

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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NLRB Returns to Setting-Specific Standards for Employee Misconduct Occurring in the Course of Protected Activity

In a recent decision, the National Labor Relations Board (the Board) returned to its earlier precedent “applying setting-specific standards” in cases involving employees who are disciplined for misconduct that occurs during activity otherwise protected by the National Labor Relations Act (NLRA). The Board announced its return to the “traditional standards” earlier this month in *Lion Elastomers LLC II*.¹

In *Lion Elastomers II*, the Board revisited the legal standards applicable to situations involving employees who are disciplined and/or discharged for misconduct occurring in the course of Section 7 activity (*i.e.*, the right to organize and engage in collective bargaining, etc.). The Board emphasized that there is a “fundamental difference . . . between employee misconduct committed during Section 7 activity and misconduct during ordinary work.” Given this distinction, the Board held that “conduct occurring during the course of protected activity must be evaluated as part of that activity—not as if it occurred separately from it and in the ordinary workplace context.”

Significantly, the Board’s decision in *Lion Elastomers II* overruled *General Motors*, a 2020 Trump-era Board decision, which specifically rejected the traditional “setting-specific” analysis in favor of a burden-shifting standard that focused on employers’ motivation for disciplinary decisions.² Criticizing the approach endorsed in *General Motors*, the *Lion Elastomers II* Board held that the question of employer motive is immaterial. Rather than focusing on an employer’s good or bad faith in issuing discipline, the focus should instead be on the “impact of the employer’s action on workers’ rights under the Act.”

General Motors rejected the notion that misconduct and Section 7 activity are inseparable even when they occur in tandem.³ It instead held that such an approach unreasonably impeded employers’ ability to address and correct abusive and inappropriate workplace conduct.

The *General Motors* Board also opined that in some instances, the setting-specific standards “conflicted alarmingly” with employers’ legal obligation to maintain a discrimination- and harassment-free work environment because “EEO laws, unlike the . . . setting-specific standards, do not forgive abusive conduct” merely because it occurred in the context of Section 7 activity.⁴ While the *General Motors* Board expressed concerns that tolerating employees’ abusive conduct due to NLRA obligations could give rise to employer liability under EEO laws such as Title VII of the Civil Rights Act of 1964, the *Lion Elastomers II* Board flatly rejected this notion. It held that because federal anti-discrimination laws do not affirmatively obligate employers to discipline or discharge employees, there is no conflict between the Board’s setting-specific approach and federal anti-discrimination laws.

¹ *Lion Elastomers LLC II*, 372 NLRB No. 83 (2023); See also *Board Returns to Traditional Standards for Evaluating Employee Misconduct During Protected Concerted Activity*, NLRB OFFICE OF PUBLIC AFFAIRS, available at: <https://www.nlr.gov/news-outreach/news-story/board-returns-to-traditional-standards-for-evaluating-employee-misconduct>.

² *General Motors*, 369 NLRB No. 127 (2020).

³ *Id.* at 1.

⁴ *Id.* at 7.

Lion Elastomers II marks the Board's return to three setting specific standards governing: (1) conduct toward management; (2) social media posts and workplace conversations; and (3) picket-line conduct.⁵ The setting-specific standards once again in effect post-*Lion Elastomers II*, are as follows:

- **Conduct Toward Management:** For discipline that stems from misconduct during workplace discussions with management, the four factor *Atlantic Steel* test applies.⁶ Under *Atlantic Steel*, the Board considers: "(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 the employer's unfair labor practice."
- **Conduct on Social Media and Workplace Conversations:** For discipline that occurs as a result of statements made on social media or during conversations among employees in the workplace, a totality-of-the-circumstances analysis determines whether the misconduct at issue lost the protection of the NLRA.
- **Picket-Line Conduct:** For discipline that stems from picket-line misconduct, the *Clear Pine Mouldings* test applies.⁷ Under *Clear Pine Mouldings*, the Board considers "whether, under all of the circumstances, non-strikers reasonably would have been coerced or intimidated by the picket-line conduct."

Practically speaking, the Board's decision to return to the setting-specific standards may put employers in a difficult position when it comes to making disciplinary decisions. When considering discipline, employers must be particularly mindful of the context in which an employee's misconduct occurred. To stave off potential unfair labor practice charges, proactive employers may consider reviewing current policies regarding social media usage and workplace communications to ensure compliance with the return to the setting-specific standards.

If you have any questions regarding the information contained in this memo, please contact [Hannah Redmond](#), any attorney in Bond's [labor and employment practice](#) or the Bond attorney with whom you are regularly in contact.

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⁵ *Board Returns to Traditional Standards for Evaluating Employee Misconduct During Protected Concerted Activity*, supra.

⁶ *Atlantic Steel Co.*, 245 NLRB 814 (1979).

⁷ *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984).

