while Lion Elastomers' petition was pending before the Fifth Circuit, the Board decided *General Motors LLC*, 369 NLRB No. 127 (2020), in which it abandoned the four-part *Atlantic Steel* test. At the time of the decision, the majority of the Board's members were appointed by President Trump. The Board reasoned that the *Atlantic Steel* test "ha[d] produced inconsistent outcomes" and was premised on the false assumption that the protected activity and abusive conduct were causally related. In its place, the Board adopted the test from *Wright Line*, 251 NLRB 1083 (1980), which previously was held not to apply to cases involving abusive conduct by an employee that later resulted in discipline. Under the new test, an employee would have to show that:

5. The employee engaged in protected activity.
6. The employer knew of that activity.
7. The employer had animus against the activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the activity.

Once those elements are satisfied, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the protected activity. This new test was to be applied in cases where the employee "alleges that discipline was motivated by [protected] activity, and the employer asserts that it was motivated by abusive conduct."

Lion Elastomers II

The Fifth Circuit remanded the *Lion Elastomers* case for the Board to apply the newly announced *General Motors* test. At that point, in May 2023, the composition of the Board had changed as a result of President Biden's nomination of two members. On remand, the Board "decided to overrule *General Motors* and return to prior Board law [*i.e.,* the *Atlantic Steel* test]," and thus reaffirmed its 2020 decision holding that Lion Elastomers violated the NLRA. The Board reasoned that the *General Motors* decision incorrectly "rejected the key distinction, traditionally made by the Board and the courts, between employee misconduct committed during protected activity and misconduct unconnected with such activity." Additionally, the Board criticized the *General Motors* test for prioritizing workplace civility and thereby giving "employers dangerous discretionary power over employees whenever they exercise their statutory rights in opposition to the employer's interests."

The Fifth Circuit's Opinion

Having lost once again before the Board, Lion Elastomers filed another petition for review with the Fifth Circuit. On July 29, 2024, the Fifth Circuit issued a published opinion vacating the Board's decision in *Lion Elastomers II*.[1] The Court reasoned that the Board disregarded the Court's prior remand order, in which the Board was directed to apply, not to overrule, the *General Motors* test; and violated Lion Elastomers' due process rights by overruling *General Motors* without providing it an opportunity to be heard on the issue. The Court vacated the Board's decision in *Lion Elastomers II* and remanded for the Board to apply *General Motors*.

Lion Elastomers III

On remand, in a September 23, 2026 decision, the Board, now controlled by a Republican majority, complied with the Fifth Circuit's mandate and remanded the case to an ALJ for application of the *General Motors* test in the first instance. It therefore remains to be seen whether *General Motors* will affect the outcome in *Lion Elastomers*. Interestingly, although the Board noted that it was bound by the Fifth Circuit's remand in this particular case, the Board stated that "[i]f the issue

of whether to overrule *General Motors* is presented and litigated in a future case, nothing in this decision or in the court's remand will preclude consideration of that issue."

Takeaways

For the time being, *General Motors* is the governing standard for cases in which an employee's abusive or opprobrious conduct, later resulting in discipline, is entangled with protected activity under the NLRA. Under *General Motors*, employees must first establish that (1) they engaged in protected activity; (2) the employer knew of that activity; and (3) the employer had animus against the activity. . If the employee can establish those three factors, the burden shifts to the employer to prove it would have taken the same action even if the protected activity never occurred. If the employer cannot do so, it will be held liable.

Practically speaking, for the best chance of prevailing under *General Motors,* employers should ensure that they maintain a clear workplace code of conduct that is enforced consistently and fairly. Employers that discipline an employee for abusive conduct (when similar conduct had not resulted in discipline in the past) will be suspected of animus against the protected activity and will find it difficult to prove they would have taken the same action in the absence of the protected activity.

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[1] *Lion Elastomers, LLC v. NLRB*, 108 F.4th 252 (5th Cir. 2024).