Lion Elastomers LLC *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 228. Cases 16–CA–190681, 16–CA–203509, and 16–CA–225153

May 1, 2023

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

The United States Court of Appeals for the Fifth Circuit remanded this case to the National Labor Relations Board to determine the effect of the Board's intervening decision in *General Motors LLC*, 369 NLRB No. 127 (2020), on the prior Decision and Order here, 369 NLRB No. 88 (2020).[1] For the reasons described below, we have decided to overrule *General Motors* and to return to prior Board law. Accordingly, we reaffirm our original Decision and Order as modified and set forth in full below.[2]

I.

On May 29, 2020, the Board issued its Decision and Order in this proceeding finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by threatening employee Joseph Colone with discharge and violated Section 8(a)(3) and (1) by disciplining Colone on July 20, 2017, for his conduct at a July 12, 2017 safety meeting and by discharging him on June 8, 2018, because he engaged in union activity. In finding that Colone did not lose the protection of the Act when he raised concerns about the employees' working conditions to the Respondent's safety manager at the July 12 safety meeting, the Board adopted the judge's application of the four-factor test set forth in *Atlantic Steel*, 245 NLRB 814 (1979).[3]

The Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the Fifth Circuit, and the Board filed a cross-application for enforcement of the Order.

While the case was pending before the court, the Board issued *General Motors*, supra, on July 21, 2020, in which it held that it would no longer apply various setting-specific standards to determine whether employers have unlawfully disciplined or discharged employees who allegedly engaged in "abusive conduct" in connection with activity protected by Section 7 of the Act.[4] Accordingly, the *General Motors* Board overruled: (1) the four-factor *Atlantic Steel* test, which governed employees' conduct towards management in the workplace; (2) the totality-of-the-circumstances test, which governed social-media posts and most cases involving conversations among employees in the workplace;[5] and (3) the *Clear Pine Mouldings* standard, which governed picket-line conduct.[6] The Board concluded that, regardless of the setting involved, the fundamental issue in cases involving "abusive conduct" in the course of Section 7 activity is not the nature of the employee's conduct, but rather the motive of the employer in taking adverse action against the employee. All such cases, the Board accordingly held, must be analyzed under the *Wright Line*[7] burden-shifting framework, which typically governs "dual motive" cases where the General Counsel alleges that discipline or discharge was motivated by the employer's animus toward Section 7 activity, while the employer contends that it was motivated by a legitimate

[1] Then-Chairman Ring, then-Member Emanuel, and Member Kaplan participated in that decision. Chairman McFerran and Members Wilcox and Prouty were not members of the Board at that time.

[2] We shall amend the remedy set forth in the judge's decision, as amended in the Board's decision reported at 369 NLRB No. 88 (2020), in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022). Under *Thryv*, the Respondent shall compensate employee Joseph Colone for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful conduct, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall modify the Order set forth in the Board's decision reported at 369 NLRB No. 88, in accordance with *Thyrv*, supra, and in accordance with *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packing—Niagara*, 370 NLRB No. 76 (2021). We shall substitute a new notice to conform to the Order as modified.

[3] Under *Atlantic Steel*, in determining whether an employee's conduct during Sec. 7 activity loses the protection of the Act, 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 an employer's unfair labor practice.

[4] Sec. 7 of the Act grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

[5] See *Desert Springs Hospital Medical Center*, 363 NLRB 1824, 1824 fn. 3 (2016); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015).

[6] *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985). 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.

[7] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 1989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

business reason. The *General Motors* Board decided to apply the *Wright Line* standard retroactively to all pending "abusive conduct" cases.

Following the issuance of *General Motors*, the Board filed an unopposed motion with the Fifth Circuit, asking the court to "remand the instant case to determine whether *General Motors* affects the Board's analysis in this case." On June 15, 2021, the court granted the Board's motion. On June 22, 2021, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position. The Respondent and the General Counsel each filed a statement of position. The General Counsel argued, among other things, that the Board should reverse *General Motors*. The Respondent asserted that the case should be remanded to the administrative law judge for further consideration and provided the Respondent's views on how this case should be decided pursuant to *General Motors.*[8]

We have carefully reviewed the statements of position and the *General Motors* decision. We have decided to overrule *General Motors* and to return to earlier Board precedent, including *Atlantic Steel*, applying setting-specific standards aimed at deciding whether an employee has lost the Act's protection. Because we decline to apply *General Motors* here, there is no basis for revisiting the Board's original Decision. We accordingly reaffirm the Decision and Order as modified herein.[9]

II.

General Motors marked a sweeping change in Federal labor law. The Board reversed four decades of unbroken precedent: *Atlantic Steel* was decided in 1979; *Clear Pine Mouldings*, in 1984.[10] But, the policy rationale that informs those decisions goes back much farther in the history of the Act. More than 35 years ago, the Board observed that it had "*long held* . . . that there are certain parameters within which employees may act when engaged in concerted activities." *Consumers Power Co.*, 282 NLRB 130, 132 (1986) (emphasis added). The *Consumers Power* Board explained that:

> The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.

Id. (footnotes omitted).[11] There is a fundamental difference, then, between employee misconduct committed during Section 7 activity and misconduct during ordinary work.

Among the decisions cited in *Consumers Power* was *Bettcher Mfg. Corp.*, 76 NLRB 526 (1948), decided more than 70 years before *General Motors*. The *Bettcher* Board found that offensive remarks by an employee in the course of collective bargaining did not permit the employer to discharge him and explained that for collective bargaining to succeed (as the Act envisions), a "frank, and not always complimentary, exchange of views must be expected and permitted," even including questioning the veracity of a negotiator. 76 NLRB at 527. If an employer could discharge an employee for giving offense, it would frustrate the Act's goals—either "collective bargaining would cease to be between equals (an employee having no parallel method of retaliation)" or "employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives." Id.[12]

[8] On September 12, 2021, the Respondent filed a motion with the Board requesting to file an answer or reply to the General Counsel's statement of position on remand. The Board denied the Respondent's request on the ground that it had "not presented any circumstances warranting leave to file an answer or reply to the General Counsel's statement of position."

[9] See supra fn. 2.

[10] The Board's standard for employees' use of social media is (not surprisingly) of much more recent vintage.

[11] The Board regularly finds that employees did lose the protection of the Act. See, e.g., *KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 2 (2018) (finding employee lost the protection of the Act while delivering employee petition based on security breach); *Public Service Co. of New Mexico,* 364 NLRB 1017, 1022–1024 (2016) (finding employee lost the protection of the Act during workplace meeting based on disruptive behavior); *Richmond District Neighborhood Center*, 361 NLRB 833, 835 (2014) (finding employees lost the protection of the Act based on Facebook posts advocating insubordination); *Gene's Bus Co.*, 357 NLRB 1009, 1009 fn. 4 (2011) (finding employee lost the protection of the Act based on disruptive behavior during workplace meeting).

[12] The Board acknowledged that employees could not be immune from discharge for their statements or conduct during bargaining, but explained that the "line must be drawn 'between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance' . . . or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service.'" Id., quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 815–816 (7th Cir. 1946).

For a contemporaneous decision addressing offensive statements that sounds the same theme as *Bettcher*, supra, see *N.P. Nelson Iron Works, Inc.*, 80 NLRB 788 (1948). There, the Board held that an employer had violated the Act by discharging a union steward for what the employer deemed "insulting" statements during collective bargaining. Id. at 795–796. The Board adopted the decision of the trial examiner (i.e., administrative law judge), who characterized the statements as "impolite according to genteel standards, . . . [but] mild according to

Bettcher, in turn, was invoked by the Board in *Longview Furniture Co.*, 100 NLRB 301 (1952), enfd. as modified 206 F.2d 274 (4th Cir. 1953), in which the Board held that name-calling on the picket line by striking employees did not permit their employer to deny them reinstatement. The Board observed that given the realities of strikes and picket lines—"it is common knowledge that in a strike where vital economic issues are at stake, striking employees will resent those who cross the picket line"—harsh language "must be regarded as an integral and inseparable part of [the employees'] picket and strike activity," protected by the Act. 100 NLRB at 104.[13]

Although the Board ultimately developed specific standards depending on the setting in which employees engaged in statutorily protected activity,[14] each of the standards shares a common principle: 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. That principle, in turn, reflects a policy choice. It ensures that adequate weight is given to the rights guaranteed to employees by Section 7 of the Act, by ensuring that those rights can be exercised by employees robustly without fear of punishment for the heated or exuberant expression and advocacy that often accompanies labor disputes, whether they are exercised by participating in contract negotiations, or grievance meetings, or walking a picket line as strikers and confronting employees who cross the line, or in discussing workplace issues with their coworkers.

III.

Today, we overrule *General Motors* and return to the Board's setting-specific standards, including the *Atlantic Steel* standard the Board applied in this case. As the Board did for decades, with judicial approval, we strike a different balance from the *General Motors* Board between the Section 7 rights of employees and the legitimate interests of employers. No Federal appellate court has ever held that the Act prohibits the Board from adopting setting-specific standards that, within limits, treat certain employee conduct as inseparable from the statutorily protected activity during which it occurs.[15] In inviting briefs from the public in *General Motors*, the Board acknowledged this fact, noting that "the courts of appeals have not repudiated the Board's tests in this area."[16] This case arises in the Fifth Circuit, for example, and that court has always followed the Board's traditional approach – as have many other courts.[17] No Federal

the not-uncommon standards of conversation in industrial plants," id. at 796, and who explained that "it is essential to the accomplishment of [the Act's] purpose that, in their dealings with the employer on behalf of the employees, the employee-representatives be treated on a plane of equality with the employers rather than as subordinates as they are in the performance of their duties in the plant." Id. at 795.

[13] On review, the Fourth Circuit took a different view of the facts, regarding the name-calling involved as more aggravated and coordinated than the Board did. The court "agree[d] with the Board that reinstatement is not to be denied striking employees because of ordinary incidents of the maintenance of a picket line or for the use of rude language arising out of the feelings thereby aroused." *NLRB v. Longview Furniture Co.*, 206 F.2d 274, 275 (4th Cir. 1953).

On remand, the Board accepted the Fourth Circuit's decision as the law of the case, explaining its decision not to seek Supreme Court review by noting that "[a]part from its disagreement with the ultimate findings of the Board's original order," the Fourth Circuit had "adhere[d] to the long-established principle that a striker's use of unseemly language on the picket line 'in a moment of animal exuberance' does not deprive him of the right of reinstatement." *Longview Furniture Co.*, 110 NLRB 1734, 1738 (1954) (quoting *Milk Wagon Drivers' Union of Chicago, Local 743* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 287, 293 (1941) (observing that the "right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force")).

[14] Each of the standards takes into account the realities of the particular setting. There clearly are meaningful differences between and among, for example (1) a confrontation on a picket line between striking employees and non-striking employees, with Sec. 7 rights of their own; (2) a bargaining session or grievance meeting where an employee is dealing face-to-face with management as a representative of other employees and thus a statutory equal of the employer; and (3) an online discussion among employees, where managers are not physically or even virtually present.

[15] To be sure, some courts have disagreed with the Board as to where those limits lie in a class of cases. Thus, in response to judicial criticism, the Board eventually adopted a narrower limit for picket-line misconduct in *Clear Pine Mouldings*, 268 NLRB at 1045–1047. The Board rejected its prior view that employees did not lose the Act's protection if they made purely verbal threats on the picket line, unaccompanied by physical acts or gestures. Instead, the Board adopted a new standard for picket-line misconduct asking, "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act," which includes the right to refrain from engaging in protected activity, such as refusing to honor a picket line. Id. at 1046 (quoting *NLRB v. W. C. McQuaide, Inc.,* 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975)). *Clear Pine Mouldings*, decided in 1984, remained the law for 37 years, until the Board overruled it in *General Motors*.

[16] *General Motors, LLC*, 368 NLRB No. 68, slip op. at 1 fn. 6 (2019) (notice and invitation to file briefs).

[17] See, e.g., *NLRB v. Allied Aviation Fueling of Dallas, L.P.*, 490 F.3d 374 (5th Cir. 2007) (rejecting application of *Wright Line* standard). The Fifth Circuit explained there that:

> [F]lagrant conduct of an employee, even though occurring in the course of protected activity, may justify disciplinary action by the employer. However, not every impropriety committed during such activity places the employee beyond the protective shield of the act. *The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.* Further, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed.

appellate court, in turn, has ever held that the Act requires the Board to apply the *Wright Line* mixed-motive test in cases where the Board traditionally applied its setting-specific standards. Here, we need not and do not hold that the Board's setting-specific standards are themselves mandated by the Act, only that they are statutorily permitted and that, as we will explain, they reflect a better policy choice than adopting the *Wright Line* standard chosen by the *General Motors* Board.

A.

A key premise of the setting-specific standards is, in the already-quoted words of the *Consumers Power* Board, the "fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." 282 NLRB at 132. That is why misconduct in the course of Section 7 activity is treated differently than misconduct in the ordinary workplace setting that is unrelated to Section 7 activity. As cases like *Bettcher* and *Longview Furniture*, supra, illustrate, the Board has recognized this reality for more than 70 years. In establishing the Board to administer the Act, Congress envisioned that the Board would develop and apply expertise in labor-management matters, to which the Federal courts would defer.[18] The premise of the setting-specific standards reflects the Board's experience as an expert agency.

In turn, the Federal courts have not hesitated to accept that premise, as well as its consequences for applying the Act. The decisions of the Supreme Court are enough to establish this proposition.[19] Thus, in *Linn v. United Plant Guard Workers,* which involved the Act's partial pre-emption of state-court defamation actions against labor unions, the Supreme Court observed that "labor disputes are ordinarily heated affairs."[20] The Court explained that "language that is commonplace [in labor disputes] might well be deemed actionable per se in some state jurisdictions," that union "representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions," and that "[b]oth labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."[21] Citing with approval the Board's decision in *Bettcher*, supra, the Court noted that "in a number of cases, the Board ha[d] concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of [the Act], even though the statements are erroneous and defame one of the parties to the dispute."[22]

In a subsequent case involving Federal preemption of a state-court libel suit, *Old Dominion Branch*, the Court drew on its prior decision in *Linn,* explaining that "[f]ederal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."[23] The "freewheeling use of the written and spoken word," the Court observed, "has been expressly fostered by Congress and approved by the NLRB."[24]

Most closely on point for present purposes is the Supreme Court's decision in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), which strongly supports the Board's traditional approach in cases involving misconduct in the course of protected activity, while undercutting the motive-focused analysis adopted in *General Motors*. In *Burnup & Sims*, two employees sought to organize their coworkers. A third employee told a manager that the two organizers, in soliciting his support for the union,

Id. at 379 (emphasis added; citations and quotation marks omitted). See also *U.S. Postal Service v. NLRB*, 652 F.2d 409, 411 (5th Cir. 1981) (citing *Bettcher*, supra, and stating that "[t]he Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts.").

For a small sample of federal appellate court decisions upholding the Board's application of a setting-specific standard to find that an employee did not lose the protection of the Act, see then Member McFerran's dissent from the Board's notice and invitation to file briefs in *General Motors*, 368 NLRB No. 68, slip op. at 4–5 fns. 9–10 (citing decisions from the District of Columbia Circuit, Second Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Ninth Circuit, and Tenth Circuit).

[18] See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

[19] The federal courts of appeals, meanwhile, have repeatedly endorsed the Board's traditional approach, as reflected in the often-cited decision of the Seventh Circuit in *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965) ("The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect."). See, e.g., *NLRB v. Caval Tool Division*, *Chromalloy Gas Turbine Corp.*, 262 F.3d 184, 192 (2d Cir. 2001) (citing *Thor Power Tool*).

[20] *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 58 (1966).

[21] Id.

[22] Id. at 60–61.

[23] *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974) (holding that a state libel action by employees against labor union was preempted by Presidential executive order governing federal-sector labor-management relations). In the case before the Court, employees had sued a union for referring to them as "scabs" in a union publication that included a long and biting definition of the term (attributed to Jack London) that recited (among other things) that "[n]o man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with." Id.

[24] Id.

had said that the union would use dynamite to retaliate if the organizing effort failed. The employer fired the two workers. The Board found that they had not, in fact, made the dynamite threat and that the discharges were unlawful, regardless of the employer's honest belief in the truth of the allegation. The Supreme Court upheld the Board.

Distinguishing between Section 8(a)(3) of the Act, which prohibits antiunion discrimination,[25] and Section 8(a)(1), which prohibits employer actions that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7,"[26] the *Burnup & Sims* Court squarely rejected the view that the case turned on the employer's motive:

> *[I]n the context of this record [Section] 8(a)(1) was plainly violated, whatever the employer's motive.* Section 7 grants employees, inter alia, "the right to self-organization, to form, join, or assist labor organizations." Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias.

379 U.S. at 22–23 (emphasis added). The Court cited Board decisions holding that Section 8(a)(1) is "violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred." Id. at 23. The Board's approach, the Court observed, was "in conformity with the policy behind [Section] 8(a)(1)," explaining that

> Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. *Union activity often engenders strong emotions* and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. *It is the tendency of those discharges to weaken or destroy the [Section] 8(a)(1) right that is controlling.* We are not in the realm of managerial prerogatives. Rather we are concerned with the manner of soliciting union membership over which the Board has been entrusted with powers of surveillance. [H]ad the alleged dynamiting threats been wholly disassociated from [Section] 7 activities quite different considerations might apply.

Id. at 23 (emphasis added; citations omitted).

The *Burnup & Sims* Court thus relied on the premise that has informed Board decisions, as well as its own: that "[u]nion activity often engenders strong emotions" and that perceived or actual misconduct committed during protected activity is properly treated differently than misconduct "wholly dissociated from" such activity. The Court endorsed the need, in light of that premise and consistent with the policy of Section 8(a)(1), to ensure that the exercise of Section 7 rights was adequately protected. And it accordingly rejected the view that the employer's motive, in exercising legitimate "managerial prerogatives" or not, was the proper analytical focus.

There are fundamental similarities between cases like *Burnup & Sims* and cases like this one, although *Burnup & Sims* involved *disproven* misconduct and loss-of-protection cases involve misconduct *insufficiently serious* to justify discharge.[27] In both situations, under traditional Board law, the employer's good faith is immaterial. Instead, the proper focus is on the employee's misconduct (or lack of it) and the predictable effect on the exercise of Section 7 rights if the employer were permitted to discipline or discharge the employee. What matters in both situations is the Board's evaluation of whether the employee's protected conduct retains or loses the protection of the Act due to the perceived misconduct, regardless of whether the employer had a good-faith or bad-faith motive for taking action against the employee. In neither type of case is the Board "in the realm of managerial prerogatives," as it would be if the misconduct were unconnected with protected activity.[28]

[25] Sec. 8(a)(3) makes it an unfair labor practice "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

[26] 29 U.S.C. § 158(a)(1). A violation of Sec. 8(a)(3) is a derivative violation of Sec. 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 fn. 4 (1983).

[27] *Burnup & Sims* itself involved perceived misconduct sufficiently serious that it would be deemed to lose the Act's protection under any reasonable standard: a threat of extreme violence. The Board decisions endorsed by the Court, see 379 U.S. at 23, in turn, involved violent strike misconduct or sit-down strikes including seizure of the employer's property.

For example, in *Mid-Continent Petroleum Corp.*, 54 NLRB 912, 932 (1944), the Board upheld the discharge of strikers who had engaged in "flagrantly unlawful conduct," regardless of the employer's motive (which had been challenged by the union). Correspondingly, it found that the discharge of strikers who did *not* engage in such conduct was unlawful, despite the employer's honest belief that they had. In explaining why motive was immaterial, the Board observed that the strikers' actual or alleged misconduct was "inseparably connected with the strike." Id. at 933. What mattered, in both instances, was the Board's evaluation of the conduct as protected or unprotected, not the employer's motive for taking action. Cases like *Mid-Continent*, then, are entirely consistent with the Board's contemporaneous loss-of-protection cases like *Bettcher* and *Longview Furniture*, supra, and with their progeny.

[28] For the reasons explained, we believe that the Court's decision in *Burnup & Sims* undercuts *General Motors* and supports the Board's

Notably, because the proper focus in these cases is on the extent of alleged misconduct occurring in the course of the exercise of Section 7 activity, the *General Motors* Board was mistaken in attacking the setting-specific standards as inherently inconsistent with Sec. 8(a)(3) because they do not require a showing of antiunion motivation. 369 NLRB No. 127, slip op. at 9. The Board has long held, with uniform judicial approval, that causation is not at issue where an employer defends a disciplinary action based on an employee's alleged misconduct in the course of union activity, and the Board determines that the misconduct was not sufficiently egregious to deprive the employee of the protection of the Act. Everyone agrees that the disciplinary action was motivated by conduct that the Board—in fulfilling its statutory responsibility to determine the scope of the Act's protection—has found to be protected. That the employer labeled the conduct abusive, disloyal, uncivil, or insubordinate does not bring its motive into question. *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177, slip op. at 5 (2018), enfd. in relevant part 803 Fed.Appx. 876, 882–883 (6th Cir. 2020); *Roemer Industries, Inc.*, 362 NLRB 828, 834 fn. 15 (2015) (explaining that where an employer defends disciplinary action based on an employee's misconduct in the course of protected union activity, and the misconduct was not egregious enough to remove the protections of the Act, "the 8(a)(3) violation is established because the antiunion motive is not in dispute--the protected union conduct was the motive for the discipline"), enfd. 688 Fed.Appx. 340 (6th Cir. 2017). The *General Motors* Board disagreed with the policy choice reflected in the Board's traditional setting-specific standards of extending the Act's protection to conduct occurring in the course of union activity that an employer might characterize as abusive or uncivil. However, where the Board has determined, under any permissible standard, that the conduct for which an employee was disciplined retained the Act's protection at all relevant times, causation is established, and additional evidence of unlawful motive is not required to substantiate a violation. *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000) (where an employer admits that it disciplined an employee for misconduct in the course of protected union activity, the only issue is whether the misconduct caused the employee to lose the protection of the Act; once that is decided in the negative, the causal connection between the discipline and the employee's protected activity is established, and the inquiry ends), cited in *Gross Electric, Inc.*, 366 NLRB No. 81, slip op. at 2–3 (2018) ("[W]here an employer undisputedly takes action against an employee for engaging in protected activity, a *Wright Line* analysis is not appropriate.").

B.

The *General Motors* Board broke sharply with well-settled precedent, but its reasons for abandoning the setting-specific standards governing employee misconduct committed during Section 7 activity are unpersuasive. We cannot accept its apparent conclusion that the Board's traditional approach in this area—long upheld by the Federal courts and consistent with Supreme Court precedent—is actually contrary to the Act itself. The decision to substitute the *Wright Line* motive-focused test, in turn, was equally flawed, as both a matter of law and a matter of policy. In erasing the fundamental distinction between misconduct committed during protected activity and misconduct unconnected with such activity, the *General Motors* Board abandoned the Board's statutory function of determining the scope of protection for Section 7 activity. It instead granted new power to employers to effectively determine, based on their own individual practices and preferences, the scope of protected activity under the National Labor Relations Act. Moreover, because the *General Motors* Board failed to define "abusive conduct," it failed to cabin its decision to those instances involving only the most extreme misconduct and made *Wright Line* and the managerial prerogatives attached to it applicable whenever an employer ostensibly disciplines or discharges an employee for any "separable" conduct in the course of Section 7 activity.

1.

The *General Motors* decision began by mischaracterizing the Board's traditional approach to misconduct during statutorily protected activity, asserting that:

> [T]he Board has *assumed* that the abusive conduct and the Section 7 activity are *analytically inseparable*. In other words, the Board has *presumed a causal connection* between the Section 7 activity and the discipline at issue, rendering the *Wright Line* standard—typically used to determine whether discipline was an unlawful response to protected conduct or lawfully based on reasons unrelated to protected conduct—inapplicable.

369 NLRB No. 127, slip op. at 1 (emphasis added). As we have explained, however, for many decades, the Board (with judicial approval) proceeded from the experience-

adoption of the setting-specific standards. We reject our dissenting colleague's view, based on his narrow parsing of the decision, that *Burnup & Sims* is irrelevant to the issue presented here. But even if we were wrong about the principle that we distill from *Burnup & Sims* -- that to best promote the Act's policies, the Board's focus in a case like this one should be on the employee's Sec. 7 activity, not the employer's motive – we would still conclude that the setting-specific standards are superior to the use of *Wright Line*.

Certainly *Burnup & Sims* in no way can be read to support the *General Motors* Board's adoption of the *Wright Line* standard.

based premise that labor disputes are often heated and from the corresponding principle that to promote the policies of Section 8(a)(1) of the Act, the Board *should* treat some employee misconduct during Section 7 activity as inseparable from that activity, making a motive-based analysis immaterial in deciding whether discipline or discharge was lawful under the Act. Contrary to the description of *General Motors*, then, the Board did not "assume[ ]" that some misconduct and protected activity were "analytically inseparable." Rather, it made the deliberate policy choice to focus on the impact of the employer's action on workers' rights under the Act, instead of on the employer's good or bad faith, just as the Supreme Court did in *Burnup & Sims*, supra. There can be no question that the Board was free to make and then adhere to that choice. It did so for decades before *Wright Line* was decided in 1980, and for decades after, and no Federal appellate court ever rejected the Board's choice.

The *General Motors* Board presented a remarkably incomplete picture of the development of Board law and relevant judicial decisions. It did not cite the Board's seminal decision in *Bettcher,* although *General Motors* itself involved the discipline of a union representative for his conduct in dealings with management officials.[29] It cited the Supreme Court's decision in *Linn* (which found that "labor disputes are ordinarily heated affairs," 383 U.S. at 58, and relied on *Bettcher)* simply to note that the Board had followed *Linn* in cases involving alleged "disparagement or disloyalty to the employer" in the course of protected activity, a situation it deemed different.[30] It failed to cite *Old Dominion Branch* and the Supreme Court's recognition there that the "freewheeling use of the written and spoken word has been expressly fostered by Congress and approved by the NLRB."[31] And it cited *Burnup & Sims* only in a footnote, failing to acknowledge the clear relevance of the Supreme Court's decision to the issue decided in *General Motors*.[32]

Examining the premise and policy on which they rest, we find that the *General Motors* Board did not carefully evaluate the Board's traditional setting-specific standards. Instead, the Board cherry-picked decisions applying those standards to attack the standards themselves. According to the Board, the standards had "failed to yield predictable, equitable results," had led to "violations . . . [that] conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws," and had been used by the Board "to penalize employers for declining to tolerate abusive and potentially illegal conduct in the workplace."[33] As explained below, these claims were meritless.

We are not persuaded by the claim of the *General Motors* Board that the setting-specific standards are unacceptable because they assertedly yielded "unpredictable" results. More than 75 years ago, in language often reiterated since, the Supreme Court explained that Congress "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms."[34] Given the "infinite combinations of events" that have confronted the Board, over the many decades in which the Board followed its traditional approach to misconduct during Section 7 activity, it is hardly shocking that in different cases, on different facts, different Boards have reached different results, despite arguable similarities between some cases. But substituting a new standard that turns on the even *more* fact-specific, evidence-dependent question of employer motive does nothing to make the Board's decisions in this area more "predictable" or "equitable." To the contrary, cases involving the same employee misconduct will turn out differently based on what the evidence reveals (or fails to reveal) about why the employer took action against the employ-

[29] *General Motors* did not involve picket-line misconduct or employee social-media posts, of course, yet the Board overruled the established standards for those settings as well, regardless of the distinct features.

[30] 369 NLRB No. 127, slip op. at 6 fn. 16 ("This precedent is inapplicable when the employer cites abusive conduct, rather than disparagement or disloyalty, for its discipline."). As explained, however, the *Linn* Court relied on Board decisions including *Bettcher*, supra, in finding that the Act preempted some state-law defamation suits and so the principles applied by the Court had an obvious bearing on the issue presented in *General Motors.*

[31] 418 U.S. at 272.

[32] The *General Motors* Board insisted that "[n]othing in th[e] decision should be read as conflicting with" *Burnup & Sims*, because the newly announced test "like the setting-specific standards . . . overrule[d], presupposes that the employee actually engaged in the misconduct." 369 NLRB No. 127, slip op. at 10 fn. 27. This effort to reconcile *General Motors* and *Burnup & Sims* fails for reasons already explained.

The *General Motors* Board apparently would agree that where an employee committed *no* misconduct, the employer's entirely lawful motive in discharging him (its honest belief that he *did* commit misconduct) is immaterial—trumped, in effect, by the imperative to promote the policy of Sec. 8(a)(1) and to protect Sec. 7 rights. Yet where the employee committed misconduct of the sort tolerated by the Board (and the courts) under the Board's setting-specific standards, the *General Motors* Board effectively denies that the Sec. 8(a)(1) policy and the imperative to protect Sec. 7 rights endorsed in *Burnup & Sims* is implicated at all. This view cannot be squared with the Supreme Court's observation that "[d]efeat of [Sec. 7] rights by employer action does not necessarily depend on the existence of an anti-union bias." 379 U.S. at 23.

[33] 369 NLRB No. 127, slip op. at 1.

[34] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). See, e.g., *NLRB v. Curtin Matheson Scientific*, 494 U.S. at 786 (quoting *Republic Aviation* language).

ee. Under the *Wright Line* standard adopted in *General Motors*, consistency cannot even be a meaningful goal.[35]

Nor is the claim that the setting-specific standards inherently tend to impose legal obligations on employers that conflict with their obligations under antidiscrimination laws well founded.[36] It is certainly true that in administering the Act, the Board must accommodate other Federal statutes insofar as they apply, just as other Federal statutes must accommodate the Act.[37] But the *General Motors* Board cited no judicial decisions finding an actual conflict between an employer's duties under the Act and its duties under Federal antidiscrimination law.[38] Indeed, the *General Motors* Board cited no cases brought under antidiscrimination law where an employer was even *alleged* to have violated the law by complying with its obligation under the Act *not* to discharge or discipline an employee who had committed misconduct in the course of protected activity.[39]

The case law contradicts the view of the *General Motors* Board. A good example is the Eighth Circuit's picket-line misconduct decision in *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017), a case the *General Motors* Board simply ignored.[40] In *Cooper Tire & Rubber*, the court enforced the Board's order requiring reinstatement of a striker who had directed racist taunts at a van carrying replacement workers that had just crossed the picket line. It agreed with the Board's application of the *Clear Pine Mouldings* standard and rejected the employer's argument that *Wright Line* should apply. 866 F.3d at 889–890. It also rejected the argument that the Board's order conflicted with the employer's duty under Title VII, 42 U.S.C. §§ 2000e, et seq. Id. at 891-892. The court explained that the striker's picket-line jibes—racially offensive, stereotyped comments about food —did not create a hostile work environment, nor did Title VII create any legal obligation to fire the striker. Id. at 892.[41]

The Eighth Circuit's decision is not anomalous. The Supreme Court has said repeatedly that Title VII is not "a general civility code for the American workplace."[42] As the Court has explained, "offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[43] There is no obvious or inevitable conflict, then, between the Board's approach as reflected in the setting-specific standards and Federal antidiscrimination law.[44] The *General Motors* Board cited no judicial support for the proposition that employers have a legal *duty* under antidiscrimination law to discipline or discharge employees in every instance involving the sort of "offhand comments and isolated incidents"—those that are not "extremely serious"—which the Board typically would find retained the protection of the Act if they occurred in the course of Section 7 activity.[45] Nor did the

[35] The *General Motors* Board also asserted that the Board's traditional approach yielded "inequitable" results, but that assertion seems to be no more than an expression of disagreement with either the outcome of particular cases applying the setting-specific standards, and/or with the policy choice reflected in those standards, as overly protective of Sec. 7 rights.

[36] As to this issue, the *General Motors* Board could not settle on a consistent statement of its claim. It first insisted specifically (and erroneously) that the Board's decisions had imposed obligations on employers that actually conflicted with their duties under antidiscrimination law, then softened its claim to assert a general (and overstated) "tension" between the Board's application of the Act and antidiscrimination laws. Compare 369 NLRB No. 127, slip op. at 1 (Board has found "violations . . . [that] conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws") and id., slip op. at 7 fn. 18 (citing "inherent conflict between employers' duties under the Act under current law . . . and their duties under antidiscrimination laws") with id., slip op. at 6 ("setting-specific standards are in tension with antidiscrimination laws").

[37] See, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (accommodating Act and Bankruptcy Code).

[38] The Supreme Court has recently observed that "the 'reconciliation' of distinct statutory regimes 'is a matter for the courts,' not agencies." *Epic Systems Corp. v. Lewis,* __U.S. __, 138 S.Ct. 1612, 1629 (2018) (quoting *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 685–686 (1975)).

[39] An employer facing such an allegation presumably could raise its duty to comply with the Act as a defense, requiring a court to determine the proper accommodation between the Act and federal antidiscrimination law. However, in the case of antidiscrimination claims raised under state or local laws (also invoked by the *General Motors* Board), the doctrine of federal preemption would very likely apply. See *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 78–79 (1st Cir. 2004) (addressing possible preemption by Act of supervisor's claim against union under Massachusetts antidiscrimination laws).

[40] Remarkably, the *General Motors* Board repeatedly cited the *Board's* decision in *Cooper Tire* without ever addressing the Eighth Circuit's decision enforcing the Board's order. 369 NLRB No. 127, slip op. at 1 fns. 3 & 8, and slip op. at 3, 6, 7.

[41] Compare the Eighth Circuit's decision in *Cooper Tire & Rubber*, supra, with another Eighth Circuit case that the court distinguished, where the serious, personalized, and repeated conduct of union representatives toward replacement workers was the basis for imposing Title VII liability on the union. *Dowd v. United Steelworkers of America*, 253 F.3d 1093, 1102 (8th Cir. 2001).

[42] See, e.g., *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80–81 (1998).

[43] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

[44] Our dissenting colleague insists that "the fact that this conflict has not yet been addressed in federal court does not establish that this is not a real-world challenge." But the Act and the setting-specific standards are many decades old, and federal antidiscrimination law is not new. The lack of a demonstrable conflict, as presented to the courts, suggests that it is more imagined than real.

[45] In support of its antidiscrimination-law based criticism of the setting-specific standards, the *General Motors* Board relied on an amicus brief filed by the Equal Employment Opportunity Commission (EEOC), which described an employer's duty under antidiscrimination law not to maintain a hostile work environment and argued that an

General Motors Board cite any prior Board decision finding that an employer was required to tolerate employee conduct that reasonably could be characterized as creating a hostile work environment for other employees.

Here, we are not required to decide whether the Board should reexamine its approach under the setting-specific standards to cases involving a potential conflict with Federal antidiscrimination law. This case poses no such issue. In returning to the setting-specific standards today, it is enough to reject the claim of the *General Motors* Board that those standards themselves somehow prevent the Board from accommodating Federal antidiscrimination statutes. They do not.[46] In determining whether employee misconduct is sufficiently severe to lose the protection of the Act, the Board is free to take into account a possible conflict with another Federal statute, if it were to find that the misconduct otherwise retained the Act's protection.[47]

Finally, we reject the claim of the *General Motors* Board that the setting-specific standards "penalize employers for declining to tolerate abusive and potentially illegal conduct in the workplace."[48] The claim is a rhetorical one. As the decisions of the Board and the courts over the decades make plain, the Board's traditional object was never to "penalize" employers, but rather to promote the policy of Section 8(a)(1) of the Act (protecting Section 7 rights) in the real-world context of labor disputes, by treating misconduct during the course of protected activity as different from misconduct unconnected with it.

We are not persuaded, then, by the criticisms leveled by the *General Motors* Board against the traditional, judicially approved, setting-specific standards. Discarding those standards upended long-settled Board law without an overriding reason.

2.

At the same time, replacing those standards with the motive-focused *Wright Line* standard utterly fails to serve the policies of the Act in the distinct context of misconduct committed during protected activity. It gives too little weight to employees' statutory rights and too much weight to employers' interests. Indeed, applying

employer thus has a legitimate interest (as opposed to an enforceable legal duty) in avoiding the creation of such an environment, by taking early corrective action against harassing conduct. 369 NLRB No. 127, slip op. at 7. Our dissenting colleague endorses the reliance of the *General Motors* Board on the EEOC's amicus brief without acknowledging its limitations.

We note that the EEOC's brief proposed no method for balancing employees' Sec. 7 rights and employer's legitimate interests, including interests predicated on antidiscrimination law. See Brief of Equal Employment Opportunity Commission as Amicus Curiae at p. 1 (Nov. 4, 2019) ("This amicus brief does not take a position on what standard the NLRB should use to determine when offensive statements or conduct lose protection under the NLRA."). Nor, relatedly, did the EEOC argue that there is no possible accommodation between the Act and the antidiscrimination laws that agency enforces, much less that the Act is always required to yield completely to antidiscrimination laws.

[46] Ironically, the District of Columbia Circuit decision cited by the *General Motors* Board and our dissenting colleague proves this point. In *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019), the issue was whether an employee protesting his employer's overtime policy lost the protection of the Act, under the *Atlantic Steel* standard, when he wrote the phrase "whore board" on an overtime sign-up sheet for employees. The District of Columbia Circuit rejected the employer's argument that *Wright Line* was, in fact, the controlling standard. 945 F.3d at 551. The court did, however, agree with the employer that the Board had erred in not addressing the employer's argument based on its "obligations under federal and state antidiscrimination laws to maintain a harassment-free workplace." Id. The Board had contended that the employer had failed to present that argument to it, but the court disagreed and accordingly remanded the case. Id. Thus, the Board never found that the *Atlantic Steel* test prevented it from considering the employer's antidiscrimination-law based argument. The premise of the District of Columbia Circuit's remand, in turn, was that the Board could (and must) consider the argument—under *Atlantic Steel*. *Constellium*, then, provides no support for the view of the *General Motors* Board.

On remand, the Board applied the intervening *General Motors* decision, but again found a violation of the Act, which was affirmed on appeal. *Constellium Rolled Products Ravenswood, LLC*, 371 NLRB No. 16 (2021), enfd. 45 F.4th 234 (D.C. Cir. 2022). Our dissenting colleague interprets the District of Columbia Circuit's decision following remand as a general endorsement of *General Motors* and a condemnation of *Atlantic Steel*. We do not read the decision so broadly. Rather, the court—which had never rejected the *Atlantic Steel* standard itself—held that in applying *General Motors*, the Board had adequately complied with the terms of the court's remand. 45 F.4th at 237–245. The court was not faced with a challenge to the *General Motors* standard (the losing employer had argued all along that *Wright Line* should apply), nor was the court somehow choosing between *Atlantic Steel* and *Wright Line* on their merits. That is an issue primarily for the Board, of course. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc*., 494 U.S. 775, 786–787 (1990) (addressing Board's primary role in developing and applying national labor policy). The ultimate result in *Constellium*, meanwhile, illustrates that employers sometimes invoke antidiscrimination law to cover up their hostility to employees' exercise of their labor law rights.

[47] No dissenting or concurring appellate judge critical of the Board's *application* of a setting-specific standard to find that certain misconduct did not lose the Act's protection has argued that the Board should adopt a different *standard*, much less the *Wright Line* standard adopted in *General Motors*. See *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1, 20–21 (D.C. Cir. 2016) (concurring opinion of Millett, C.J.) (arguing that "conduct of a sexually or racially demeaning and degrading nature is categorically different" from other employee misconduct in course of protected activity that properly retains Act's protection); *Cooper Tire & Rubber*, supra, 866 F.3d at 894, 896 (dissenting opinion of Beam, C.J.) (endorsing view of Circuit Judge Millett in *Consolidated Communications*, supra). Compare the view of Circuit Judge Millett with that of the First Circuit in *Local Union No. 12004, United Steelworkers v. Massachusetts*, supra, 377 F.3d at 79 (the Act "clearly protects the right of picketing workers to use a variety of harsh and insulting speech—including racial, ethnic, and homophobic slurs—in furtherance of their § 7 right to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection.'").

[48] 369 NLRB No. 127, slip op. at 1.

Wright Line effectively permits employers engaged in a labor dispute to determine the scope of their employees' statutorily protected activity in negotiating a contract, pursuing a grievance, walking the picket line, or discussing workplace issues with coworkers—settings outside the realm of ordinary managerial prerogatives. This approach abdicates the Board's statutory role in protecting Section 7 rights. As we will explain, the case made for the *Wright Line* standard by the *General Motors* Board is as flawed as its case against the setting-specific standards.

The *General Motors* Board began its justification for adopting the *Wright Line* standard by announcing that it "fail[ed] to see the merit of finding violations of federal labor law against employers that act in good faith to maintain civil, inclusive, and healthy workplaces for their employees."[49] But, as decades of Board and judicial decisions explain, the "merit" in such findings is that they ensure that employees are free to exercise their Section 7 rights (including on behalf of other employees) in the course of often-heated labor disputes that reasonably tend to lead to impulsive behavior. That the Section 7 activity may still warrant protection in these circumstances, even where the employer is acting against the employee in a good-faith response to impulsive or other misconduct accompanying the protected activity, is the very point of the Board's traditional setting-specific standards. The *General Motors* Board explicitly rejected the premise of the Board's traditional approach, the same premise accepted by the courts (and the one we reaffirm today). It announced that the Board would "not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful."[50] The Board (1) noted that employees can and do engage in Section 7 activity *without* engaging in "abusive conduct"; and (2) insisted that "it is reasonable for employers to expect employees to engage all [challenging] topics in the workplace with a modicum of civility."[51] We have no quarrel with the first proposition, but it begs the question posed in cases where employees *do* engage in misconduct in the course of protected activity. That such cases continue to arise with regularity should tell the Board something: that labor disputes often remain heated affairs.

And we cannot accept the second proposition advanced by the *General Motors* Board, that an employer should have complete freedom to police the "civility" of employees engaged in Section 7 activity as part of a labor dispute with the employer. This most obviously frustrates the Act's purposes in cases where an employer disciplines or discharges an employee who was representing coworkers in collective bargaining or in a grievance proceeding, settings where the Act envisions the employee to be the equal of management.

The declared purpose of the Act is the elimination of obstructions to the free flow of commerce by removing what Congress deemed to be two of the primary causes of industrial strife and unrest—namely, the inequality of bargaining power between employers and employees and the denial by employers of the right of employees to organize. 29 U.S.C. § 151. To achieve this end, the Act is designed both to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Id. Since the Act's earliest days, the Board and courts have recognized that it would interfere with the accomplishment of these purposes to permit employers to discipline or discharge employees for relatively minor misconduct in the course of collective bargaining or grievance adjustment, where the union has no parallel method of retaliation. See fn. 48, below. The *General Motors* Board failed to explain how meaningful collective bargaining can occur if employee representatives, while engaged in their official union duties, are subject to discipline or discharge for any perceived violation of the employer's work rules, including civility rules that may prohibit, among other things, speaking in loud, angry, or threatening tones. As cases like *Bettcher* recognize, an employer's ordinary prerogatives over discipline and discharge do not extend to dealings between the employer and employees when the employees are acting as union representatives. To the contrary, for collective bargaining to succeed, it is essential that employee-union representatives "be treated on a plane of equality" with their management counterparts and that, in spite of possible offense to the employer, they be permitted not only to put forth and defend demands, but also to vigorously and robustly debate and challenge the statements of management representatives without fear of discipline or retaliation.[52]

[49] 369 NLRB No. 127, slip op. at 8.

[50] Id.

[51] Id.

[52] *N.P. Nelson Iron Works*, supra, 80 NLRB at 795. See also *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765, 766 & fn. 6 (1975) (explaining that "[t]he relationship at a grievance meeting is not a 'master-servant' relationship but a relationship between company advocates on one side and union advocates on the other side, engaged as equal opposing parties," and that allowing an employer to discipline employee-representatives for giving offense during a grievance meeting "where the union has no parallel method of retaliation, . . . would destroy that essential relationship" and "so heavily weigh the mechanism in the

Whatever the particular setting, the elevation of "civility" as a supposed statutory goal gives employers dangerous discretionary power over employees whenever they exercise their statutory rights in opposition to the employer's interests. But just as Title VII is not "a general civility code for the American workplace,"[53] neither is the National Labor Relations Act. It imposes no obligation on employees to be "civil" in exercising their statutory rights. And while the Act has always been understood to recognize that employers have a legitimate interest in maintaining order and respect in the workplace, it also authorizes the Board to balance that interest against employees' Section 7 rights.[54] Put somewhat differently, the Board—not employers—referees the exercise of protected activity under the Act.

Remarkably, the *General Motors* Board rejected that proposition, stating that it did "not read the Act to empower the Board to referee what abusive conduct is severe enough for an employer to lawfully discipline."[55] The *General Motors* Board, then, seemed to view the setting-specific standards as inconsistent with the Act and thus an impermissible policy choice. Such a view has no support in the courts; indeed, it is completely contrary to decades of judicial precedent. In routinely enforcing the Board's application of the setting-specific standards, the Federal courts have affirmed the Board's role as referee and have deferred to it.[56] Nor does Section 10(c) of the Act somehow support the view of the *General Motors* Board, as it claimed.[57] If, as it seems, the *General Motors* Board mistakenly believed that the setting-specific standards were inconsistent with the Act, then its own decision cannot stand. When the Act permits the Board to choose between reasonable interpretations of the statute, the Board must make a choice and explain it. If it errs in thinking that it had no choice, then it fails to engage in reasoned decision-making, as the courts have held.[58] It is significant, in turn, that the *General Motors* Board did not even contemplate the possibil-

employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances"), enfd. 545 F.2d 674, 676 (9th Cir. 1976) ("[G]rievance meetings often generate high emotions. Shouting and profanity are common and are protected activities in this setting."), cert. denied 431 U.S. 965 (1977); *Crown Central Petroleum Corp.*, 177 NLRB 322, 323 fn. 4 (1969) (observing that "'the master-servant' relationship does not carry over into a grievance meeting"; therefore, company advocate was subject to the" free exchange of remarks" inherent in such a meeting and his supervisory disciplinary authority was not involved), enfd. 430 F.2d 724 (5th Cir. 1970); *Bettcher*, supra, 76 NLRB at 527 (explaining that "[i]f an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives").

[53] *Oncale v. Sundowner Offshore Services, Inc.*, supra, 523 U.S. at 80-81.

[54] As the Supreme Court has often emphasized, Congress committed to the Board the "difficult and delicate responsibility" of balancing "the conflicting legitimate interests" of employers and employees to effectuate national labor policy, and the Board's determinations, in striking that balance, of the scope of the Act's protection and whether particular employer conduct unlawfully restrains or interferes with protected activity are entitled to considerable deference by the courts. *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963) (quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)); *Republic Aviation Corp. v. NLRB*, 324 U.S. at 797-798. Accord: *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-496 (1979); *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266-267 (1975).

[55] 369 NLRB No. 127, slip op. at 8.

[56] See, e.g., *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 28 (D.C. Cir. 2011); *International Union, UAW v. NLRB*, 514 F.3d 574, 581-583 (6th Cir. 2008); *NLRB v. Allied Aviation Fueling*, 490 F.3d at 379; *NLRB v. Thor Power Tool*, 351 F.2d at 587.

[57] 369 NLRB No. 127, slip op. at 9. Certainly, the Board may not order relief when an employee is discharged "for cause" within the meaning of the Act. Sec. 10(c) provides in relevant part that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged *for cause*." 29 U.S.C. § 160(c) (emphasis added). But a discharge in violation of the Act, an unfair labor practice, is not "for cause," as the Supreme Court has explained. See *Washington Aluminum Co. v. NLRB*, 370 U.S. 9, 14 (1962) (stating that Sec. 10(c) "cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which [Sec.] 7 of the Act protects."). See also *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964).

In adopting the "for cause" provision of Sec. 10(c), Congress intended to prevent the Board from remedying the discharge of employees "guilty of gross misconduct," based on an unsupported inference that the employee's status as a union member or official "was the reason for his discharge." See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), quoting H. R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). As the Supreme Court explained in *Transportation Management*, the "proviso was . . . a reaction to the Board's readiness to infer antiunion animus from the fact that the discharged person was active in the union." 462 U.S. at 401.

There is no evidence that Congress was concerned about Board cases involving relatively minor misconduct in the course of statutorily protected activity. Such misconduct, of course, is distinct from unprotected concerted activity. See *Washington Aluminum*, supra, 370 U.S. at 15 (referring to the "normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract," as well as "indefensible" disloyalty, as discussed in *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). Contrary to the *General Motors* Board (see 369 NLRB No. 127, slip op. at 10 fn. 25), *Jefferson Standard*, which involved disparaging statements about an employer's product made by striking employees in a leaflet that did not disclose the ongoing labor dispute, has no bearing in cases like this one.

[58] See, e.g., *Slaughter v. NLRB*, 794 F.2d 120, 122 (3rd Cir. 1986); *Prill v. NLRB*, 755 F.2d 941, 947–948 (D.C. Cir. 1985). Assuming for the sake of argument that the *General Motors* Board did believe that it had the option of rejecting the setting-specific standards, and so exercised a policy choice, we reject that choice for all of the reasons explained here.

ity of any alternative between the setting-specific standards and *Wright Line*, although it was free to create one.[59]

In adopting the *Wright Line* standard, the *General Motors* Board also explicitly 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.[60] That distinction, as we have demonstrated, has a solid foundation in the Act and its policies, as well as in Supreme Court and other judicial precedent. Before *General Motors*, it was universally recognized that taking action against employees for conduct *during* Section 7 activity had a significant potential to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by [S]ection 7," in the words of Section 8(a)(1). The *General Motors* Board denied that potential. Instead, the Board granted employers the same managerial prerogatives regardless of the setting of the employees' conduct.

Those prerogatives are extremely broad, as the *General Motors* Board recognized. Under the Act, employers remain free to discipline or discharge employees for any reason that the Act does not make unlawful.[61] If Section 8(a)(1) and (3) are removed from the equation, as *General Motors* does, then employers apparently may cite any sort of "separable" conduct during Section 7 activity as the basis for discipline or discharge of the employee. Under *General Motors*, it seems, an employer could legitimately invoke common incivility during Section 7 activity—talking in a loud voice, wearing an angry expression, making a hand gesture, standing up from a chair, using profanity, and the like—as a basis for disciplining or discharging an employee.[62] Under *General Motors*, Section 7 activity may be stripped of protection if exercised with even mild accompanying misconduct of which the employer disapproves, leaving employees at great risk of crossing a line that only their employer can determine when they engage in the intimidating and unpredictable practice of confronting their employer in a concerted and protected manner. It is easy to see that the *General Motors* standard has the potential to chill not only robust, but all manner of Section 7 activity, lest an employee err in its exercise and run afoul of the employer-determined standards of conduct.

General Motors purported to focus on addressing "abusive conduct" by employees, but that term has no statutory definition, and the *General Motors* Board did not, in fact, offer a clear or comprehensive definition of its own – despite using the phrase "abusive conduct" 65 times. However, if the *Wright Line* test applies *only* in cases of "abusive conduct"—and not, as just suggested, in every case where an employer points to some "separable" employee conduct during Section 7 activity—then the rationale of the *General Motors* decision collapses. In every case involving discipline or discharge ostensibly

[59] The Supreme Court has explained that the *Wright Line* standard itself is not required by the Act even in cases governed by Sec. 8(a)(3). *NLRB v. Transportation Management*, supra, 462 U.S. at 402–403. Unlike the *General Motors* Board, and for reasons already explained, we are not persuaded that any standard focused on the employer's motive is superior to the long-established setting-specific standards. But even assuming that the setting-specific standards were fundamentally flawed, the *General Motors* Board erred in reflexively adopting *Wright Line* as a substitute, rather than genuinely considering its options under the Act.

[60] 369 NLRB No. 127, slip op. at 10 (explaining that under *Wright Line* standard "employees who engage in abusive conduct in the course of Section 7 activity will not receive greater protection from discipline than other employees who engage in abusive conduct").

[61] 369 NLRB No. 127, slip op. at 9 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937)).

[62] Although the Board in *General Motors* stated that a *Wright Line* analysis would apply in cases involving employees discharged or disciplined for alleged "abusive conduct," such as profane ad hominem attacks, racial slurs, and threats of violence, it has subsequently applied the *Wright Line* analysis to cases involving much milder forms of misconduct in the course of Sec. 7 activity. See, e.g., *Wismettac Asian Foods, Inc.,* 370 NLRB No. 35, slip op. at 2, 13 (2020) (severing allegation that the respondent unlawfully disciplined an employee for speaking in an "angry and hostile" tone while concertedly complaining in a safety meeting about being required to drive overweight trucks and remanding the allegation to the judge for analysis under the *Wright Line* standard, rather than the *Atlantic Steel* test, pursuant to *General Motors*). Any lingering doubt that *General Motors* would permit employers to discipline employees for even routine misconduct in the course of Sec. 7 activity was removed in the Board's supplemental decision in *Wismettac*, where Chairman Ring and Member Kaplan, although affirming the judge's finding of a violation, expressly disavowed the judge's statement that "[speaking] out aggressively" in the course of Sec. 7 activity could not be considered misconduct under *General Motors* and the judge's highly pertinent observation that

> [I]f speaking in an animated and elevated voice in the course of protected activity, without more, can justify discipline, Sec[.] 7 is eviscerated. Herein lies one of the problems with a *Wright Line* analysis under the facts here. To quell employees from raising protected complaints, an employer could discipline all employees for speaking up at meetings, whether they are making a protected complaint or not. Then, it can be argued that the employee disciplined for using the same tone while engaging in protected activity is being treated the same as other employees, so there is no causal connection. That surely isn't consistent with the Act.

371 NLRB No. 9 (2021), slip op. at 1 fn. 6, 6 & fn. 12. Our dissenting colleague dismisses the problem illustrated by *Wismettac* because the Board there ultimately found that the employer acted unlawfully. But this misses our point. Under *General Motors*, unless the General Counsel is able to prove a motive-based violation under *Wright Line*—which will not always be the case, of course—an employer is free to discipline or discharge employees for even minor misconduct in the course of protected activity.

for conduct during Section 7 activity, the Board first would be required to decide whether the conduct amounted to "abusive conduct" or not. But this determination would require the Board to do precisely what the *General Motors* Board said the agency was not statutorily permitted to do: determine what degree of misconduct lost the Act's protection.[63]

In adopting the *Wright Line* standard, the *General Motors* Board demonstrably focused on the interests of employers.[64] This focus has consequences not only for employees who exercise their Section 7 rights in a way that offends their employers, but also for employees who might be harmed when coworkers engage in conduct that, under the setting-specific standards, would *lose* the protection of the Act. Under the Board's traditional approach, the Board's evaluation of employee conduct is dispositive (a fact the *General Motors* Board condemned). But under *Wright Line*, an employee could engage in conduct during Section 7 activity that would have lost the Act's protection under a setting-specific standard, but still win reinstatement and other remedies from the Board, if the employer's motive in discharging or disciplining the employee was unlawful. The *General Motors* Board acknowledged this real possibility.[65]

Yet the Board dismissed its significance, asserting that the agency's "role is to protect employees from interference, restraint or coercion . . . in the exercise of" Section 7 rights, but not to "affirmatively sanction an employer for failing to take steps to prevent a hostile work environment or otherwise fight discrimination."[66] This attempt to justify use of the *Wright Line* standard fails. Consider cases involving picket-line misconduct. Contrary to the claims of the *General Motors* Board, the *Wright Line* standard may be *more* tolerant of severe misconduct than the long-established *Clear Pine Mouldings* standard. *Clear Pine Moldings* focused on the need to protect non-striking employees from picket-line misconduct that restrained or coerced them in the exercise of their Section 7 right to refrain from joining the strike. Under *General Motors*, which overruled *Clear Pine Mouldings*, such misconduct would not prevent the Board from reinstating a discharged striker, if the evidence showed that the employer's overriding goal was to punish employees for striking—hardly an uncommon motive. Under *General Motors*, employees who might be victimized by coworkers' harassing conduct would be *least* likely to be protected in situations where they *most* need protection: where their employer tolerated harassing conduct unconnected to Section 7 activity, demonstrating its disparate treatment of employees engaged in harassing conduct *during* Section 7 activity and thus supporting a motive-based finding of liability under *Wright Line* for discharging those harassers (but not others).[67] Adopting the *Wright Line* standard was thus at odds with a core part of the rationale advanced by the *General Motors* Board for discarding the setting-specific standards.

In our view, then, the application of *Wright Line* to misconduct occurring in the course of protected activity is an unsatisfactory solution to an exaggerated problem. It is indisputable that, until *General Motors*, the Board's

[63] Our dissenting colleague argues that *General Motors* sufficiently defined "abusive conduct" by pointing to examples: "misconduct like racial slurs, sexual harassment, and profane ad hominem attacks." This argument, however, does not refute our point here: that the threshold question in every *General Motors* case is whether the "separable" employee conduct during Sec. 7 activity falls into the category of "abusive conduct." Making this determination is not fundamentally different than determining whether the conduct lost the protection of the Act for purposes of the traditional setting-specific standards that *General Motors* rejects. And it offers the same possibility for inconsistency and judicial disagreement. How "profane" must a "profane ad hominem attack" be before it constitutes "abusive conduct"? What conduct amounts to "sexual harassment" in this context? Does it include, for example, writing the phrase "whore board" on a voluntary-overtime sign-up sheet, when the evidence suggests that the phrase was used to criticize employees, regardless of gender, who effectively prostituted themselves for extra wages by siding with the employer in a dispute about work hours? See generally *Constellium,* supra*,* 371 NLRB No. 16. The notion that *General Motors* is simpler to apply than the setting-specific standards, then, is highly dubious. Our colleague insists that "it is reasonable to expect that abusive conduct will be self-evident in most cases," but it would seem just as reasonable to expect that conduct that loses the protection of the Act "will be self-evident in most cases," a proposition that our colleague would not endorse.

[64] See, e.g., 369 NLRB No. 127, slip op. at 8 (asserting that rationale for setting-specific standards "has largely swallowed employers' . . . right to maintain order, respect, and a workplace free from invidious discrimination"); id. at 10 (stating that "realignment" of law "honors the employer's right to maintain order and respect"); id. at 11 (new rule should be applied retroactively because "[c]ontinuing to find violations of the Act . . . where employers were simply exercising their right to maintain a civil, safe, nondiscriminatory workplace for their employees would be the greater injustice").

[65] 369 NLRB No. 127, slip op. at 10 fn. 26 (noting that "[i]f an employer is unable to prove it would have taken the same action against, for instance, racist conduct in the absence of Sec. 7 activity, perhaps because of a history of tolerating such conduct, the Board would still find the violation under *Wright Line*").

[66] Id.

[67] For this reason, the *General Motors* Board's application of the *Wright Line* standard to misconduct occurring in the course of protected activity provides no assurance that the antidiscrimination goals of Title VII will be met, or even incentivized. Rather, under *Wright Line* employees will be protected from coworker harassment only to the extent that the employer can prove it would have taken the same action against the harasser in the absence of the protected aspect of the activity. Indeed, under a *Wright Line* standard, an employer that cannot shoulder this evidentiary burden will be found to have violated the Act by taking action against the harasser.

setting-specific standards had stood the test of time. No court, and no commentator, had ever argued that *Wright Line* was superior. We do not believe it is.

IV.

Addressing the Board's authority to reconsider and change its law, the Supreme Court has characterized the administrative process as a "constant process of trial and error."[68] In *General Motors*, the Board decided to upend long-established, judicially approved law, with little if any justification. For all of the reasons explained here, we conclude that the Board's decision was error, and we restore the law to where it stood when this case was originally decided (and for decades before). Just as the *General Motors* Board found it appropriate to apply its holding retroactively (369 NLRB No. 127, slip op. at 10–11), we too retroactively apply today's holding, which overrules *General Motors* and restores the Board's traditional setting-specific standards.

Indeed, the "Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage,'" unless retroactive application would work a "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-1007 (1958)). See, e.g., *Valley Hospital Medical Center, Inc.*, 371 NLRB No. 160, slip op. at 15–17 (2022). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *SNE Enterprises*, supra at 673 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947)). In making that determination, the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." Id.

There can be no claim of manifest injustice here, because this case, as explained, was litigated under the *Atlantic Steel* standard, which we restore today. See *Valley Hospital Medical Center, Inc.*, supra, slip op. at 15 (applying restored legal standard retroactively where that standard was in effect when employer acted unlawfully). In contrast to our dissenting colleague, we see no "serious due process concerns" presented here.[69] Moreover, any harm to the interest of employers who might have relied on *General Motors* in the relatively short time since it was decided is outweighed by the clear harm to the achievement of the Act's policies by continuing to apply *General Motors* in cases like this one. As explained, in discarding the long-established setting-specific standards, the *General Motors* Board upended decades of Board precedent without a sound overriding reason. Applying today's holding retroactively will avoid the potential for inconsistency in pending cases, will restore judicially approved standards to this area of law, and will ensure that our decision serves its intended goal of adequately protecting employees' exercise of Section 7 rights, as Board law did for many decades. Accordingly, we reaffirm our prior Decision and Order as modified herein.[70]

V.

In doing so, we have carefully considered (as already reflected) the arguments of our dissenting colleague, a member of the *General Motors* Board, who endorses and reiterates the rationale for that decision. While our colleague criticizes the setting-specific standards, he forthrightly acknowledges that he does *not* argue that they are irrational or inconsistent with the Act or that some other reason prevents the Board from readopting them.[71] Instead, as *General Motors* did, he points to judicial decisions criticizing how the Board *applied* a setting-specific standard in a particular case.[72] He does not argue that

[68] *NLRB v. J. Weingarten* supra, 420 U.S. at 266.

[69] Our dissenting colleague faults the Board for not permitting the Respondent to reply to the General Counsel's statement of position here, following remand from the Fifth Circuit, in addition to filing its own statement of position. (The General Counsel argued that the Board should overrule *General Motors*.) According to our colleague, this was a violation of the Respondent's due-process rights. But clearly the Respondent was not prejudiced by the Board's action. Here, we return to the law under which this case was decided originally, and we reaffirm our original decision and order. Overruling *General Motors,* in other words, has left the Respondent precisely where it was before, after it had a full and fair opportunity to litigate the case under the *Atlantic Steel* standard.

The Respondent has never been entitled to have this case decided under *General Motors*, applied retroactively, as opposed to *Atlantic Steel*, the legal standard in effect at the time of the events of this case and at all times during the pendency of the litigation leading to the Board's original decision.

Nor are we persuaded that our decision today reaffirming our original decision in this case somehow exceeds the scope of the Fifth Circuit's remand. The court's remand did not order the Board to apply *General Motors*, nor did the court decide any issue related to the governing legal standard here. It simply gave the Board the opportunity to determine what legal standard, in its view, was applicable. The Board was entirely free, then, to determine that *General Motors* has no bearing on this case because it was incorrectly decided and is overruled.

[70] See supra fn. 2.

[71] Our colleague observes that the Board today "certainly ha[s] the right to 'strike a different balance' between the Section 7 rights of employees and the legitimate interests of employers" than *General Motors* did.

[72] The main premise of our colleague's dissent—that "[f]or years, the courts have expressed concerns regarding the Board's traditional approach for evaluating whether an employer violates the Act by disciplining an employee for misconduct where that misconduct took place

these decisions are the rule, rather than the exception.[73] And he does not and cannot cite to any decision in which a Federal appellate court has rejected a setting-specific standard itself.[74] Rather, our colleague properly acknowledges "the fact that reviewing United States Courts of Appeals historically tolerated the loss-of-protection standards by enforcing Board decisions applying those standards." As *General Motors* did, our colleague criticizes Board decisions applying setting-

in connection with [protected] activity"—has no foundation in case law. The dissent fails to cite a single case in which a court criticized or rejected the Board's setting-specific standards, rather than the Board's application of those standards to the facts of a particular case. The dissent cites *Felix Industries v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001), denying enf. 331 NLRB 144 (2000), a decision more than 20 years old, as an example of "pressure on *Atlantic Steel*" from the courts. However, there, as in the other appellate cases cited by the dissent, the court did not question the *Atlantic Steel* standard, only the Board's particular application of it to the facts, criticizing the Board's weighing of one of the four *Atlantic Steel* factors, the nature of the outburst. Contrary to the Board, the court found that the nature of the outburst weighed in favor of the employee losing the protection of the Act. 251 F.3d at 1055. The court agreed with the Board, however, that none of the other factors weighed in favor of loss of protection. Accordingly, the court remanded the case to the Board to determine whether the "outburst" factor sufficiently outweighed the other factors so as to tip the balance in favor of loss of protection. On remand, the Board found that it was "insufficient to overcome the other factors" and so again found a violation of the Act. *Felix Industries*, 339 NLRB 195, 196 (2003). The court subsequently granted the joint motion of the parties for summary entry of consent judgment enforcing the Board's order. *Felix Industries v. NLRB*, Nos. 03–1221, 03–1239, 2004 U.S. App. LEXIS 13793 (D.C. Cir. 2004) (per curiam).

Similarly, in *Tampa Tribune v. NLRB*, 560 F.3d 181, 184-189 (4th Cir. 2009), denying enf. 351 NLRB 1324 (2007), cited by our colleague, the court did not criticize the Board's setting specific standards or the policies on which they are based but, rather, disagreed with how the Board viewed one of the factors. See *Tampa Tribune*, 560 F.3d at 186 (agreeing that the standard for determining "whether an employee has forfeited the protection of the Act as a result of the nature of his conduct was set forth . . . in *Atlantic Steel*"); see also *NMC Finishing v. NLRB*, 101 F.3d 528, 532 (8th Cir. 1996) (recognizing that "the rough and tumble economic activity permitted by the policies established by Congress through the NLRA must be supported and not unreasonably or unduly inhibited," but finding, contrary to the Board, that an employee forfeited the protection of the Act under the *Clear Pine Moulding* standard).

[73] Our colleague says that "[e]ven assuming that courts have not expressly criticized the loss-of-protection standards themselves, courts' repeated rejections of the Board's application of those standards to the facts of particular cases necessarily calls into question the standards themselves because they are leading, in effect, to false positives." But the "repeated rejections" our colleague cites are relatively few in number, given the many cases decided under the setting-specific standards over several decades. Such rejections, in any case, do not undermine the standards themselves, any more than judicial decisions disagreeing with the Board's application of *Wright Line* in particular cases call *Wright Line* into question.

[74] In *NLRB v. Starbucks Coffee Co.*, 679 F.3d 70 (2d Cir. 2012), denying enf. 355 NLRB 636 (2010), cited by our colleague, the Second Circuit held that the *Atlantic Steel* test "is inapplicable to an employee's use of obscenities in the presence of an employer's customers." 679 F.3d at 80. It accordingly remanded the case to the Board for the Board to develop a *setting-specific* standard to apply in that particular context. Id. ("Now that the Board is advised that its *Atlantic Steel* four-factor test is not applicable to determining section 7 protection for an employee who, while discussing employment issues, utters obscenities in the presence of customers, we think the Board should have the opportunity in the first instance to consider what standard it will apply in that context."). The *Starbucks* decision, in turn, was the only judicial pronouncement cited by the Second Circuit in *Pier Sixty*, supra, in stating that the "*Atlantic Steel* test has come under pressure in recent years." 855 F.3d at 122. Our colleague, then, places far more weight on that statement than it deserves in arguing against setting-specific standards and in favor of adopting the *Wright Line* standard in their place—which the Second Circuit has never suggested.

Our colleague also relies on an inapposite decision of the District of Columbia Circuit, involving a facial challenge to an employer rule, rather than the *application* of such a rule to an employee outburst in the course of Sec. 7 activity. See *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001). There, the court generally recognized that "labor negotiations produce occasional intemperate outbursts and, in a specific context, such language may be protected." Id. at 27. Indeed, citing *Adtranz*, the District of Columbia Circuit itself has found such outbursts protected. See, e.g., *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 27–28 (D.C. Cir. 2011) (intemperate statements during workplace meeting). The court has also recognized that employer rules ostensibly intended to promote civility in the workplace may actually be adopted and applied to stifle Sec. 7 activity. See *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 362–364 (D.C. Cir. 2016) (affirming the Board's determination that employer memorandum urging employees "to behave with 'dignity and respect'" was unlawful, where employees would reasonably have interpreted memorandum, in context, as warning not to engage in Sec. 7 activity).

LeMoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004), cited by our colleague for the proposition that the setting specific standards are "simply a cloak for agency whim," is also inapposite. *LeMoyne-Owen College* was a test-of-certification case; it did not involve application of the Board's traditional setting-specific standards. Rather, the issue before the court was whether the Board correctly found that the respondent violated Sec. 8(a)(5) and (1) by failing and refusing to recognize and bargain with the newly elected union as the exclusive collective-bargaining representative of employees in an appropriate unit. In that context, the court observed that careful and thorough application of a multifactor test is "important to allow relevant distinctions between different factual configurations [to] emerge." Id. at 61 (alteration in original, citations and internal quotations omitted). Of course, identifying and evaluating relevant factual distinctions is exactly what the setting-specific standards are designed to do. In contrast, the standard adopted by the majority in *General Motors* ignores factual distinctions that the Board and the courts have long considered relevant to the determination of whether an employee has forfeited the protection of the Act by engaging in misconduct in the course of protected activity. Thus, the standard adopted in *General Motors* elides consideration of such critical factors as whether the alleged misconduct occurred in the course of protected activity; the nature and severity of the alleged misconduct; the place of the alleged misconduct and whether it was witnessed by other employees or customers; and whether the alleged misconduct was provoked by the employer's unfair labor practices. Additionally, *General Motors* does not permit consideration of whether the alleged misconduct took place in the context of the give and take of collective-bargaining or grievance adjustment, where the Act contemplates that employee-representatives will be treated on an equal plane with the employer, rather than as subordinates subject to the employer's work rules and directives.

specific standards that actually were *enforced* by a court of appeals.[75]

Pointing to the decision of the *General Motors* Board to invite amicus briefs, he argues that the Board should have done so here. But he cites no amicus brief submitted to the Board that argued in favor of adopting the *Wright Line* standard. Indeed, the Board's notice and invitation to file briefs gave no hint that the Board was contemplating that step, as opposed to expanding the scope of conduct deemed to lose the protection of the Act—which is the thrust of the criticism leveled against the setting-specific standards.[76] It is perhaps unsurprising, then, that the rationale of *General Motors* for abandoning the setting-specific standards altogether, in favor of an employer-motive based test, proved to be demonstrably flawed, as we have shown here. We cannot accept any part of our colleague's claim that today we "reflexively scrap the Board's carefully considered change in direction [in *General Motors*] without giving it time to prove its worth."[77]

As did the *General Motors* Board, our dissenting colleague focuses on the supposed conflict between the setting-specific standards and Federal antidiscrimination laws. Of course, in cases involving purported "abusive conduct" that does *not* implicate antidiscrimination law—situations illustrated by several cases cited in the dissent, such as *Plaza Auto Center, Inc.*, 360 NLRB 972 (2014), *Pier Sixty, LLC*, 362 NLRB 505 (2015), and *Felix Industries,* 331 NLRB 144 (2000), as well as *General Motors* itself[78]—our colleague's argument has no application, although such cases, too, come under *General Motors*.

In turn, our colleague faults us for "merely mak[ing] assurances that the Board can accommodate antidiscrimination laws while applying the loss-of-protection standards" and for "not provid[ing] any suggestions or guidelines for how any such accommodation might work." But this case, where antidiscrimination law is not implicated, does not require us to provide the speculative guidance our colleague insists is necessary. While we reject our colleague's suggestion that there is an inherent or intractable conflict between the setting-specific standards and Federal antidiscrimination law—a conflict that *General Motors* itself failed to define with any level of specificity or clarity, and that has never caused a reviewing court to reject the Board's setting-specific standards—we note that if such a conflict were to arise on the particular facts of a future case, the Board could, of course, address the issue as that specific adjudication required.

ORDER

The National Labor Relations Board reaffirms its Decision and Order set forth at 369 NLRB No. 88 and orders that the Respondent, Lion Elastomers LLC, Port Neches, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they engage in activities on behalf of the Union.

(b) Issuing disciplinary warnings to employees because of their support for and activities on behalf of the Union.

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[75] For example, our colleague cites decisions enforced by the Second, Eighth, and Ninth Circuits. See *Pier Sixty, LLC*, 362 NLRB 505 (2015), enfd. 855 F.3d 115 (2d Cir. 2017); *Cooper Tire & Rubber Co.*, 363 NLRB 1952 (2016), enfd. 866 F.3d 885 (8th Cir. 2017); *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985). In defending the failure of the *General Motors* Board to address the Eighth Circuit's decision in *Cooper Tire*, supra, our colleague points to the Board's established policy of declining to acquiesce in adverse decisions from the federal courts of appeals. But the Eighth Circuit's decision was *not* adverse to the Board, and insofar as the Board's nonacquiescence policy is relevant here, it would seemingly weigh *against* abandoning the setting-specific standards based on the judicial criticism invoked by the *General Motors* Board and our colleague.

[76] 368 NLRB No. 68 (2019). The questions posed in the Board's notice and invitation to file briefs did not mention *Wright Line* or the issue of employer motive. Rather, they asked, among other things: "Under what circumstances should profane language or sexually or racially offensive speech *lose the protection of the Act*?" and "What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements *lose the protection of the Act*?" Id., slip op. at 2 (emphasis added).

[77] Our colleague questions why the Board would revisit *General Motors* here when the original decision in this case stated that the discharge at issue would have been unlawful even under *Wright Line*. See *Lion Elastomers*, supra, 369 NLRB No. 88, slip op. at 1 fn. 3, 21 (adopting decision of administrative law judge, who found that *Wright Line* test did not apply, but who opined that result would have been the same in any case). But, as we have explained, the Fifth Circuit remanded the case to the Board, at the Board's request, to consider the effect of *General Motors*, an intervening decision. This step was taken under the Board's prior majority, which issued *General Motors*. We hardly reach, then, to reject the application of *General Motors* in this case, decided originally under the law to which we now return.

[78] *General Motors* involved separate incidents of claimed misconduct by an employee union representative in the course of his union duties at work. Only one incident even conceivably touched on the concerns of antidiscrimination law: an episode where the employee, in a meeting over subcontracting, "addressed [a management official] as "Yes Master," and acted in a subservient manner." 369 NLRB No. 127, slip op. at 22. The employer asserted that the employee "created a racially hostile environment." Id. The administrative law judge rejected this argument, but nevertheless found that the employee had lost the protection of the Act, because the employee's "demeanor towards [the manager] was a personal attack which had the effect, even from an objective view, of negatively impacting other meeting attendees such that [the employee] was unfit at that time to carry out his union duties." Id.

(c) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful discipline issued to Joseph Colone on July 20, 2017.

(b) Within 14 days from the date of this Order, offer Joseph Colone full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Joseph Colone whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful termination and adverse disciplinary action against him, in the manner set forth in the remedy section of the judge's decision as amended in the Board's decision reported at 369 NLRB No. 88 and further amended in this decision.

(d) Compensate Joseph Colone for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) File with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Joseph Colone's corresponding W-2 forms reflecting the backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharge, and within 3 days thereafter, notify Joseph Colone in writing that this has been done and that the discipline and discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its Port Neches, Texas facility copies of the attached notice marked "Appendix."[79] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 24, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 1, 2023

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Lauren McFerran, Chairman

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Gwynne A. Wilcox, Member

[79] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

For years, the courts have expressed concerns regarding the Board's traditional approach for evaluating whether an employer violates the Act by disciplining an employee for misconduct where that misconduct took place in connection with activity protected by Section 7 of the National Labor Relations Act. In particular, the Board's traditional approach, focusing on whether an employee's misconduct had "lost the protection of the Act," had resulted in seemingly arbitrary and, at times, unreasonable results.[1]

In 2019, the Board invited briefing from interested amici in regard to the pending *General Motors* case, asking whether the Board's traditional standards for evaluating employer discipline in this context should be revised.[2] Drawing upon specific suggestions submitted by amici, the Board determined that applying the frequently used and more reliable *Wright Line*[3] standard to these cases would lead to more consistent, reasonable outcomes that protected employees' protected activity while also ensuring that employers had the ability to protect their employees from hostile workplaces, threats of violence, and other forms of harassment. *General Motors LLC*, 369 NLRB No. 127 (2020).

Under *General Motors*, the Board appropriately recognized that, as in traditional mixed motive cases, when an employer disciplines an employee for abusive conduct, the lawfulness of that action should be judged by whether or not the employer would have disciplined the employee for their misconduct, regardless of the context in which it occurred. *General Motors* rejected the assumption upon which the traditional loss-of-protection standards had been based: that protected Section 7 activity was fundamentally inseparable from misconduct that occurs during that protected activity. It also rejected the presumption that by allowing employers to discipline employees for abusive conduct—not covered by the Act--occurring in connection with Section 7 activity would in any way dissuade other employees from engaging in Section 7 activity that did not involve abusive conduct. Accordingly, the Board concluded that the best way to protect *both* employees' Section 7 rights *and* employers' right to maintain a safe workplace free from violence, harassment, and discriminatory conduct was to ensure employees are treated no worse than if they had not engaged in Section 7 activity. Employer discipline purportedly for abusive conduct would be analyzed as any other discipline where the General Counsel alleges that Section 7 activity was a motivation. With this change, the Board returned closer to its statutory mission.

Today, despite the fact that it seems unlikely that the application of *General Motors* would affect the outcome of this case,[4] and notwithstanding the serious due process concerns involved, my colleagues do not even consider that approach. Rather, they reflexively scrap the Board's carefully considered change in direction without giving it time to prove its worth. Although my colleagues certainly have the right to "strike a different balance" between the Section 7 rights of employees and the legitimate interests of employers, I am concerned that today's decision will, once again, require employers to continue to employ individuals who have engaged in such abusive conduct any reasonable employer would have terminated them for that conduct. If the past is any guide, the Board will now protect employees who engage in a full range of indefensible misconduct, such as profane ad hominem attacks and threats to supervisors in the workplace,[5] posting social media attacks against a manager and his family,[6] shouting racist epithets at other employees,[7] or carrying signs sexually harassing a particular employee.[8] I

[1] I note that the concept of "losing the Act's protection" is a Board-made construct that does not appear in the Act itself.

[2] *General Motors LLC*, 368 NLRB No. 68 (2019). The Board received more than 20 responses to its invitation for briefing.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] See *Lion Elastomers*, 369 NLRB No. 88, slip op. at 1 fn. 3, 21 (2020) (finding employee's discharge unlawful even under *Wright Line*). Although I previously determined, applying *Atlantic Steel*, that the Respondent violated the Act by discharging the discriminatee in this case, and have no reason to expect that my view would change, I would nevertheless remand the matter so that the parties would have an opportunity to present additional evidence that could be relevant under *General Motors* and to allow the judge to make the initial *General Motors* analysis.

[5] See *Plaza Auto Center, Inc.*, 360 NLRB 972, 977–980 (2014) (finding protected an employee calling the owner a "fucking mother fucking," a "fucking crook," an "asshole," and "stupid"; telling the owner nobody liked him and everyone talked about him behind his back; standing up in a manner that pushed the chair aside; and threatening that the owner would regret firing him, if he did).

[6] *Pier Sixty, LLC*, 362 NLRB 505, 506-508 (2015) (finding protected a Facebook post stating that a manager "is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!"), enfd. 855 F.3d 115 (2d Cir. 2017).

[7] *Airo Die Casting, Inc.*, 347 NLRB 810, 812 (2006) (finding protected a striker shouting "fuck you [n-word]" to a black security guard while gesturing with both middle fingers).

[8] *Nickell Moulding*, 317 NLRB 826, 828–829 (1995) (finding protected a striker carrying a sign targeted at one particular nonstriker that

cannot agree that the Act protects such significant misconduct simply because it takes place in connection with Section 7-protected activity.

I believe that the *General Motors* standard effectively protects the rights of employees to engage in Section 7 conduct while, at the same time, holding employees accountable for the consequences of their abusive conduct, which conduct may affect their fellow workers as well as their employers' ability to maintain a workplace free of personal attacks, threats of violence, and harassment. Accordingly, I must dissent.

I. TODAY'S DECISION DEPRIVES THE RESPONDENT OF ITS RIGHT TO DUE PROCESS

Before turning to the merits of this case, I must draw attention to the fact that the Respondent's due process rights are being violated by the majority's decision to use this case to overrule *General Motors.*

As set forth in the majority's decision, this case is currently before the Board because, at the time that *General Motors* issued, it was pending before the Fifth Circuit Court of Appeals. Following the issuance of *General Motors,* the General Counsel filed a motion with the court, asking the court to "remand the instant case to determine whether *General Motors* affects the Board's analysis in this case." The Respondent did not oppose that motion. On June 15, 2021, the court granted the Board's motion.

On June 22, 2021, the Board notified the parties that it had accepted the court's remand and invited them to file statements of position "with respect to the issues raised by the remand." The Respondent and the General Counsel each filed a statement of position. The Respondent, consistent with the scope of the remand that was granted by the court, set forth its argument regarding how this case should be decided pursuant to *General Motors* and concluded that the best course would be for the Board to remand the case to the administrative law judge for further consideration. The General Counsel, on the other hand, declined to adhere to the scope of the remand that she herself had requested, instead arguing—for the first time—that the Board should use the remand of this case as an opportunity to overrule the *General Motors* decision.

After the parties' statements of position were filed, the Respondent filed a motion with the Board, seeking leave to file an answer or reply to the General Counsel's statement of position.[9] In its motion, the Respondent asserted that, in the General Counsel's motion to the Fifth Circuit, the "General Counsel sought remand to consider 'whether *General Motors* affects the Board's analysis in this case.' The motion filed by the General Counsel, and consented to by Lion Elastomers, did not address attacks on the viability of the *General Motors*' standards altogether." The Respondent's motion concludes:

> Respondent respectfully submits that the General Counsel's argument attempting to overturn General Motors exceeds the specific scope of remand and the directive of the Board. At a minimum, fundamental fairness and due process considerations support permitting Lion Elastomers to file the attached Answer to briefly address the arguments raised by the General Counsel.

Id. On September 22, 2021, the Board denied the Respondent's motion, stating that "the Respondent has not presented any circumstances warranting leave to file an answer or reply to the General Counsel's statement of position."[10]

My colleagues assert that the Respondent's due process rights were not violated by the Board's denial of its motion, reasoning "there can be no claim of manifest injustice here, because this case, as explained, was litigated under the *Atlantic Steel* standard, which we restore today." Further, they assert that the Respondent was "clearly . . . not prejudiced" by the Board's denial of its motion to file a reply to the General Counsel's statement of position because "[o]verruling *General Motors* . . . has left the Respondent precisely where it was before, after it had a full and fair opportunity to litigate the case under the *Atlantic Steel* standard."

With all due respect to my colleagues, I do not believe that their understanding of due process is the same as mine. Here, the General Counsel filed a request for remand with the Fifth Circuit for a specific purpose, namely to determine how *General Motors*—the law *at the time of the request for remand*—affected the analysis of the case. The Fifth Circuit granted the General Counsel's request for remand *for that specific purpose*. The Respondent, in reliance on the scope of the remand requested by the General Counsel, did not object to the motion for remand and, further, submitted a statement of position consistent with the scope of the remand, as directed by the Board in its letter of June 22, 2021. The Respondent could not have anticipated that the General Counsel would, in turn, jettison the express purpose for which the General Counsel had sought, and been granted, remand from the court. The Respondent could not have

read: "Who is Rhonda F [with an X through the F] Sucking Today?"), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996).

[9] See Motion to File Answer or Reply to General Counsel's Statement of Position (Sep. 17, 2021).

[10] Executive Office Letter Denying the Respondent's Motion to File Answer or Reply to General Counsel's Statement of Position (Sep. 22, 2021).

anticipated that the General Counsel would argue *for the first time* that *General Motors* should be overruled. Furthermore, the Respondent cited these very concerns to the Board in requesting leave to file a response to the General Counsel's statement of position. By depriving the Respondent of the opportunity to raise these arguments, and thereafter using the case to overrule *General Motors*, the Board's actions constituted a denial of due process. Furthermore, my colleagues' position that the Respondent could not have been prejudiced by the Board's denial because the law simply changed back necessarily assumes that the Respondent could not have possibly convinced the Board either that the General Counsel had improperly exceeded the scope of the remand or that the Board should not overrule *General Motors*. I strongly disagree with that assumption, and I have serious concerns whether the decision today is going to survive judicial review on due process grounds.[11]

Despite those concerns, I now turn to the substance of my colleagues' decision.

II. THE APPLICATION OF THE TRADITIONAL LOSS-OF-PROTECTION STANDARDS CREATED STRIKINGLY INCONSISTENT CASE LAW AS WELL AS UNREASONABLE RESULTS.

As explored in detail in *General Motors*, the Board traditionally applied three different setting-specific standards to judge whether abusive conduct that occurred in connection with Section 7 activity had lost the Act's protection.[12] In the context of discipline that occurred when employee misconduct happened during workplace discussions with management, the Board applied the four-factor *Atlantic Steel* standard. This standard considered "(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."[13] In the context of discipline that followed from misconduct taking place on social-media posts or in coworker discussions, the Board considered the totality of the circumstances without reference to any particular factors.[14] Finally, in the context of discipline resulting from picket line misconduct, the Board applied the *Clear Pine Mouldings* standard, which queried whether "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[15]

Each of these standards presented fundamental problems. Turning first to the *Atlantic Steel* and the totality-of-the-circumstances standards, the Board has failed to "explain, in applying the test[s] to varied fact situations, which factors are significant and which less so, and why," which led these multifactor standards to become "simply a cloak for agency whim." See *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004).[16] Another inherent problem with regard to the *Atlantic Steel* standard was that one of the four factors, the subject matter of the discussion, always favored protection for abusive conduct because the standard only applied when the subject matter of the discussion was related to Section 7 activity.

Plaza Auto Center exemplifies in stark relief the faults of *Atlantic Steel*, and by extension the even more flexible totality-of-the-circumstances standard applied in other settings, that are often obfuscated in other cases. In its initial decision, the Board concluded an employee's outburst during a conversation in a manager's office regarding breaks, restrooms, and compensation did not cost him the Act's protection. *Plaza Auto Center, Inc.*, 355 NLRB 493, 493–496 (2010). The employee called the owner a "fucking mother fucking," a "fucking crook," an "asshole," and "stupid." Id. at 494. He further told the owner nobody liked him, and everyone talked about him behind his back. Id. At the end, he pushed the chair aside and threatened that the owner would regret firing him, if he did. Id. The owner did immediately. Id. The Board concluded that all four *Atlantic Steel* factors—place, subject matter, nature of the outburst, and provocation by unfair labor practices—weighed in favor of the employee retaining protection. Id. at 494–496.

On the employer's petition for review, the United States Court of Appeals for the District of Columbia Circuit found insupportable the Board's conclusion that the nature of the outburst favored protection. *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286, 293–295 (9th Cir. 2011). The court observed that the Board's finding was "at odds with [the Board's] own precedents, which recognize that an employee's offensive and personally deni-

[11] I also seriously question whether the majority's decision to overrule *General Motors* actually falls within the scope of the Fifth Circuit's remand of this case. However, because the Respondent will presumably have the opportunity to raise that issue through filing a motion for reconsideration of today's decision, thereby presenting the issue to the Board as well as preserving the issue for determination by the Fifth Circuit on appeal, I decline to pass on the question at this time.

[12] See *General Motors*, 369 NLRB No. 127, slip op. at 4–7.

[13] *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

[14] See *Desert Springs*, 363 NLRB at 1824 fn. 3; *Pier Sixty*, 362 NLRB at 506.

[15] *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984) (internal quotation marks and citation omitted), enfd. mem. 765 F.2d 148 (9th Cir. 1985).

[16] My colleagues criticize my citation to this case because it involves a different legal standard. However, I believe it is clear that I am citing this case for the important principle that it represents, not its legal standard.

grating remarks alone can result in loss of protection." Id. at 293–294. Further, the court faulted the Board for purporting to adopt the judge's credibility resolutions while disregarding the judge's credibility finding that "the outburst was physically aggressive and menacing." Id. at 295. The court remanded the case for the Board to reweigh the *Atlantic Steel* factors in light of its finding that the nature of the outburst weighed against protection. Id. at 296.

On remand, the Board revised its prior analysis of certain factors, thereby reaching the same conclusion that the employee's misconduct did not lose the protection of the Act and that the employer's discipline was therefore unlawful. See *Plaza Auto Center, Inc.*, 360 NLRB 972, 977-980 (2014). The Board found that, although the court had found that the nature of the outburst actually weighed against protection, the place and provocation factors now weighed "heavily" in favor of protection. Id. at 978. As Member Johnson remarked in his dissent,

> [The majority] rebalance[d] the original Board majority's weighting of those factors by stating that the place-of-discussion and provocation factors now weigh 'heavily' in favor of protection. . . . [T]he majority's approach in now reweighing 'heavily' both factors one and four is essentially anachronistic, implicitly assuming that the same events frozen in the past and by the law of the case can now illogically grow more significant and persuasive through reimagination.

Id. at 985.

Unsurprisingly, given the way in which the various traditional loss-of-protection standards have been inconsistently applied, our precedent is replete with cases that cannot be reconciled. For example, in *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005), the Board found a union steward's disagreement with a supervisor in an open work area about scheduling a grievance meeting lost the Act's protection where the steward said "bullshit, I want the meeting now," "fuck this shit," he didn't "have to put up with this bullshit," and the supervisor was an "asshole." Id. at 1328–1330. By comparison, when presented with markedly more serious abusive conduct in *Postal Service*, 364 NLRB 701 (2016), the Board found a union steward retained the Act's protection during a one-on-one breakroom grievance meeting where she called the supervisor "an ass," unleashed a stream of profanity, forcefully stood up, stepped toward the supervisor, shook her finger within striking distance, and continuously screamed, "I can say anything I want," "I can swear if I want," and "I can do anything I want." See id. at 702–704. Although there have only been a few cases decided under the totality-of-the-circumstances standard applied to coworker discussions and social-media posts, the results suggested that the Board's findings are unlikely to be any less arbitrary when the Board considers an even wider range of factors. See, e.g., *Pier Sixty*, 362 NLRB at 506-508 (applying totality-of-circumstances test and finding that the Act protected a Facebook post stating that a manager "is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!").

Turning to *Clear Pine Mouldings*, the analysis applicable to employer discipline based on picket line misconduct, this standard has been interpreted so narrowly by the Board that, with regard to verbally abusive conduct, only express threats of violence are found to lose the protection of the Act. Compare *Universal Truss, Inc.*, 348 NLRB 733, 739–740 (2006) (discerning a credible threat of sexual violence from the surrounding context in order to conclude "I'm going to beat the crap out of you. I'm going to beat you up and just go fuck your mother" lost protection), with *Briar Crest Nursing Home*, 333 NLRB 935, 937–938 (2001) (finding that a striking employee telling another employee that, if she went to work, the striker would get another striking employee "on her tail" and "make sure [she doesn't] come to work" were "not sufficiently unambiguous to be considered threats of bodily harm" to lose protection). As a result of cabining the analysis of picket line misconduct in this way, the Board issued decisions in which truly appalling behavior was found to be protected by Section 7 of the Act. See, e.g., *Cooper Tire & Rubber Co.*, 363 NLRB 1952, 1957–1961 (2016) (finding conduct protected when a white picketer saying to black replacement workers, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon."), enfd. 866 F.3d 885 (8th Cir. 2017); *Airo Die Casting, Inc.*, 347 NLRB at 812 (finding conduct protected when a striker shouted "fuck you [n-word]" to a black security guard while gesturing with both middle fingers); *Nickell Moulding*, 317 NLRB at 828–829 (finding conduct protected when a striker carrying a sign targeted at one particular nonstriker that read: "Who is Rhonda F [with an X through the F] Sucking Today?"); *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989) (finding conduct protected including repeatedly calling nonstrikers "whores" and telling one that she could make more money by selling her nonstriker daughter at the flea market).

As shown in the examples above across each of the traditional loss-of-protection standards, these standards have unreasonably prevented employers from addressing abusive conduct, despite the fact that nothing in the Act

suggests an intent to protect employees who engage in abusive conduct in the workplace. These standards paid little more than lip service to "the employer's right to maintain order and respect." See *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994). Further, these standards interfere with employers' legal duties to protect their employees from discrimination on the basis of protected characteristics—including race, color, religion, sex, national origin, age, and disability—as set forth in Federal, state, and local antidiscrimination laws. See *General Motors*, 369 NLRB No. 127, slip op. at 6–7.

III. MY COLLEAGUES' REASONING FOR RETURNING TO THE TRADITIONAL LOSS-OF-PROTECTION STANDARDS IS NOT PERSUASIVE.

My colleagues set forth numerous bases in support of their decision to overrule *General Motors* and return to the traditional loss-of-protection standards. Some of these rationales, however, are easily discredited.

A. Burnup & Sims is not relevant to the issue presented.

My colleagues have decided to rely, as an important part of their analysis for returning to the loss-of-protection standards, on the Supreme Court's inapposite decision in *Burnup & Sims*, 379 U.S. 21 (1964).[17] As *General Motors* correctly stated, the question presented in *Burnup & Sims* was whether the employer violated Section 8(a)(1) by discharging two employees based on their belief that they had engaged in misconduct but the misconduct *did not actually occur*. Nevertheless, my colleagues insist that language in *Burnup & Sims*, taken out of the context of that case, suggests that the Court's decision could be read to apply to instances where the discipline was based upon actual employee misconduct. For the reasons explained below, I do not believe that is an accurate interpretation of the Court's holding in *Burnup & Sims.*

The Court's concise decision is focused on its holding that "[Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." The Court's analysis of the case is narrowly focused on that specific finding. As the Court reasoned:

> [The rule that Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, *and that the employee was not, in fact, guilty of that misconduct* . . . seems to us to be in conformity with the policy behind [Section] 8(a)(1). Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged *on false charges* would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active *rumors*. A protected activity acquires a precarious status if *innocent employees* can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the [Section] 8(a)(1) right that is controlling.

Id. at 23–24 (emphases added).

Despite the fact that *Burnup & Sims* concerned an entirely different scenario—disciplinary action based on misconduct that did not in fact occur—and as discussed in the Court's decision, different policy concerns than cases involving actual misconduct, my colleagues nevertheless insist that language in that case "undercuts" *General Motors*.[18] With all due respect to my colleagues, their position is not supported by the Court's decision. To begin, my colleagues focus on the following language from *Burnup & Sims:*

> *In the context of this record*, [Section] 8(a)(1) was plainly violated whatever the employer's motive. Section 7 grants employees, inter alia, "the right to self-organization, to form, join, or assist labor organizations." Defeat of those rights by employer action does not *necessarily* depend on the existence of an anti-union bias.

Id. at 22–23 (emphases added).

In my colleagues' view, this language establishes that the Supreme Court has held that motive is not to be considered when determining when Section 8(a)(1) has been violated. Of course, it says no such thing. To begin, the Court expressly states that it is discussing "the context" of the particular case before it, which is one where the rumored misconduct never occurred, "whatever the em-

[17] If *General Motors* had relied on *Burnup & Sims*, then I might understand why the majority would analyze why that reliance was mistaken. Or perhaps if *General Motors* had gone to great lengths in an attempt to distinguish *Burnup & Sims.* But the only mention of *Burnup & Sims* in *General Motors* is the indisputable statement that the former involved the discipline of employees when the alleged misconduct for which they were disciplined never occurred, whereas the latter involves the discipline of employees for their actual misconduct.

[18] Similarly, to the extent that my colleagues criticize *General Motors* for "failing to acknowledge the clear relevance" of *Burnup & Sims*, I believe that readers can decide for themselves whether the latter case, presenting an entirely different set of facts, expressly limiting its holding to the specific "context" involved, explaining why the specific facts presented justify the decision, and containing no language suggesting that its holding was not in fact limited to those facts, is in fact clearly relevant to the former.

ployer's motive." I disagree with my colleagues that it is reasonable to read that statement as though the Court had any intent that the second part of that sentence was meant to be understood as applicable beyond the introductory limiting clause. Furthermore, it is important to remember that the Court was employing the phrase "whatever the employer's motive" in the context of a case where the issue was that the employer did *not* have any unlawful motive. Accordingly, the sentence upon which my colleagues seize effectively reads as, "In the context of the facts presented here, the discharges violated the Act, even though the employer did not have an unlawful motive."[19] It is not clear to me how my colleagues made the leap from that sentence to the proposition that an employer's lawful (or unlawful) motive cannot be considered where employees are disciplined for actual misconduct.

Next, my colleagues effectively read the word "necessarily" out of the second sentence. It cannot be disputed that straightforward violations of Section 8(a)(1) do not require any employer motive; the only issue in such cases is whether the employer's conduct interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in Section 7. By contrast, in most cases involving allegedly discriminatory discipline where employees are not represented by a union, the Board applies the *Wright Line* standard which does require employer animus in order to find a violation. See, e.g., *Renew Home Health*, 371 NLRB No. 165, slip op. at 1–2 fn. 2 (2022); *Pacific Intermountain Express Co.*, 264 NLRB 388, 389–390 (1982). Surely my colleagues are not suggesting that the Board has erroneously been applying *Wright Line* to 8(a)(1) discipline cases all these years.[20]

Finally, my colleagues cite to the Court's analysis, which I set forth above, as supporting their position that employer motive may not be a controlling factor in analyzing disciplines involving *actual* misconduct. But, again, my colleagues read an important word out of the Court's language. Once again, the Court decision reads, in part:

> That rule [that discharges based on misconduct in connection with Section 7 conduct that never actually occurred are unlawful, even if the employer acted in good faith] seems to us to be in conformity with the policy behind [Section] 8(a)(1). Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged *on false charges* would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active *rumors*. A protected activity acquires a precarious status if *innocent employees* can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of *those* discharges to weaken or destroy the [Section] 8(a)(1) right that is controlling.

Id. at 23–24 (emphases added). Read in its entirety, this paragraph is clearly addressing the specific scenario presented in *Burnup & Sims*—where the alleged misconduct did not actually occur. My colleagues' citation to the final sentence of this paragraph as applicable to situations other than discharges based on alleged misconduct that did not actually occur effectively reads the word "those" out of the sentence.

For the reasons set forth above, and notwithstanding my colleagues' protestations to the contrary, it is clear that the Court's analysis and holding in *Burnup & Sims* is not relevant to the issue presented here.

B. The Board need not protect abusive conduct, including hate speech and threats, in order to protect employees' right to engage in activity protected by Section 7 of the Act.

My colleagues, in defense of the loss-of-protection standards, emphasize the principle that "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumer Power Co.*, 282 NLRB 130, 132 (1986). As they point out, this principle flows from a line of cases going back to *Bettcher Mfg. Corp.*, 76 NLRB 526 (1948), wherein the Board stated that, for there to be effective bargaining "between equals," "a frank, and not always complimentary, exchange of views must be expected and permitted," and participants must be able "to debate and challenge the statements of one another without censorship, even if, in the course of debate, the veracity of one of the participants occasionally is brought into question." Id. at 527. My colleagues also find support in a pair of Su-

[19] Should my colleagues contend that the sentence means anything different, I believe that readers can decide for themselves whether my restatement is an accurate reflection of the Court's meaning.

[20] There can be no other meaning of the words "not necessarily" in this sentence other than that sometimes employer motive is required but other times it is not. If employer motive could never be required, then the Court would not have included "necessarily."

Accordingly, I believe that the more reasonable reading of that sentence is that the Court concluded that, in the unique circumstances presented where the employees were discharged based on the employer's mistaken belief that they had engaged in misconduct, the Board did not err in finding the 8(a)(1) violation, even in the absence of employer motive, because the Board has found other 8(a)(1) violations without requiring a showing of animus.

preme Court cases regarding preemption of state-law libel suits that recognized "'labor disputes are ordinarily heated affairs . . . [with] bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.'" *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974) (quoting *Linn v. Plant Guards Local 114*, 383 U.S. 53, 58 (1966)). Federal policy, the Court added, favors "uninhibited, robust, and wide-open debate in labor disputes." Id. at 273.[21]

Make no mistake, I fully agree that labor disputes can be heated, and that Federal policy favors free speech. I do not agree, however, that the Act must protect abusive conduct in order to satisfy this policy—especially to the extremes the loss-of-protection standards have gone. I firmly believe Section 7 activity can thrive without racist, sexist, sexually harassing, or profane ad hominem attacks. As the D.C. Circuit explained:

> In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language. . . . According to the Board and the Union Intervenor, it is perfectly acceptable to use the most offensive and derogatory racial or sexual epithets, so long as those using such language are engaged in union organizing or efforts to vindicate protected labor activity. Expecting decorous behavior from employees is apparently asking too much. Indeed, Union Intervenor suggests that it is unfair to expect union members to comport themselves with general notions of civility and decorum when discussing union matters or exercising other statutory rights. We do not share the Union's low opinion of the working people it purports to represent. America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who now condescend to them. . . . It defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace.

Adtranz ABB Daimler-Benz Transp. v. NLRB, 253 F.3d 19, 26, 28 (D.C. Cir. 2001);[22] see also *General Motors*, 369 NLRB No. 127, slip op. at 8.

C. Courts have criticized the traditional loss-of-protection standards.

My colleagues focus on the fact that reviewing United States Courts of Appeals historically tolerated the loss-of-protection standards by enforcing Board decisions applying those standards.[23] However, my colleagues fail to recognize that courts have often questioned the standards themselves or, at the very least, expressed grave concerns about how the Board had twisted their application.[24] Indeed, the United States Court of Appeals for the

[21] In *Old Dominion*, the Court wrote, "*Linn* recognized that federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." Id. at 283. This paraphrased *Linn* in a manner that could be read more broadly than *Linn* supports. In full, the relevant passage in *Linn* stated, "In sum, although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false." *Linn*, 383 U.S. at 61. The Court, therefore, did not indicate in any way that the Act necessarily shields employees from discipline by their employers for engaging in abusive conduct in connection with Sec. 7 activity, or even that the Board was implementing the Act correctly. Moreover, these cases are not directly applicable here. The specific holding of *Linn* was that the Act did not preempt a state-law libel suit for statements that were knowingly false or recklessly disregarded the truth in a union's campaign leaflets. See *Linn*, 383 U.S. at 55–67. In the same vein, *Old Dominion* held an executive order applicable to federal employees, which was similar to the NLRA, *did* preempt a state-court libel suit against a union's use of the term "scab" in its newsletter because the term was not a reckless or knowing falsehood. See *Old Dominion*, 418 U.S. at 266–287.

[22] My colleagues choose to ignore the D.C. Circuit's discussion in *Adtranz* only because it came in the context of a facial challenge to a civility rule rather than the application of a loss-of-protection standard. Clearly, though, it also applies to the point that I make here.

[23] This does not establish, however, that the standards are unquestionably correct or that they should not be reexamined for modern times. See *Boilermakers Local 290*, 72 FLRA 586, 591 (2021) ("[T]he norms of acceptable conduct in the workplace have changed throughout the years as employers have recognized their legal obligations to prevent harassment and ensure a safe and civil environment for employees.").

[24] My colleagues assert that, although courts have rejected the Board's finding of violations in cases applying *Atlantic Steel*, "[t]he dissent fails to cite a single case in which a court criticized or rejected the Board's setting-specific standards, rather than the Board's application of those standards to the facts of a particular case." I disagree with that characterization of the cases I have cited. Furthermore, it is not surprising that courts have not outright rejected the traditional loss-of-protection standards that the Board developed because the Board is generally entitled to *Chevron* deference for the standards that we choose in terms of interpreting the Act. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) ("We will uphold a Board rule as long as it is rational and consistent with the Act, even if we would have formulated a different rule had we sat on the Board.") (internal citation omitted). And my colleagues are correct: I do not contend that the traditional loss-of-protection standards, which my colleagues reinstate today, are irrational or inconsistent with the Act. But this is of course missing the point. Even assuming that courts have not expressly criticized the loss-of-protection standards themselves, courts' repeated rejections of the Board's application of those standards to the facts of particular cases necessarily calls into question the standards themselves because they are leading, in effect, to false positives.

Second Circuit reported that "the *Atlantic Steel* test has come under pressure in recent years" and expressed doubt that the "amorphous 'totality of the circumstances' test" applied to social-media posts "adequately balances an employer's interests." See *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 122–124 (2d Cir. 2017).

The pressure on *Atlantic Steel* had come from several circuits. In a case where an employee called a vice president a "fucking idiot" in relation to a letter about bargaining the employee had not even read, the Fourth Circuit found the Board "overreached as a matter of law in finding that the conduct in question was not so egregious as to forfeit the protection of the Act . . . [and had] expanded the *Atlantic Steel* factors to essentially create a buffer around employee conduct that would travel with the employee wherever he goes and for as long as some form of collective bargaining can be said to be taking place. That ruling would significantly expand the parameters of our extant law, pushing its borders beyond the language of the Act." *Tampa Tribune v. NLRB*, 560 F.3d 181, 184-189 (4th Cir. 2009), denying enf. 351 NLRB 1324 (2007). Where an employee yelled at an off-duty manager in front of customers that "[y]ou can go fuck yourself, if you want to fuck me up, go ahead, I'm here," the Second Circuit found the Board "improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers" and held the Board cannot, as it did, apply *Atlantic Steel* to such circumstances. *NLRB v. Starbucks Coffee Co.*, 679 F.3d 70, 73–74, 79–80 (2d Cir. 2012), denying enf. 355 NLRB 636 (2010). Where an employee called his supervisor a "fucking kid" three times and insisted he did not have to listen to him, the D.C. Circuit criticized Board's arbitrary application of Atlantic Steel, particularly not realizing the seriousness of the outburst and trying to expand the breadth of protection for Section 7 activity. *Felix Industries v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001), denying enf. 331 NLRB 144 (2000).

Even beyond these standards eclipsing employers' right to maintain order and respect, which undergirded the criticism in the forgoing cases, the D.C. Circuit had specifically raised the conflict with employer responsibilities under antidiscrimination laws that these standards create. In a case where the employer had recently been hit by a $1 million jury verdict for creating a hostile work environment for two female employees in contravention of a state antidiscrimination law, the D.C. Circuit held the Board improperly failed to address the employer's argument that the Board's finding the employer violated the Act by discharging an employee who wrote "whore board" on overtime sign-up sheets would conflict with its obligations under antidiscrimination laws. See *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546, 551–552 (D.C. Cir. 2019), denying enf. 366 NLRB No. 131 (2018).

The interplay with antidiscrimination laws indeed deserves the Board's earnest attention. The Equal Employment Opportunity Commission filed an illuminating amicus brief for the Board's consideration in *General Motors*. As the Board described in that decision:

> The amicus brief filed by the EEOC, the principal federal agency tasked with administering and enforcing federal laws prohibiting employment discrimination, helpfully outlines employers' duties under laws within its purview.[25] Under EEO law, when an employee creates a hostile work environment—by engaging in objectively and subjectively severe or pervasive harassment based on a protected characteristic—the employer is liable so long as it knew or should have known about the offending conduct and failed to take prompt and appropriate corrective action. The EEOC stresses that it is
>
> > critical that employers are able to take corrective action as soon as they have notice of harassing conduct—even if the harassing conduct has not yet risen to the level of a hostile work environment. . . . This is because if the employer fails to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability. The "primary objective" of Title VII is "not to provide redress but to avoid harm."
>
> EEOC Amicus Brief at 18 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998)).
>
> EEO laws, unlike the Board's current setting-specific standards, do not forgive abusive conduct because, for instance, it arises from heated feelings about working conditions or because crude language is common in the workplace. Further, the EEOC notes that "[e]mployers may also be liable under Title VII for conduct occurring outside of work when that conduct impacts the

As a governmental agency, we should be particularly concerned when the standards we are applying result in finding parties to have violated federal law when courts repeatedly tell us that no such violations have occurred. And that is so even if the standards lead to the correct results more often than not. My colleagues refuse to adequately consider the feedback we have received from the courts in this regard.

[25] These laws include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

> employee's working environment . . . . Employees subjected on the picket line—or through social media—to racist or sexist comments or conduct outside the workplace may thus be impacted by that conduct, including when they return to work after picketing and must work alongside their harasser." EEOC Amicus Brief at 14.

General Motors, 369 NLRB No. 127, slip op. at 6–7.

The majority brushes aside the legitimate concern that there is a conflict between the Board's traditional loss-of-protection standards and employers' efforts to comply with antidiscrimination laws.[26] For one, they cite the absence of any court decisions depicting employers visibly caught in such a conflict.[27] Of course, the fact that this conflict has not yet been addressed in Federal court does not establish that this is not a real-world challenge. As the EEOC describes, the point of antidiscrimination laws is to avoid harm, which necessarily means they contemplate encouraging employers to take prompt remedial action before conduct rises to a level where a court action to redress a harm is warranted. With the flexible loss-of-protection standards either providing no clear guidance or, in the case of the picket line, prohibiting discipline for anything short of threats of violence, employers cannot make good-faith efforts to take corrective action against employees engaging in conduct hostile to protected characteristics. An employer either cannot be sure if they will be found by the Board to interfere with Section 7 activity or, for the picket line, can be fairly sure that they will be no matter if antidiscrimination goals are at cross-purposes. This is a self-evident detriment to the effectiveness of antidiscrimination laws—and not for reasons that are necessary for the full protection of Section 7 rights. The harm is by no means just to employers. By operation of these irresponsible loss-of-protection standards, individual employees will be exposed to hostile work environments. Employees cannot reasonably work in harmony again with coworkers who have engaged in the abusive conduct that the Board has ensconced. My colleagues, however, do not seriously address this concern in their analysis; they merely make assurances that the Board can accommodate antidiscrimination laws while applying the loss-of-protection standards. But the Board never made any attempt to reconcile these laws with the Act before, and my colleagues do not provide any suggestions or guidelines for how any such accommodation might work.[28]

III. *GENERAL MOTORS* APPROPRIATELY REPLACED THE LOSS-OF-PROTECTION STANDARDS WITH *WRIGHT LINE*.

Consistent with the holding in the *General Motors* decision, in which I participated, I would find that, in light of all the concerns addressed above, the traditional loss-of-protection standards had significant flaws that required redress and that the *Wright Line* standard, with which both the Board and parties are well acquainted, is a more straightforward approach for, and would yield

[26] My colleagues are correct that not all cases involving discipline for abusive conduct implicate antidiscrimination laws. As discussed above, however, the loss-of-protection standards are infirm for additional reasons, including that they have proven indefensibly arbitrary in their application and fail to consider employers' right to maintain order in the workplace.

[27] My colleagues fault the Board in *General Motors* for not addressing the Eighth Circuit's enforcement decision in *Cooper Tire* that found unlawful, applying *Clear Pine Mouldings*, the employer's discharge of a picketer that said to black replacement workers, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon." *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (8th Cir. 2017), enf'g 363 NLRB 1952 (2016). Particularly, the majority relied on the Eighth Circuit finding that the outcome did not interfere with the employer's antidiscrimination obligations under Title VII.

To begin, my colleagues are well aware that, pursuant to the Board's longstanding "nonacquiescence" policy, Board decisions are binding precedent on the Board but circuit court decisions are not. See, e.g., *Sunbelt Rentals, Inc.*, 372 NLRB No 24, slip op. at 17 fn. 40 (2022) (recognizing that, under the Board's nonacquiescence policy, appellate court decisions are not binding upon the Board). Consistent with the nonacquiescence policy, *General Motors* focused on the Board's decision in *Cooper Tire*, which is the relevant binding precedent.

But, further, it is worth noting that the Eighth Circuit's Title VII discussion did little to help the majority's point. The employer argued the statements at issue were not alone enough to create a hostile work environment actionable under Title VII, but it had an obligation to take action to prevent a hostile work environment from developing. See id. at 892. The court's response was the employer "was under no 'legal obligation' to *fire*" the harassing employee; lesser remedial action would be sufficient for Title VII purposes. Id. (emphasis in original). This offers no comfort to employers because the Board would find lesser remedial action just as unlawful under *Clear Pine Mouldings*. The Board's loss-of-protection standards had never differentiated among types of discipline. A discharge would be just as unlawful as a warning, in the Board's eyes. For example, the racial misconduct at issue in *General Motors* only resulted in a suspension, see *General Motors*, 369 NLRB No. 127, slip op. at 2, and *Atlantic Steel* cases involving, in my mind, severely abusive misconduct only resulted in warnings. See, e.g., *Postal Service*, 364 NLRB 701, 702-704 (2016) (finding unlawful a warning letter for the aggressive, profane "I can say anything I want" tirade described above). Maybe the Eighth Circuit would have sympathized with the employer if it had only warned the picketer, but that would be a departure from the Board's standard in *Clear Pine Mouldings*. The majority here shows no willingness to consider any adjustments to these standards.

[28] In my view, this failure does not heed the Supreme Court's admonition that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." See *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

more consistent results in, these cases. See *General Motors*, 369 NLRB No. 127, slip op at 7–10. Further, abusive conduct, which by itself has no protection in the Act,[29] *is* separable from the related Section 7 activity—contrary to the underlying premise of the loss-of-protection analysis that treated the abusive conduct as an inseverable part of the Section 7 activity.[30] See id. Therefore, the causation analysis of *Wright Line* is appropriate because there is a dispute over whether the discipline was motivated by Section 7 activity or the abusive conduct. See id., slip op. at 9. As stated succinctly in *General Motors*, "[u]nder this approach, the Board will properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity." Id., slip op. at 10.[31]

Critically, the shift to *Wright Line* removed the conflict between the loss-of-protection standards and employers' efforts to comply with antidiscrimination laws. The D.C. Circuit recently recognized as much and expressed no concerns about the Board's pivot to *Wright Line*. After the D.C. Circuit remanded the Board's decision in *Constellium Rolled Products* for failing to consider the employer's argument that the "whore board" discharge violation found while applying *Atlantic Steel* failed to address the employer's argument that the finding conflicted with its antidiscrimination law responsibilities, the Board applied its new *General Motors* decision to find a violation under *Wright Line* instead. See *Constellium Rolled Products Ravenswood, LLC*, 371 NLRB No. 16 (2021). On the petition for review and cross-application for enforcement, the D.C. Circuit enforced the Board's decision applying *General Motors*. See *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 45 F.4th 234, 237–245 (D.C. Cir. 2022). The court described the Board's *General Motors* analysis with approval:

> Instead of [the] ultimate conclusion turning on the egregiousness of Williams's conduct, *see Atlantic Steel Co.*, 245 NLRB 814 (1979), it now turns on Constellium's motive for disciplining Williams, *Wendt Corp.* [v. NLRB], 26 F.4th [1002,] 1010 [D.C. Cir. 2022), allowing the Board to balance employers' efforts to fulfill antidiscrimination obligations against protecting Section 7 activity more holistically, as required by our mandate on remand . . . . For some time, this Court has stressed that "where the policies of the [NLRA] conflict with

[29] Contrary to my colleagues' assertion, I do not agree that "[e]veryone agrees" that discipline based on abusive conduct that takes place in the context of protected activity is "motivated" by that protected activity.

[30] My colleagues criticize *General Motors* (actually the *General Motors* Board, for some reason) because it "failed to define 'abusive conduct' and thereby failed to cabin its decision to those instances involving the most extreme misconduct . . . ." It is not clear to me why the descriptor "abusive" is problematic but the description "most extreme" is not. In any event, contrary to my colleagues' concern, I do not believe that there is anything in *General Motors* to suggest that the holding is meant to cover routine "separable" conduct. That decision made clear that misconduct like racial slurs, sexual harassment, and profane ad hominem attacks were examples of abusive conduct. Nor is there any merit to my colleagues' suggestion that determining whether a case involves abusive conduct would present a threshold issue just as murky as whether conduct lost the Act's protection. Certainly, the facts set forth in the cases cited in this dissent present no such complications, and it is reasonable to expect that abusive conduct will be self-evident in most cases.

Further, my colleagues assert that applying *Wright Line* to these cases "eras[es] the fundamental distinction between misconduct committed *during* protected activity and misconduct *unconnected* with such activity." With all due respect, this is a false dichotomy. I believe that there are three categories of misconduct: misconduct committed *during* protected activity, misconduct committed *in the wake of* protected activity, and misconduct *unconnected* with such activity." In my view, it is not clear why my colleagues would differentiate between misconduct committed *during* protected activity and misconduct committed *in the wake of* protected activity, but that is a distinction they appear to draw.

Nor, as my colleagues contend, did *General Motors* indicate that the "object" of the traditional loss-of-protection standards was to "penalize employers for declining to tolerate abusive and potentially illegal conduct in the workplace." See 369 NLRB No 127, slip op. at 1. Rather, as the paragraph containing that language makes clear, the Board was merely indicating that the *effect* of the application of the traditional standards had been to penalize employers for taking action against abusive and potentially illegal conduct in the workplace. And if my colleagues are suggesting that *General Motors*'s use of the word "penalize" rather than language such as "negatively affected" is somehow inappropriately rhetorical, I don't even know what to say. Although I'm not sure how my colleagues then defend their statement that "[t]his approach abdicates the Board's statutory role in protecting Sec[.] 7 rights."

Finally, my colleagues take issue with a sentence in *General Motors* stating that the Board has "assumed that the abusive conduct and the Sec[.] 7 activity are analytically inseparable." They apparently take issue with the word "assumed" because they contend that the presumption of inseparability of Sec. 7 activity and the abusive conduct was a policy choice. Frankly, I am not sure why an assumption cannot be a policy choice, nor do I see how the use of "assumption" instead of "policy choice" affects the analysis in *General Motors*. Nevertheless, for the purposes of this dissent, I recognize that the traditional assumption of inseparability was a policy choice. That does not change my analysis nor does it change my belief that *General Motors* is the proper standard to apply in these circumstances.

[31] In full, the *Wright Line* standard requires the General Counsel initially show that (1) the employee engaged in Sec. 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Sec. 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Sec. 7 activity. If the General Counsel makes her initial showing, the employer has the rebuttal burden to prove it would have taken the same action even in the absence of Sec. 7 activity. See id., slip op. at 10.

> another federal statute, the Board cannot ignore the other statute; instead, it must fully enforce the requirements of [the NLRA], but must do so, insofar as possible, in a manner that minimizes the impact of its actions on the policies of the other statute." *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153-54, 355 U.S. App. D.C. 160 (D.C. Cir. 2003) (internal quotation marks and citation omitted). The Board has done just that by using a framework that provides Constellium the opportunity to prove that it would have punished Williams for his conduct separate and apart from its connection to Section 7 activity.

Id. at 242, 244–245.

As mentioned above, I fundamentally disagree with the majority's assertion that the application of *Wright Line* to these cases will constrain employees' Section 7 rights. Every day, employees can, and do, engage in robust Section 7 activity without engaging in abusive conduct, and there is nothing in the Act indicating abusive conduct must be tolerated to any extent.

The majority describes the result of *General Motors* as the Board ceding to employers the role of refereeing the extent of Section 7 activity allowed.[32] In fact, the majority goes so far as to suggest employers will consciously delimit the extent of Section 7 activity by being deliberately restrictive, across the board, in its discipline of abusive conduct. It is exaggerated, to say the least, to expect employers would have reacted to *General Motors* by designing their disciplinary systems, in all contexts, to hinder Section 7 activity as much as possible. I am confident Section 7 activity is well protected by ensuring an employer has consistently enforced its standards of workplace conduct to the abusive conduct at issue. An employer deliberately orchestrating its disciplinary system to interfere with Section 7 activity would certainly be a different question and unlawful in its own right. I am also unpersuaded by the majority's position that employees must be allowed leeway to engage in abusive conduct while engaging in Section 7 activity to be on equal footing with management—presumably because management will have that leeway unimpeded. In my view, if an employer allows abusive conduct by management in that setting, it will potentially defeat the employer's defense, under *Wright Line*, that it would have disciplined the employee even in the absence of Section 7 activity.

For all these reasons, I believe that *General Motors* correctly concluded that the application of *Wright Line* to employees who engage in abusive conduct arising from protected activity would both protect employees' right to engage in Section 7 activity while allowing responsible employers to protect their employees from abusive conduct, which is not protected by Section 7, including unlawful discrimination.

IV. MY COLLEAGUES DECISION TO REINSTATE THE TRADITIONAL LOSS-OF-PROTECTION STANDARDS FAILS TO ADDRESS THE INHERENT PROBLEMS WITH THOSE STANDARDS.

My colleagues criticize the Board's decision in *General Motors*, stating that "the *General Motors* Board did not even contemplate the possibility of any alternative between the setting-specific standards and *Wright Line*, although it was free to create one." Yet, although my colleagues have explained why, in their view, the application of *Wright Line* in cases involving abusive conduct arising from protected activity is not sound policy, they have not explained why the traditional loss-of-protection standards must be reinstated, despite many weaknesses that have drawn circuit court criticism of those standards.

Although my colleagues assert with confidence that the Board failed to "contemplate" possible alternatives prior to issuing *General Motors*, certainly the evidence is to the contrary. Before General Motors issued, the Board invited briefing on the issue,[33] considered the varied recommendations set forth in the responses it received, and developed its approach with that briefing in mind.[34] The majority here, by contrast, did not offer parties any op-

[32] My colleagues cite the Board's application of *General Motors* to an employer disciplining an employee ostensibly for aggressive conduct during a safety meeting in *Wismettac Asian Foods, Inc.*, 371 NLRB No. 9 (2021), as evidence that *General Motors* "would permit employers to discipline employees for even routine misconduct in the course of Sec. 7 activity." *Wismettac* proves, however, that their concerns are unfounded. The Board's application of *Wright Line* there easily revealed that the employer's discipline was motivated by Sec. 7 activity and that the employer had no basis for its defense that it would have issued the same discipline even absent the Sec. 7 activity. See 371 NLRB No. 9, slip op. at 1, 7. Accordingly, despite my colleagues' protestation, the application of the *General Motors* test effectively protected employees' Sec. 7 activity in that case.

[33] See *General Motors LLC*, 368 NLRB No. 68 (2019).

[34] My colleagues doubt that the briefing informed the *General Motors* decision because the notice and invitation to file briefs did not set forth the *Wright Line* standard as a possibility and because no brief specifically argued in favor of implementing the *Wright Line* standard. They are mistaken. Without revealing the inner deliberations of the Board, as a participant in *General Motors* I can attest that the briefings played a critical role in the Board's consideration of the proper standard to apply. I further note that none of my colleagues were on the Board when that case was being considered, so they are in no position to speculate on the extent to which briefing informed the Board's internal discussions on the matter. Finally, I note that several amici urged the Board to abandon the existing loss-of-protection standards and instead adopt a motive-based analysis for determining whether discipline violated the Act, despite the fact that the Board had not listed that option in the invitation for briefing. See *General Motors*, 369 NLRB No. 127, slip op. at 4.

portunity for briefing, which was especially unusual given that the Respondent in this case was not able to argue the proper standard here because, at the time that the Respondent filed its statement of position on remand, the General Counsel had not yet raised the argument that *General Motors* should be overturned. And further, as discussed above, once the Respondent became aware that the General Counsel was taking the new position that *General Motors* should be overruled, the Board rejected the Respondent's request to file a responsive brief. Given my colleagues' recognition that other possible standards might be applicable to these cases, the longstanding concerns regarding the traditional standards raised by the courts, and the repeated criticisms levied by the previous Board minority against the previous Board majority for not seeking briefing in cases where a change in law was contemplated, it is striking that, in their own decision, my colleagues fail to consider any alternative approaches.

CONCLUSION

There can be no dispute that, in enacting the National Labor Relations Act, Congress intended to protect a wide range of conduct protected by Section 7. Nowhere, however, is there any suggestion that Congress intended the Act to be used as a shield for employees who engage in significant workplace misconduct or to prevent employers from taking action when necessary to protect their employees from abusive conduct. In fact, to the contrary, Congress has indicated that it is the responsibility of employers to ensure that employees have protection from harassment in the workplace based on employees' race, color, religion, sex, national origin, age and disability. In my view, the holding in *General Motors* effectively struck a balance between protecting employees' Section 7 rights and protecting employees' rights, as recognized by Congress, to work in a workplace free from harassment and hate speech. Accordingly, I dissent.

Dated, Washington, D.C. May 1, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge if you engage in activities on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful discipline issued to Joseph Colone on July 20, 2017.

WE WILL, within 14 days from the date of the Board's Order, offer Joseph Colone full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joseph Colone whole for any loss of earnings and other benefits resulting from the unlawful termination and adverse disciplinary action against him, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful termination and adverse disciplinary action, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Joseph Colone for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Joseph Colone's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline and discharge of Joseph Colone, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline and discharge will not be used against him in any way.

LION ELASTOMERS LLC

The Board's decision can be found at https://www.nlrb.gov/case/ 16-CA-190681 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940