

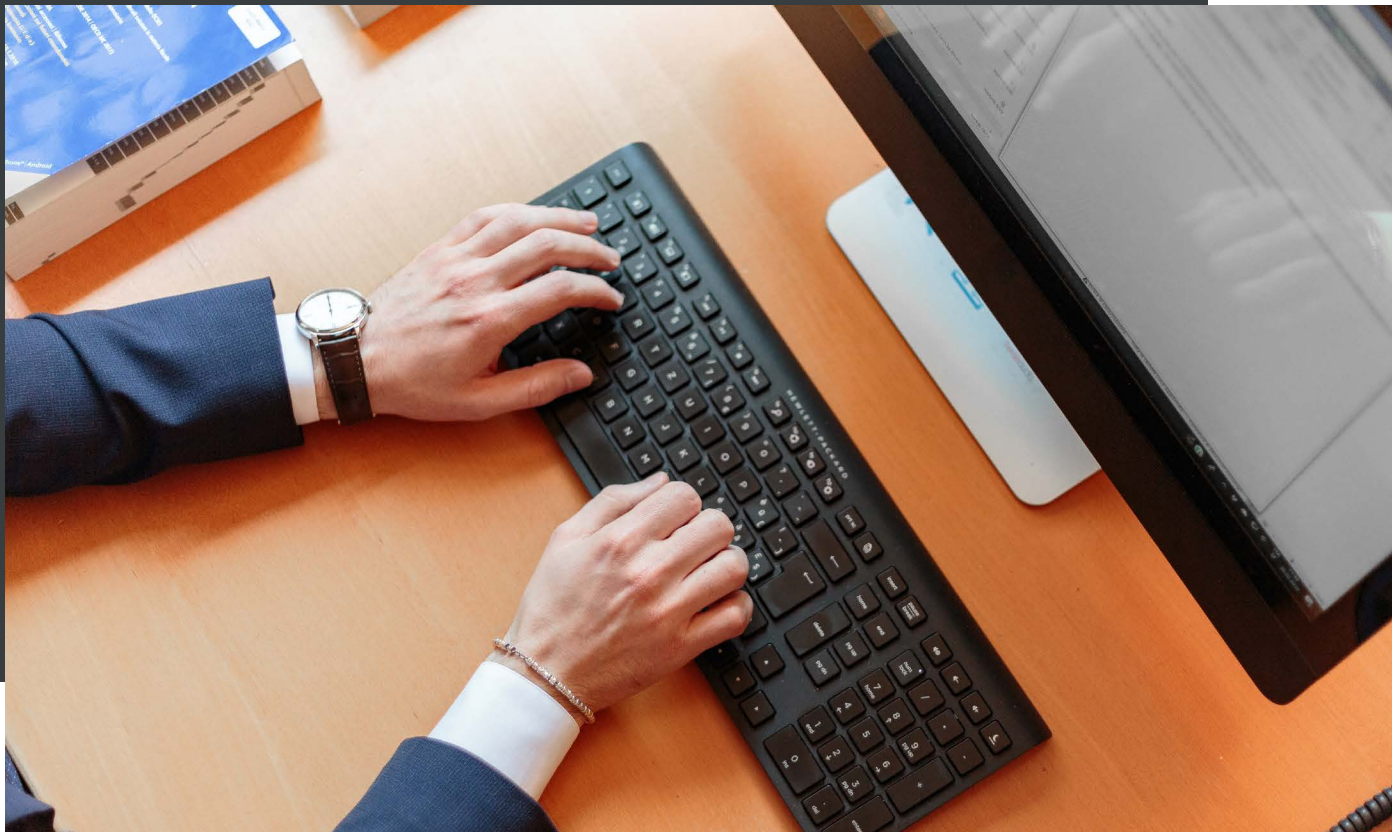
# Take this Job and Shove It: National Labor Relations Board Sets Standard for Employee Outbursts in Workplace

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On July 21, 2020, the National Labor Relations Board (“NLRB”) rendered a decision impacting how the NLRB will now analyze and determine whether employers unlawfully discharged or disciplined employees engaging in abusive conduct in connection with protected activity under Section 7 of the National Labor Relations Act (“NLRA”). NLRA Section 7 specifically defines employees’ rights to act collectively in seeking representation by a labor union. Examples of this conduct include profane attacks against an employer by the employee while also voicing concerns about compensation, writing a profane social media post against the employer while also advocating for union participation, and shouting racial slurs while picketing. These previous examples are all real cases decided by the NLRB where they decided the employer violated the NLRA for disciplining the employee for that behavior. See *Plaza Auto Center, Inc.*, 360 NLRB 972, 977-980 (2014); *Pier Sixty, LLC*, 362 NLRB 505, 506-508 (2015); *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 7-10 (2016). The NLRB previously analyzed these different situations under different standards and tests (“Setting Specific Tests”). For workplace outbursts to management involving protected conduct, the NLRB applied the Atlantic Steel test, considering: (1) the place of the conduct; (2) subject matter of the discussion; (3) nature of the employee outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. For social media posts, the NLRB analyzed the totality of the circumstances. Finally, for conduct during picket-lines the test determined whether under all of the circumstances, non-strikers would reasonably have been coerced or intimidated by the abusive conduct.

However, under the NLRB’s most recent decision, all of these circumstances will be analyzed under the *Wright Line* Standard. This recent decision, *General Motors, LLC and Charles Robinson*, 14-





CA-197985 and 14-CA-208242, involved an employee, Charles Robinson, who was a labor committee member. There were three separate instances where Mr. Robinson had outbursts in the workplace against management, with Mr. Robinson being suspended for each instance. The Administrative Law Judge, analyzing each instance using the *Atlantic Steel* test, found that Mr. Robinson's activity was protected by Section 7 of the NLRA for the first instance. Upon review, the NLRB replaced the three Setting Specific Tests above, including the *Atlantic Steel* test, and applied the *Wright Line* Standard. The NLRB pointed towards the failure of the Setting Specific Tests to uphold anti-discrimination laws when the employee creates a hostile work environment while engaging in Section 7 NLRA conduct. If the employer cannot take corrective action to stop an employee engaged in harassing conduct, even before it rises to the level of a hostile work environment, then the employer could become liable to other employees under anti-discrimination laws.

Under *Wright Line* Standard the employee must first prove the worker's protected activity factored into the employer's discipline of the employee. The burden then shifts to the employer to prove it would have disciplined the employee regardless of the protected activity. If the employee fails to prove the first prong or the employer proves its burden under the second prong, the activity is not protected. This new standard will ensure that employers have a greater ability to uphold order in the workplace and prevent discrimination even when it is associated with NLRA protected activity. While employees certainly have rights to engage in protected activity under the NLRA, there are limits to this right. Employers will now have the ability to ensure other employees' rights are protected and maintain a safe working environment despite an employee's NLRA protected yet abusive conduct.