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Is Title VII a "Civility Code" Only for Union Activities?

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ABSTRACT

Changes to labor law by the National Labor Relations Board are nothing new; changes in Presidential administrations often result in changes to the law, based on differences in philosophy by new majorities of the Board toward the proper interpretation of the National Labor Relations Act. But in 2020, the Board made a fundamental change to long-standing interpretations of the Act's protections for union and other concerted activities, not based on the Act itself, but based on what it said were the mandates of the anti-discrimination laws for employers to prevent harassment and discrimination. The Board contended that the former context-driven standards prohibited employers from complying with the anti-discrimination laws, but this article demonstrates that the anti-discrimination laws do not require that the Act's protection be stripped from all racially and sexually offensive conduct that occurs in the context of union and concerted activities. This article also demonstrates that the new standard adopted by the Board, focusing on employer motivation in disciplining employees, fails to recognize all of the purposes of the Act itself. This article proposes a return to the Board's traditional context-driven standards, which allowed the Board to decline to protect concerted activities based on their egregiousness, and discusses potential changes to those standards, or the interpretation of those standards, to allow employers to comply both with the dictates of the Act and the requirements of the anti-discrimination laws.

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I. INTRODUCTION

The federal courts, including the United States Supreme Court, have reiterated that Title VII[1] was not intended to be a workplace "civility code."[2] Accordingly, courts have held that sexual and racial harassment, as well as other offensive conduct, violates that statute only when such conduct meets certain rigorous requirements.[3] That conduct must be deemed to be discriminatory, a requirement that has often been difficult to meet for sexual harassment, even when the conduct is explicitly sexual in nature.[4] The conduct must also be sufficiently severe or pervasive to alter the terms and conditions of an employee's employment or otherwise create an abusive environment, a requirement often said to be met only by "extreme" conduct.[5] The mere presence of offensive conduct in the context of the workplace—racial, sexual, or otherwise—has not provided justification for finding a violation of Title VII's prohibition against discrimination.[6] And rules concerning employer liability under Title VII mean that employers often escape liability even for actionable harassment engaged in by their supervisory and non-supervisory employees.[7]

In contrast, with respect to the National Labor Relations Act, the National Labor Relations Board has recently held that racial, sexual, and other offensive conduct, even when it occurs in the context of a union campaign or other "concerted activities for . . . mutual aid or protection,"[8] is likely to lose the protection of the Act because of the conduct's offensive nature.[9] As

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1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17 (prohibiting discrimination in employment on the basis of a number of protected characteristics, including race and sex).

2. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998) (noting the requirements of Title VII that "prevent[] Title VII from expanding into a general civility code"); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988) (noting that "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code'"); Burlington Ne. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (noting that Title VII "does not set forth 'a general civility code for the American workplace'"); *see also* Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 807 (11th Cir. 2010) ("Title VII is not a civility code, and not all profane or sexual language or conduct will constitute discrimination in the terms and conditions of employment.").

3. *See infra* Part II.

4. *See infra* Part II.

5. *See infra* Part II.

6. *See infra* Part II.

7. *See infra* Part II.

8. 29 U.S.C. § 157. The courts have generally held that employees have engaged in "concerted activities" for "mutual aid or protection" when they have acted together with other employees or with the authority of other employees to address "legitimate employee concerns about employment-related matters," or more simply, that the Act "protect[s] the right of workers to act together to better their working conditions." Inova Health Sys. v. NLRB, 795 F.3d 68, 74, 81 (D.C. Cir. 2015).

9. *See infra* Part III.

justification for this loss of protection for the union activities engaged in by employees, the Board has cited the obligations imposed on employers by Title VII and other anti-discrimination laws with respect to addressing discrimination and harassment in the workplace.[10] That is, the Board has indicated that employers must have the ability to take disciplinary and other action against employees based on that offensive conduct for employers to meet their obligations under the anti-discrimination laws.[11]

Much offensive workplace conduct has been found not to be actionable under Title VII, while obligations purportedly imposed by that same statute have been used to justify the actions of employers in disciplining employees for engaging in concerted union activities when those activities involve offensive conduct or are otherwise deemed "uncivil." The question raised by these circumstances is whether Title VII is a "civility code" only with respect to union activities.

I do not want to be misunderstood as arguing against workplace civility codes as a general matter. I recognize that efforts by employers to require civility in the workplace, particularly with respect to interactions between and among employees, may work to reduce the occurrence of harassment and other forms of workplace discrimination. But I do object to calls for civility, not as a way to protect the interests of employees from harassment and discrimination but as a way to limit the rights of employees in the workplace in general. And my sense is that the recent action of the National Labor Relations Board, supported by a range of employer-affiliated entities, in invoking civility and the requirements of Title VII in an effort purportedly to free the workplace of discrimination and harassment is much less about protecting employees from discrimination and harassment and much more about allowing employers to limit the workplace rights of employees. After all, some of these same entities have argued to limit the definition of actionable harassment and the liability of employers for harassment and discrimination under Title VII.[12]

Part II of this article will address the way in which the law of harassment has developed under Title VII, which limits the types of workplace conduct

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10. *See infra* Part III.

11. *See infra* Part III.

12. For example, the Society for Human Resource Management, an employer-affiliated entity, argued in an amicus curiae brief filed in the United States Supreme Court in the case of *Faragher v. City of Boca Raton* that the Court should not impose vicarious liability on employers based on sexual harassment by supervisory employees. Brief Amicus Curiae of the Soc'y for Hum. Res. Mgmt. in Support of Respondent at 16–17, 524 U.S. 775 (1998) (No. 97-282). As discussed below, the Society for Human Resources Management filed a brief in *General Motors*, 369 N.L.R.B. No. 127 (July 21, 2020), arguing that employers should be able to take adverse action against employees for any racial, sexual, or otherwise offensive conduct occurring in the context of concerted activities under the Act. *See infra* note 76 and accompanying text.

that violate the statute. Much has been written about this issue, and because this is not the focus of this article, this discussion will be brief.

Next, in Part III, the article addresses the evolving approach of the Board and the courts with respect to the protections granted to union and other concerted activities. This part of the article provides the background for the standards followed by the Board for the last several decades and then explains how the Board has recently moved from a context-driven approach, which addresses whether certain conduct is entitled to protection because of the nature of that conduct, to an approach focused on employer motivation in restricting such conduct.

In Part IV, the article focuses on the new approach of the Board on whether to extend protection to union or concerted activities that are "uncivil" or otherwise offensive, under which the Board has severely restricted the protections given to such activity and expanded the ability of employers to punish employees for their union and concerted activities. This part of the article explores and challenges the reasons that the Board has provided for this new standard.

Part V of the article suggests an alternative to the Board's new approach, one that attempts to balance the purposes of the anti-discrimination laws and the need for civility with the need to protect union and other concerted activities. This part of the article argues for a return to an approach that focuses not just on whether the employer has engaged in discrimination against union or concerted activities, which is one important prohibition of the National Labor Relations Act, but also on whether those activities deserve the protection of the Act based on the context in which they occurred. This approach considers another important provision of the Act that seeks to protect union and concerted activities and to prohibit employer interference with those activities, regardless of employer motivation.

Part VI of the article concludes that the present Board should once again reexamine the standards to be applied to offensive or otherwise uncivil union and concerted activities to give appropriate consideration not only to the purposes of the anti-discrimination laws, but also to the purposes of the National Labor Relations Act to protect the workplace rights of employees from both discrimination and interference.

II. THE LIMITS OF TITLE VII'S REGULATION OF SEXUAL AND OTHER FORMS OF HARASSMENT

The courts have been clear about the limits of Title VII's protection of employees from sexual, racial, or other offensive conduct, whether that conduct comes from supervisors, co-workers, or other workplace actors. Although the courts have sometimes indicated that employees have a right to a

workplace "free" from discriminatory and harassing behavior,[13] the legal standard for actionable harassment guarantees employees no such right. Instead, the courts have made clear that employees can successfully challenge the existence of harassment only when it meets certain stringent standards of actionability.[14]

It is true, of course, that the results in individual cases vary widely with respect to the type of conduct found to be actionable harassment under Title VII. It is the nature of a fact intensive inquiry that some courts will find certain offensive conduct to be lawful, while other courts might well find essentially the same type of conduct to be unlawful. But it is also true that the way in which the elements of a claim of actionable harassment have been described by the courts make clear that not all racial, sexual, or otherwise offensive or objectionable conduct that occurs in the workplace context will be found to be unlawful under Title VII.

One element of a claim of workplace harassment is that it satisfy Title VII's requirement that it be discriminatory. That is, the harassment must have occurred "because of" a characteristic protected by the statute, such as race, sex (including pregnancy, sexual orientation, and gender identity), religion, or national origin.[15] Particularly with respect to conduct that is sexual in nature, the courts generally do not assume the discriminatory nature of the conduct based on its sexual nature but instead require that discrimination be independently proven. For example, in *Oncale v. Sundowner Offshore Services, Inc.*,[16] a case in which deeply humiliating sexual conduct had been directed at a male employee by several of his male supervisors and co-workers, the Court made clear this requirement when it indicated that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at

13. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (referencing "judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult").

14. Because the focus of this article is the way in which the anti-discrimination laws have been used to limit union activities and concerted activities under the National Labor Relations Act, the discussion of the limits of Title VII in protecting employees against harassment is necessarily brief. For a much more detailed discussion of the limits of Title VII in protecting against harassment, see L. Camille Hébert, *How Sexual Harassment Law Failed Its Feminist Roots*, 22 GEO. J. GENDER & L. 57 (2020).

15. Pregnancy is defined as a form of sex discrimination by the Pregnancy Discrimination Act of 1978, an amendment to Title VII. 42 U.S.C. § 2000e(k). Sexual orientation and gender identity were recognized as a form of sex discrimination by the United States Supreme Court in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). Other federal anti-discrimination statutes prohibit discrimination and therefore harassment based on other protected characteristics. Under the Age Discrimination in Employment Act, actionable harassment must have occurred because of age, and under the Americans with Disabilities Act, actionable harassment must have occurred because of disability.

16. 523 U.S. 75 (1998).

'*discriminat[ion]* . . . because of . . . sex.'"[17] The Court went on to note that "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[18] This requirement that sex discrimination be established independently of the sexual nature of the harassment has resulted in cases in which courts have found that explicitly sexual and derogatory comments and conduct was not established to be "because of . . . sex" and therefore was not actionable.[19]

Another element of a claim of actionable workplace harassment that limits the types of offensive conduct that is found to violate Title VII is the requirement that the conduct at issue be "severe or pervasive," such that an abusive workplace environment is created in order for the terms and conditions of employment to be altered.[20] Courts have said that this is a "high threshold;"[21] the United States Supreme Court has declared that "conduct must be extreme to amount to a change in the terms and conditions of employment."[22] And the Supreme Court's best effort to provide a workable standard for determining whether harassing conduct meets the "severe or pervasive" requirement seems to suggest that "a mere offensive utterance" is likely to be insufficient to meet that requirement.[23]

In addition to limits on the conduct that constitutes actionable harassment in the context of the workplace, the law also imposes significant limits on the liability of employers for harassment that occurs in the workplace

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17. *Id.* at 80 (emphasis in original); *see also id.* at 82 (Thomas, J., concurring) ("I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'").

18. *Id.* at 80.

19. *See, e.g.*, Dohrer v. Metz Baking Co., No. 96 C 50455, 1999 WL 60140, at *2, *7 (N.D. Ill. Jan. 27, 1999) (expressing doubt about whether derogatory comments about the plaintiff's husband after co-worker indicated that he wanted a relationship with her, as well as name-calling, including being called "meat" and "boner," were made because of the plaintiff's sex); Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996) (concluding that the term "bitch" was not a gender-related term because it did not "draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect" but was "simply a pejorative term for 'woman'").

20. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'").

21. Duncan v. Gen. Motors Corp., 300 F.3d 928, 934 (8th Cir. 2002).

22. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

23. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (describing "all the circumstances" relevant to determining if a workplace environment is hostile or abusive, the Court noted "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, *or a mere offensive utterance*; and whether it unreasonably interferes with an employee's work performance") (emphasis added).

context. While employers are vicariously liable for the conduct of supervisors that constitutes actionable harassment,[24] this liability on the part of employers is limited in two distinct ways. First, the courts have imposed a very restrictive definition of who is a "supervisor."[25] In addition, there is an affirmative defense available to employers if the supervisory action has not resulted in a tangible employment action, such as a firing, demotion, or a significant change in responsibilities or benefits.[26] That affirmative defense allows an employer to defeat vicarious liability and avoid liability or damages if the employer can establish both that the employer acted reasonably to prevent and correct harassing behavior and that the plaintiff employee unreasonably failed to take advantage of any preventive and corrective opportunities, such as by failing to make a prompt and effective complaint.[27] This affirmative defense has generally been interpreted in such a way as to impose relatively little burden on employers to prevent and correct harassing behavior and a much larger burden on employees to act to take advantage of those preventive and corrective opportunities.[28] What this means is that employers often escape liability for the harassing conduct of their supervisors.

It is even more difficult for employees to establish employer liability for harassing conduct when that harassment comes not from supervisors but from other workplace actors, such as co-workers, even those that have some workplace authority over the employees, and clients or customers. Employer liability in those situations is imposed only if the employee can show that the employer was negligent.[29] Unlike the elements of the affirmative defense available to employers in the event of supervisory action, which the employer has the burden to prove, it is the employee who has the burden to prove the elements of negligence.[30] Negligence in this context generally means that the employer must have had notice of the harassment[31] and must have failed to

24. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."); *Faragher*, 524 U.S. at 807.

25. *See* Vance v. Ball State Univ., 570 U.S. 421, 431 (2013) (finding that a supervisor is one with the power "to take tangible employment action against the victim, *i.e.,* to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'").

26. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

27. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

28. *See* Hébert*, supra* note 14, at 87–101.

29. *See Vance*, 570 U.S. at 445–46 (indicating that for harassment by co-workers, employers will face liability if the plaintiff can show "that the employer was negligent in permitting [the] harassment to occur").

30. *Id.* at 443.

31. *See, e.g.*, EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1072 (C.D. Ill. 1998) (explaining standards for employer liability for harassment based on negligence,

take effective action to stop or otherwise remedy the harassment. Again, a number of courts have been quite accepting of employers' actions in response to harassment, even if those actions did not involve taking any disciplinary action against the harassers[32] or did not in fact stop the harassment from occurring or continuing.[33]

The existence of these elements of a claim of actionable harassment, as well as the rules about employer liability, means that there is a good deal of racially, sexually, and otherwise offensive behavior that occurs in the workplace that is beyond the scope of Title VII and that, even when actionable harassment occurs in the workplace, employers will escape liability for much of that conduct. This reality about the ability of the anti-discrimination laws, including Title VII, to prohibit harassment in the workplace and to hold employers liable for harassing conduct that occurs in the workplace suggests that the National Labor Relations Board may be disingenuous in justifying its actions of limiting employee protection for engaging in union and other concerted activity based on the asserted fear of employer liability under the anti-discrimination laws.

III. THE EVOLVING APPROACH OF LABOR LAW TO PROTECTED CONCERTED ACTIVITY

The approach of the National Labor Relations Board to the efforts of employees to engage in union organizing or to come together in other ways to further their common interests as employees, when those efforts also involved profane, offensive, or discriminatory behavior or speech, has depended on whether the Board deemed the objectionable behavior to be severable from activities expressly protected by section 7 of the National Labor Relations Act—"concerted activities for the purpose of collective bargaining or other mutual aid or protection."[34]

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indicating that employer must have notice in order for there to be liability and suggesting that notice will normally be obtained through the plaintiff's complaint).

32. *See, e.g.*, Knabe v. Boury Corp., 114 F.3d 407, 412–14 (3d Cir. 1997) (rejecting any requirement that disciplinary action had to be taken against harasser in order for employer's response to harassment to be found to be effective).

33. *See, e.g.*, Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 676 (10th Cir. 1998) (discussing employer liability for negligence for actions of co-workers, the court indicated that while the "stoppage of the harassment by the disciplined perpetuator evidences effectiveness," an employer's response may be reasonably calculated to end the harassment "even though the perpetuator might persist").

34. Section 7 of the National Labor Relations Act provides in relevant part that "[e]mployees shall have 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, and shall also have the right to refrain from any and all such activities." 29 U.S.C. § 157.

The Board had previously taken the position that concerted activity could be protected in spite of its objectionable nature in order to provide meaningful protection for the section 7 rights of employees, noting that "there are certain parameters within which employees may act when engaged in concerted activities" and 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 those most likely to engender ill feelings and strong responses."[35] That is, the Board has previously suggested that offensive or objectionable conduct might well be an integral part of concerted activities protected by section 7 of the Act, so that some objectionable conduct might have to be tolerated in order to allow employees the freedom to engage in conduct expressly protected by the Act.

The standards that the Board formerly used to judge whether concerted activity lost protection because of its objectionable nature recognized that concerted activity had to be judged in the particular context in which it arose.[36] The Board traditionally used a four-factor test, established in the *Atlantic Steel* case,[37]with respect to face-to-face discussions between employees and members of management.[38] These face-to-face discussions often occurred in situations in which union members were negotiating collective bargaining agreements with members of management or were otherwise involved in seeking to enforce the provisions of collective bargaining agreements on behalf of the bargaining unit. These situations generally involve rank and file employees punished for making offensive comments to members of management, unlike the situations more common in harassment cases in which management employees make offensive comments to lower-level employees.

The *Atlantic Steel* test determined whether concerted activity lost protection because of its "abusive" nature based on a balancing of: "(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."[39] The *Atlantic Steel* standard recognized that the objectionable conduct was "intertwined with [the] protected

35. Consumers Power Co., 282 N.L.R.B. 130, 132 (1986).

36. The Board had previously indicated that there are different analytical frameworks used depending on the type of protected activity. However, the question to be answered by each framework was the same: "Was the misconduct of such a nature that it forfeited the Act's protection?" Constellium Rolled Products Ravenswood, LLC, 366 N.L.R.B. No. 131, at 12 n.9 (July 24, 2018).

37. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979).

38. *See* NC-DSH, LLP, 363 N.L.R.B. 1824, 1824 n.3 (2016) (noting that the Board had applied the *Atlantic Steel* factors in a situation in which there were direct face-to-face communications between an employee and a supervisor or manager).

39. *See Atl. Steel Co.*, 245 N.L.R.B. at 816; *see also* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 122 (2d Cir. 2017) (noting that traditional standard for judging employee use of profanity in the workplace was the four-factor *Atlantic Steel* test).

activity," such that the conduct could not be "bifurcate[d]."[40] Application of this test recognized that the employee's conduct could not be judged in isolation, apart from the context in which it occurred. Under this test, employee conduct was more likely to be protected if it related directly to concerted activity, if it occurred away from the employee's working area, and if the actions of the employer may have provoked or otherwise led to the employee's conduct.[41] But even conduct that otherwise met the standards for protection would lose its protection if it was viewed as "egregious" or "opprobrious." [42] Under the *Atlantic Steel* standard, the question of whether certain conduct was protected under the Act, such that employer discipline or discharge based on that conduct violated the Act, was based on the circumstances of the activity, including its objectionable character, with important consideration given to the context in which it occurred.

In other contexts, such as that involving workplace conversations among employees and social media posts by employees, the Board had applied a different standard, that of considering all the circumstances surrounding the challenged conduct.[43] These workplace conversations, whether occurring in person among employees or conducted over social media, often involved rank and file employees together taking issue with the ways in which the employer was interpreting or enforcing collective bargaining agreements or, more generally, the way in which the employer was treating those employees.

The "totality of the circumstances" test considered the following factors in determining whether union or concerted conduct has lost protection: (1) any evidence of anti-union hostility; (2) whether the conduct was provoked;

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40. Felix Indus., Inc. v. NLRB, 251 F.3d 1051, 1054 (D.C. Cir. 2001).

41. *See, e.g.*, Media Gen. Operations, Inc. v. NLRB, 560 F.3d 181, 186–89 (4th Cir. 2009) (applying *Atlantic Steel* factors, court of appeals found that employee was not protected by the Act when he called his supervisor a "fucking idiot" or a "stupid fucking moron" in connection with collective bargaining negotiations, but in response to a legal action taken by the employer); Plaza Auto Center, Inc. v. NLRB, 664 F.3d 286, 292–95 (9th Cir. 2011) (applying *Atlantic Steel* factors, court of appeals noted that in situation in which employee called supervisor "a fucking mother fucking," a "fucking crook," and an "asshole," fact that discussion occurred away from normal work area weighed in favor of protection, as did fact that the subject matter of the meeting was the employer's compensation policies and that the comment was contemporaneous with the employer's unfair labor practice); *Felix Indus., Inc.*, 251 F.3d at 1053–56 (applying *Atlantic Steel* factors, court of appeals indicated that fact that employee called supervisor "a fucking kid" on the telephone rather than in workplace in front of other employees and in response to a dispute about compensation favored protection of employee's speech, while the obscene and insubordinate nature of the speech weighed against its protection).

42. *Media Gen. Operations, Inc.*, 560 F.3d at 186.

43. *See NC-DSH, LLP*, 363 N.L.R.B. at 1824 n.3 (noting that the Board had applied the totality of the circumstances test in a situation involving profane language in the context of workplace communications between employees); *Pier Sixty, LLC.*, 855 F.3d at 123 (noting that Board had utilized nine-factor "totality of the circumstances" test in social media cases).

(3) whether the conduct was impulsive or deliberate; (4) the location of the conduct; (5) the subject matter of the conduct; (6) the nature of the conduct; (7) whether the employer considered similar conduct to be offensive; (8) whether the employer maintained a rule specifically prohibiting the conduct at issue; and (9) whether the discipline imposed by the employer was typical for similar violations or proportionate to the offense.[44] These factors, as well as the very notion of a "totality of the circumstances" test, made clear that the context in which the conduct occurred was central to determining whether that conduct would be protected under the Act and that the context was an integral part of the concerted activity. While some of those factors involved issues of motivation on the part of the employer, other factors spoke to the issue of whether the conduct was otherwise appropriate for protection, based both on the nature of the conduct and the context in which it occurred.

With respect to a third type of conduct, that of objectionable conduct occurring on a picket line, the Board followed another standard, this one asking whether such conduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[45] The Board made clear that this standard could be met even in the absence of a physical threat and that words alone could be sufficient to establish coercion and intimidation.[46] But employee conduct on a picket line was generally evaluated differently than conduct occurring in the working environment, with more leeway given to employees engaged in picket line conduct.[47] This greater protection given to picket line conduct was presumably based not only on the separation of the picket line from the general workplace environment but also on the fact that the employees were expressly involved in protesting employer actions, either in connection with a strike or other concerted action.

While the Board had previously suggested the interconnectedness of protected concerted activities and objectionable conduct, the Board more recently, in the *General Motors LLC v. Robinson* case,[48] questioned that interconnectedness. The *General Motors* Board rejected the notion that "where an employer disciplines an employee who engaged in abusive conduct" in connection with section 7 activity, the Board "either cannot or ought not separate the two analytically" and determine whether the employer was motivated by

44. *Pier Sixty, LLC.*, 855 F.3d at 123 n.38.

45. Clear Pine Mouldings, Inc, 268 N.L.R.B. 1044, 1046 (1984).

46. *Id.* at 1045–46.

47. *See* Consol. Comm'ns., Inc. v. NLRB, 837 F.3d 1, 8, 12 (D.C. Cir. 2016) (noting that "[t]he striker-misconduct standard thus offers misbehaving employees greater protection from disciplinary action than they would enjoy in the normal course of employment" and citing to fact that impulsive behavior on the picket line is to be expected).

48. Gen. Motors LLC, 369 N.L.R.B. No. 127 (July 21, 2020).

the protected activity in disciplining the employee and would have taken the same action even in the absence of that protected activity.[49]

But it is not so easy for protected concerted activities to be completely separated from objectionable conduct, even when that conduct has a sexual or racial nature or is otherwise offensive based on a protected characteristic. While it is true that employees can engage in union activities or other concerted activities without also engaging in offensive conduct, it is also true that the two types of conduct are often quite interrelated and interconnected. Further, as the Board had traditionally recognized, it can be difficult to determine whether that conduct should be deemed to be protected without a consideration of the context in which it occurred.

The Board's new approach to the issue, however, seeks to determine whether the union activities and other concerted conduct should be protected under the Act without a consideration of the context and the circumstances in which that conduct occurred. Instead, the Board's new standard, referred to as its *Wright Line* analysis,[50] focuses not on whether the concerted activities of the employee are entitled to protection but instead on the employer's motivation in taking employment action against the employee. This new standard indicates that even concerted conduct that otherwise would be entitled to the protection by the Act can be the basis of employee discipline and discharge as long as the employer can establish that it did not have an anti-union motivation in taking action against an employee. The Board, in adopting the new standard, indicated:

> Absent evidence of discrimination against Section 7 activity, we fail 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. These results simply do not advance the Board's mission of promoting labor peace or any of the other principles animating the Act.[51]

Although the Board purported to be addressing only "abusive" speech and conduct, the Board also declared 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,"[52] suggesting that this new standard will apply whenever the employer considers conduct to be abusive and claims to have acted on that basis. It should be clear that the Board's new standard is not limited

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49. *Id.* at 13 n.19.

50. This analysis comes from the case of *Wright Line, a Div. of Wright Line, Inc.* 251 N.L.R.B. 1083 (1980), *enforced*, NLRB v. Wright Line, a Div. of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981). For a more detailed discussion of this standard, see *infra* text accompanying notes 94–103.

51. *Gen. Motors LLC*, 369 N.L.R.B. No. 127, at 12.

52. *Id.* at 13.

to racially, sexually, or otherwise discriminatory offensive behavior because the Board clearly defined the term "abusive" to encompass other types of offensive behavior, including profanity.[53] Additionally, the Board justified its conclusion not only as avoiding potential conflicts with the anti-discrimination laws but also as a way to "honor[] the employer's right to maintain order and respect."[54]

IV. THE BOARD'S NEW APPROACH TO THE NEED FOR "CIVILITY" IN UNION ACTIVITIES

A. The *General Motors* Case

The new approach of the National Labor Relations Board with respect to concerted activity with objectionable content has been deliberate and calculated.[55] Rather than wait until a case arose in front of the Board that properly raised the issues that the Board wanted to address, the Board decided to use a case before it to broadly reconsider its approach to protection for concerted activities, even though the factual issues in that case did not present many of

53. *See id.* (indicating that "[a]busive speech and conduct" included, for example, "profane ad hominem attack or racial slur"). There are indications that the meaning of "abusive" may be stretched to include any behavior of which the employer disapproves. In a recent case that had been remanded by the Board in light of the Board's decision in *General Motors*, to be decided under the Board's new standard, the conduct for which the employee had been disciplined, after asking to speak at a safety meeting to raise a safety issue and ceasing to speak when asked, involved no profanity or threats; the employer disciplined the employee because he was said to be speaking loudly and because of his body language, which was said to be unprofessional and indicative of his "unwillingness to work as a team." Wismettac Asian Foods, Inc., 371 N.L.R.B. No. 9., at 3 (July 16, 2021).

54. *Gen. Motors LLC*, 369 N.L.R.B. No. 127, at 16.

55. The decision of the Board in the *General Electric* case, to abandon its use of context-specific standards and instead adopt the *Wright Line* approach focusing on employer motivation, appears to be part of the Board's application of the *Wright Line* standard in such a way as to make it more difficult for employees to challenge discipline based on their protected activities. For example, in *Tschiggfrie Properties, Ltd.,* 368 N.L.R.B. No. 120, at 5 (Nov. 22, 2019), the Board "clarif[ied]" that generalized evidence of anti-union animus on the part of the employer was not sufficient to meet the General Counsel's initial burden under *Wright Line*; member McFerren expressed her concern that the case might "portend something more, such as a significant raising of the bar on the General Counsel in future *Wright Line* cases." 368 N.L.R.B. No. 120, at 16 (McFerran, concurring). And in *Electrolux Home Products*, 368 N.L.R.B. No. 34, at 4 (Aug. 2, 2019), the Board held that, under *Wright* Line, a showing that the reason asserted by the employer for a challenged employment decision was pretextual was not sufficient to satisfy the General Counsel's initial burden to show that the employee's protected activities was a motivating factor in the employer's employment decision; member McFerren indicated that the majority's holding "buck[ed] decades of precedent" and expressed the hope that "this case is an aberration and not a sign that the majority intends to fundamentally alter the role of pretext in the *Wright Line* framework." 368 N.L.R.B. No. 34, at 9 (McFerran, dissenting).

those issues. The *General Motors* case involved a union committeeperson who was disciplined based on his conduct while engaging with members of management during the course of union activity and while in bargaining meetings; the case did not raise issues of conversations among employees, social media posts, or conduct on the picket line.[56]

The *General Motors* case was arguably a poor case in which to consider even the appropriateness of disciplining an employee based on objectionable racial conduct with members of management, given the facts of the case and the rulings by the administrative law judge for the Board. Charles Robinson was an African American union committeeperson, who was a long-term employee of General Motors but who represented bargaining unit members as his full-time job.[57] He was suspended three times for three incidents, at least one of which had no racial overtones at all; it was only the incident without racial overtones that had been found to be protected by the Act by the administrative law judge considering the case.[58] The second incident occurred during a meeting on subcontracting with a number of managers in which Robinson was told that he was speaking too loudly.[59] He lowered his voice and, as the Board characterized his conduct, "mockingly acted a caricature of a slave," saying "Yes, Master," "Is that what you want me to do, Master Anthony?," and stated that the manager wanted Robinson "to be a good Black man."[60] The administrative law judge found that Robinson had lost the protection of the Act for this conduct.[61] The third incident involved Robinson suggesting that he was going to "mess [the manager] up" and, when asked if this was a threat, said the manager could "take it how he wanted."[62] Later in the meeting, Robinson used his cell phone to play loud music that was profane and "racially charged," according to the Board, turning off the music when the manager left the room and turning it back on when the manager returned.[63] The administrative law judge upheld Robinson's suspension for this activity, finding that his conduct caused him to lose the protection of the Act.[64] Given this disposition of the claim by the administrative law judge, it is hard to say that this was a case in which the Board was compelled to address any potential

56. *Gen. Motors LLC*, 369 N.L.R.B. No. 127, at 2–3.
57. *Id.*
58. In the first incident, Robinson had a heated exchange with a manager about overtime coverage for employees away on cross-training, in which he told the manager that he did not "give a fuck about your cross-training" and that the manager could "shove it up [his] fuckin' ass." *Id.* at 2. The administrative law judge for the Board found that Robinson did not lose the protection of the Act for this incident, in spite of his use of profanity. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 3.
62. *Gen. Motors LLC*, 369 N.L.R.B. No. 127, at 2–3.
63. *Id.*
64. *Id.*

conflicts between the standards traditionally used by the Board and the anti-discrimination laws because the judge had found the arguably racially offensive conduct to be unprotected even under those traditional standards.

In its initial consideration of the *General Motors* case,[65] the Board, over the dissent of its one Democratic member,[66] announced its intent to reconsider "the standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the Act,"[67] inviting the parties and interested amici to file briefs in connection with the Board's reconsideration of those standards. The Board identified a number of issues that might be addressed in those briefs, including "[w]hat 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?" and "[h]ow should the Board accommodate both employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?"[68] The Board majority also announced its view that the potential conflict between the then-current Board interpretation of the Act and the Title VII obligations of employers was "self-evident."[69]

The parties in the case and a number of other entities took the Board up on its invitation to submit briefs with respect to the case before the Board. The brief of the Board's then-General Counsel, whose office is generally

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65. Gen. Motors LLC, 368 N.L.R.B. No. 68 (Sept. 5, 2019).

66. *Id.* at 4 (McFerran, dissenting). Member McFerran challenged the suggestion of the majority that the EEOC itself had indicated that the Board's interpretation of the Act was inconsistent with Title VII, noting that while an EEOC Task Force had suggested that the Board and the EEOC "should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes *with regard to the permissible content of workplace 'civility codes,'*" the Task Force report did not suggest that Board doctrine was "in any way inconsistent with federal equal employment statutes." *Id.* at 4 n.8. McFerran also noted that the Supreme Court had repeatedly said that Title VII is not a civility code. She also noted:

> Neither is the National Labor Relations Act. It is not the role of the Board, in interpreting the Act, to make it as easy as possible for employers to maintain workplace decorum. The role of the Board is to enforce the rights that the Act provides in support of the goals that the Act clearly sets out.

Id. at 4.

The members of the Board are divided into Republican and Democratic members, and the Board generally has three members of the political party of the President and two members of the other political party, depending on when terms expire, when Board members are nominated, and when they are confirmed by the Senate. Member McFerran, now Chair of the Board, is identified as a Democratic member of the Board. *See Members of the NLRB Since 1935*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board/members-of-the-nlrb-since-1935 (last visited Sept. 2, 2022).

67. *Gen. Motors LLC*, 368 N.L.R.B. No. 68, at 2.

68. *Id.* at 3.

69. *Id.* at 3 n.8.

responsible for enforcing the provisions of the National Labor Relations Act, took the position that the National Labor Relations Act does not supersede other federal employment laws.[70] But that brief really seemed to suggest that the purposes of the Act to protect employees' organizational and other union-related activities must be subordinated to the interests that it saw as protected by anti-discrimination laws. Indeed, the General Counsel's Brief declared that the Board should adopt standards to ensure that racist and sexist conduct and "conduct or speech that an affected employee would reasonably find contributes to a hostile work environment . . . must never be protected by the Act."[71] The Brief suggested that any other approach would require employers to "engage in a Hobson's Choice of having to decide with which federal labor laws to comply."[72] The General Counsel, however, failed to come to terms with the fact that not all racist and sexist conduct that occurs in the workplace risks a violation of Title VII and that the standard for Title VII liability for harassment does not come close to resembling the standard set forth by the General Counsel. Much conduct, even racially or sexually offensive conduct that an employee could reasonably find to contribute to a hostile environment, would not be found to violate Title VII under existing standards.

The Brief filed by General Motors also invoked the anti-discrimination laws and "every employee's right to be free from exposure to unlawful workplace harassment and discrimination"[73] in arguing for restrictions to be imposed on protected activity under the National Labor Relations Act. For determining the type of conduct that should be precluded from protection, the Brief indicated that "the only relevant consideration in this context is whether the conduct is racially or sexually offensive to others."[74] That brief also invoked notions of workplace civility, arguing that "i[t] is entirely appropriate for the Board to require employees, while engaging in NLRA-protected activities, to comply with policies, laws and regulations that promote and advance civility, respect and decency in the workplace."[75] But the standard invoked by the employer—the mere fact that language or conduct is found to be offensive—is not the standard imposed by the anti-discrimination laws, nor do those anti-discrimination laws generally impose workplace standards of civility, decency, and respect. In fact, the courts have repeatedly rejected

70. General Counsel's Brief at 11, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

71. *Id.* at 4.

72. *Id.* at 5.

73. Respondent General Motors, LLC's Brief in Response to the Nat'l Lab. Rel. Bd.'s Notice and Invitation to File Briefs at 2, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

74. *Id.* at 14.

75. *Id.* at 8.

the notion that the anti-discrimination laws should be interpreted as "civility codes" for workplaces.

Amicus Briefs filed by employer-oriented or employer-affiliated entities also argued that the National Labor Relations Act should be interpreted to give substantial weight, and perhaps priority, to the interests said to be promoted by the anti-discrimination statutes, including civility, over the interests traditionally promoted by the National Labor Relations Act. For example, the Amicus Brief filed by the Society for Human Resources Management, a group representing human resource professionals and other business leaders, contended that "employers must be permitted to prohibit discriminatory, offensive, abusive, and profane behavior and language in the workplace and establish diverse, respectful, inclusive, and civil workplaces"[76] and argued for the adoption of a "bright-line rule that an employee forfeits any protection under the [National Labor Relations] Act when the employee uses sexual and/or racial language or engages in sexual and/or racist conduct."[77] Another amicus brief filed on behalf of a number of employer associations declared that "[a]n employer's effort to root out discrimination and comply with its legal obligations should not be hamstrung by theoretical concerns about the potential chilling of inchoate employee rights, nor should those rights be used to excuse repugnant, and intolerable workplace behavior."[78] The brief did not explain why removing protection for concerted activity represented only a theoretical concern or what was unformed or confused about employee rights protected by the National Labor Relations Act for over eight decades.

Interestingly, the amicus brief filed by the agency that actually has responsibility for enforcing the federal anti-discrimination laws, the Equal Employment Opportunity Commission, took a much more measured approach to the issue of reconciling the protections of the National Labor Relations Act with the requirements of Title VII and other anti-discrimination statutes. The brief expressly did not take a position on the standard that the Board should use to determine when statements and conduct would lose the protection of the Act, instead stating:

> Given that employers must address racist and sexist conduct that violates Title VII, and may need to do so even before the conduct becomes actionable in order to avoid liability for negligence, the EEOC urges the NLRB

76. Brief of Amicus Curiae Soc'y for Hum. Res. Mgmt. at 2, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

77. *Id.* at 15.

78. Brief of Amici Curiae Coal. for a Democratic Workplace et al. at 25, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

> to consider a standard that permits employers to address such conduct, including by disciplining employees, as appropriate.[79]

The brief also acknowledged that not all harassing conduct is unlawful because of the severe or pervasive requirement, as well as the fact that consideration must be given to the status of the harasser, because "[h]arassment perpetrated by a supervisor is inherently more severe than that of a coworker."[80] The brief noted that the situations most likely to arise before the Board would involve not harassment by a supervisor but co-worker harassment for which employers would face liability only if the employer was negligent.[81] The EEOC did recognize that the negligence standard might require employers to respond to harassment before it became actionable under the anti-discrimination statutes because liability could be imposed on employers if they failed to take effective action and the harassment later reached the threshold of actionability.[82] The brief also emphasized the need for proportionality between the seriousness of the offense and the sanction imposed by the employer, as well as the fact that an employee's offensive conduct must not be used as a pretext, under either the anti-discrimination statutes or the National Labor Relations Act.[83]

Amicus briefs filed by unions and other organizations representing the interests of employees also took a more nuanced approach to the question of whether protection should be given to discriminatory or other offensive speech or conduct when that conduct occurred in the course of union activities or other concerted activity for mutual aid or protection. One of those briefs noted that a change in the Board's standards to weaken the protection for employees under the National Labor Relations Act was not likely to advance the goals of racial and gender equality in the workplace but instead would likely harm the interests of women and minority workers by limiting their ability to protest against discrimination.[84] The brief noted that the employee involved in the case before the Board was disciplined in part because of his protest against what he viewed as discriminatory treatment based on his race when he sarcastically acted in a servile and subservient manner after he was repeatedly told that he was being "intimidating" by members of management.[85] Another brief suggested that "[w]omen and racial minorities, among the most vulnerable sections of the workforce, will ultimately be the victims of

79. Brief of the Equal Emp. Opportunity Comm'n as Amicus Curiae at 1–2, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 4, 2019).

80. *Id.* at 10.

81. *Id.* at 17.

82. *Id.* at 18.

83. *Id.* at 19–20.

84. Brief of Amicus Curiae Am. Fed'n of Tchr., AFL-CIO et al. at 8–9, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

85. *Id.* at 4, 7.

diminishing Sec. 7 rights," at least in part because the curtailing of those rights may well be used against employees who are opposing perceived racism and sexism on the part of employers and in the workplace more generally.[86] More bluntly, another brief, noting that the disciplined employee was himself a racial minority, indicated that

> [t]he Board's conflation of an employee from a subordinated social group accusing his employer of racism, however ungracefully, with conduct creating a hostile work environment under Title VII evinces a fundamental misunderstanding of the anti-subordination purpose and legal standards of Title VII, an Orwellian attempt to diminish worker protections under the pretext of combating bigotry, or both.[87]

Similarly, another brief took issue with the Board's suggestion of a conflict between the National Labor Relations Act and anti-discrimination statutes and accused the Board of using "some purported tension between the NLRB and Title VII (and other EEO laws) as an excuse to further limit workers' rights."[88]

After obtaining input from the parties and amici, the three then-remaining members[89] of the National Labor Relations Board issued a decision in *General Motors LLC*,[90] revising the standards for determining when concerted activities would be protected when those activities contained discriminatory or otherwise objectionable behavior. The Board abandoned the context-specific standards that had long been used by the Board to judge whether conduct would be protected, taking an entirely new approach to that issue. The Board determined that it would apply its *Wright Line*[91] standard for determining

86. Amicus Brief by SEIU Loc. 32BJ at 2, 14, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

87. Brief of Amicus Nat'l Nurses United at 3, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

88. Amicus Brief by Commc'n Workers of America, AFL-CIO at 6, Gen. Motors LLC, 368 N.L.R.B. No. 68 (Nov. 12, 2019).

89. The Board avoided a dissent in its second consideration of the *General Motors* case by issuing the decision at a time when there were only three members of the Board, all Republican members. McFerran's term as a member of the Board expired on December 16, 2019, and she was reappointed on August 10, 2020. The decision of the Board in the *General Motors* case was issued July 21, 2020.

That Member, now Chair, McFerran would have dissented from the *General Motors* case had she been on the Board when it was decided is suggested by her indication in a later case, *Wismettac Asian Foods, Inc.*, that she "questions whether the majority's decision to replace the Board's longstanding loss-of-protection standards with the *Wright Line* standard contravenes the policies of the Act." 371 N.L.R.B. No. 9, at 1 n.6 (July 16, 2021).

90. 369 N.L.R.B. No. 127 (July 21, 2020).

91. Wright Line, a Div. of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), *enforced*, NLRB v. Wright Line, a Div. of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981). In *NLRB v. Transportation Management Corp*, the United States Supreme Court held that the *Wright Line* standard was a permissible interpretation of the Act. 462 U.S. 393, 404 (1983). That case also

causation to that issue, indicating that the Board was capable of determining whether the employer would have taken adverse action against an employee for engaging in abusive or objectionable activity, unrelated to the protected, concerted nature of the conduct.[92] Although the Board adopted this standard in a new context in which it had not been previously applied, the Board determined that the *Wright Line* standard should be applied retroactively and remanded the case to the administrative law judge for application of the standard to the *General Motors* case.[93]

B. The *Wright Line* Analysis

Under the *Wright Line* analysis, the General Counsel must first establish that the employee's union activities were a motivating factor in the employer's decision to take adverse action against the employee. This showing can be made by evidence that the employee engaged in protected union or concerted activities, that the employer knew of those activities, and that the employer had animus against that activity; the evidence also must be sufficient to establish a causal connection between the activity and the adverse action. Once that showing is made by the General Counsel, the employer then has the burden of proving that the employer would have taken the same action in the absence of the protected activity of the employee. [94]

The context of the *General Motors* case is not the context in which the Board has traditionally applied the *Wright Line* test. The *Wright Line* case itself dealt with a situation in which an employer had discharged a leading union advocate who had played a critical part in a recent union campaign, purportedly because of discrepancies in his timesheet. The discharge of the employee, who had worked for the employer for ten years and was considered a "better than average" employee, occurred two months after the union campaign, and the decision to discharge him was apparently made before he was asked about the discrepancies in his timesheet.[95] Additionally, no other

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involved a situation in which the employer arguably had "dual motives"—the employer claimed that the employee was discharged for two minor transgressions completely unrelated to his union activities.

92. *Gen. Motors LLC*, 369 N.L.R.B. No. 127, at 9–10.

93. *Id.* at 17–18. Although the Board noted that employees might have relied on the context-specific standards that it was abandoning, the Board reasoned that "[c]ontinuing to find violations of the Act, under the overruled standards, where employers were simply exercising their right to maintain a civil, safe, nondiscriminatory workplace for their employees would be the greater injustice." *Id.* at 17.

94. *Wright Line*, 251 N.L.R.B. 1083, 1089; *see also Transp. Mgmt. Corp.*, 462 U.S. at 395. The Board reiterated these requirements in the *General Motors* case. 369 N.L.R.B. No. 127, at 14; *see also* Sec. Walls, LLC., 371 N.L.R.B. No. 74, at 3 n.14 (Mar. 14, 2022).

95. *Wright Line*, 251 N.L.R.B. at 1090.

employee had ever been discharged for a similar reason.[96] The Board described the test being adopted as one involving "dual motives": a situation in which an employer had arguably both a "good"—a legitimate business justification—and "bad"—union animus—reason for its action.[97] The Board found that the General Counsel had shown that the employee's union activity was a motivating factor in the decision to discharge him and that the employer had not met its burden to show that it would have made the decision to discharge him in the absence of those union activities, that is, on the basis of the claimed discrepancy in his timesheet.[98] The employer's claimed justification for the challenged employment action was a reason completely separate from and unrelated to the employee's union activities. The *Wright Line* case itself contained no indication that the standard being adopted by the Board would apply in a situation in which the "good" reason articulated by the employer for the challenged action was an integral part of the "bad" reason for that action—that is, the objectionable conduct was interwoven with the concerted activities.

The opinion of the concurring Board member in the *Wright Line* case noted the "dual motive" nature of that case by pointing out situations in which that member would not apply the standard adopted by the Board:

> This standard may suffice for most cases. However, there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. All of them, both lawful and unlawful, may have combined to push the employer to the decision he would not have reached if even one were absent.[99]

This concurrence suggested that a situation in which the claimed justification for an employer's action was interlocked or interrelated with the employee's protected union activities would not be an appropriate case for application of the *Wright Line* test.

The Board has previously indicated the inappropriateness of the *Wright Line* analysis in cases in which the employer has sought to justify its actions against employees for reasons interconnected with their activities protected

96. *Id.*
97. *Id.* at 1083–84.
98. *Id.* at 1090–91.
99. *Id.* at 1091 (Jenkins, concurring).

by the Act.[100] The courts have reached the same conclusion.[101] As one court of appeals indicated: "As the Board explained below, . . . and as this court has explained before, *Wright Line* is inapplicable to cases—like this one—in which the employer has discharged the employee because of alleged misconduct 'in the course of' protected activity."[102] Instead, the court indicated that "*Wright Line* is the test the Board uses when an employer has discharged (or disciplined) an employee for a reason assertedly *unconnected* to protected activity."[103]

C. Dangers of Application of the *General Motors* Standard

An administrative law judge with the Board, in considering a case remanded from the Board to be reconsidered in light of the *General Motors* case, indicated the inappropriateness of the standard that she was being forced to apply. The judge indicated that she did not think that the *Wright Line* standard was the appropriate legal framework for the case before her because that analysis applies only in "mixed motive" cases when the record "supports the potential existence of one or more legitimate justifications" for the employer's action but not cases "where 'the very conduct for which employees are disciplined is itself protected concerted activity.'"[104] She indicated that *Wright Line*'s focus on the issue of whether the employer would have taken the same action in the absence of protected activity indicated the problem with application of the standard in this case, in which the employer claimed to have disciplined an employee for raising his voice and using "angry hostile tones":

> But if speaking in an animated and elevated voice in the course of protected activity, without more, can justify discipline, Section 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

100. *See* Starbucks Corp., 360 N.L.R.B. 1168, 1169–71 (2014) (applying *Wright Line* rather than *Atlantic Steel* in context of discharge of employee for engaging in concerted activity involving the use of profanity because employee was found to have been discharged for engaging in unrelated union activities); Siemens Energy & Automation, Inc., 328 N.L.R.B. 1175, 1175–76 (1999) (indicating that it was inappropriate to apply the *Wright Line* analysis in the context of the issue of whether an employer may discharge a worker for strike misconduct).

101. *See* NLRB v. Me. Coast Reg'l Health Facilities, 999 F.3d 1, 11 (1st Cir. 2021) ("*Wright Line* is inapplicable where an employee's discharge is based upon a single act."); *see also* Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885, 890 (8th Cir. 2017) (quoting Shamrock Foods Co. v. NLRB, 346 F.3d 1130, 1135 (D.C. Cir. 2003) ("*Wright Line* applies 'when an employer has discharged (or disciplined) an employee for a reason assertedly *unconnected* to protected activity.'")).

102. *Shamrock Foods Co.*, 346 F.3d at 1136.

103. *Id.* at 1035.

104. Wismettac Asian Foods, Inc., 371 N.L.R.B. No. 9, at 3 (July 16, 2021) (quoting Burnup & Sims, Inc., 256 N.L.R.B. 965, 976 (1981)).

> 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.[105]

The administrative law judge indicated that the employee "did not, under any reasonable view, engage in misconduct," even if he did raise his voice, noting that he did not "use any profanity, make threats, act insubordinately, or touch anyone."[106] The judge indicated that "[t]here is simply no requirement to use a pleasant, happy tone of voice when engaging in protected activity."[107]

In affirming the judge's determination that the employer had indeed violated the Act even under the *Wright Line* standard, the two members of the Board who had participated in the *General Motors* case reaffirmed their commitment to the *Wright Line* analysis, while Chair McFerran affirmed the judge's application of that analysis for "institutional reasons" but indicated that this case "illustrates some of her concerns" with the Board's new standard.[108] She noted that the *Wright Line* standard "may not be suitable in these circumstances" because of its focus on evidence of the employer's animus toward unions or protected activity:

> Prior to the Board's decision in *General Motors*, a violation was established under *Atlantic Steel* by focusing specifically on whether an employee who suffered adverse employment consequences for engaging in what was indisputably protected concerted activity lost the protection of the Act by opprobrious conduct in the course of that activity. Now, the finding of a violation does not focus on whether the employee did anything to lose the protection of the Act, but instead requires the General Counsel to show that the employer's decision to discipline or discharge the employee was motivated by animus toward the employee's protected activity. Consequently, conduct that would typically be protected by the Act would in essence lose the Act's protection absent a showing that the employer harbored animus toward the protected activity.[109]

The Board in the *General Motors* case justified its new approach—its abandonment of context-specific standards and its embrace of issues of causation under the *Wright Line* analysis—in part on the grounds that "violations found under these standards have conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws" and that use

105. *Id.* at 3 n.12.
106. *Id.* at 3.
107. *Id.*
108. *Id.* at 1 n.6.
109. *Id.*

of those prior standards served "to penalize employers for declining to tolerate abusive and potentially illegal conduct in the workplace."[110] In spite of the insistence of the courts that Title VII and other anti-discrimination laws are not "civility codes," the Board, in explaining the need for the new standard, both sang the praises of civility and suggested that the need for civility was justified by the dictates of the anti-discrimination laws.

In noting the importance of civility in the workplace, the Board in *General* Motors cited to a dissenting opinion by former member of the Board:

> We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment. Given all this, employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency.[111]

Interestingly, the dissenting member of the Board had issued this call to civility in a case in which the administrative law judge had found that the employees' organizing campaign was prompted at least in part by "management's hostile and degrading treatment" of employees, including use of profanity and discriminatory epithets by management toward employees.[112] It appears that the dissenting member of the Board was much more concerned

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110. Gen. Motors LLC, 369 N.L.R.B. No. 127, at 1 (July 21, 2020). One of the Board's members made explicit the claimed connection between the Board's new standard and workplace harassment in an editorial in the Wall Street Journal titled "NLRB Stops Excusing Workplace Harassment." Then-Chair of the Board John F. Ring claimed, in that editorial, that the change in the Board's standard "eliminates the conflict with federal, state and local antidiscrimination laws and stops penalizing employers for complying with those laws." John F. Ring, *NLRB Stops Excusing Workplace Harassment*, WALL ST. J. (July 21, 2020, 3:11 PM), https://www.wsj.com/articles/nlrb-stops-excusing-workplace-harassment-11595358659. He also asserted that the Board's decision "is an important advancement for civility and respect in this country's workplaces." *Id.*

111. *Gen. Motors LLC*, 369 N.L.R.B. No. 127, at 13 (quoting Pier Sixty, LLC, 362 N.L.R.B. 505, 510 (2015) (Johnson, dissenting)).

112. *Pier Sixty, LLC*, 362 N.L.R.B. at 505. The Board's decision noted that "vulgar language is rife in Respondent's workplace, among managers and employees alike." *Id.* at 506. Some of the comments made by managers included use of the term "motherfucker" to refer to employees, asking employees "[a]re you fucking stupid?," and referring to an employee as a "fucking little Mexican." *Id.* While the dissenting Board member would have found the comment "Fuck his mother and his entire fucking family!!!!" to be "opprobrious" behavior not protected by the Act, the administrative law judge noted that "it is well-settled that use of the word 'fuck' and its variants, including the term 'motherfucker,' is insufficient to remove otherwise protected activity from the purview of Section 7." *Id.* at 529.

about allowing employers to impose civility requirements on employees, particularly when employee actions were directed at the employer and its representatives, while ignoring the instances of incivility of management employees directed toward rank and file employees.

A recent case decided by the Board, after remand from a court of appeals, demonstrates the considerable effect that the new standard from *General Motors* will have on the Board's determinations with respect to whether employer actions targeting union or other concerted activities violate the Act when those activities also involve offensive conduct. When the Board first considered the case of *Constellium Rolled Products Ravenswood, LLC*,[113] the Board decided the case under the context-specific standards then used by the Board. That case involved the termination of an employee who had written "whore board" on an overtime signup sheet, as part of a protest against the employer's unilateral adoption of the new overtime policy after impasse was reached on the negotiation of a new collective bargaining agreement.[114] Applying both the *Atlantic Steel* factors and the totality of the circumstances test, the Board determined that the employee's conduct had not lost the protection of the Act.[115] The focus of the Board in determining whether the employee's conduct was protected was on the right of the employee to engage in concerted activity, balanced against the need of the employer to maintain order in the workplace. The Board noted that the employee's conduct did not interfere with the use of the signup sheets and that, while the language used was "harsh and arguably vulgar," the employee's use of that language, in context, in which it was clear that he was referring to the ongoing labor dispute with respect to the overtime policy, was not egregious.[116]

By contrast, upon reconsideration of the case, after remand by the court of appeals, the Board focused on an entirely different issue in determining whether the employee's termination violated the Act. Although the court of appeals had remanded the case to the Board to address the potential conflict between the National Labor Relations Act and the anti-discrimination laws, the Board did not address how the employee's conduct would have been treated under the anti-discrimination laws or even how the employer's interests in running its business or employee interests in engaging in concerted activity under the National Labor Relations Act would be impacted by the employer's action. Instead, the Board focused on the sole issue of whether the employer had engaged in discrimination against the protected activities of the employee, concluding that the fact that the employer tolerated profanity and vulgarity in the workplace generally, including the precise term "whore

113. 366 N.L.R.B. No. 131 (July 24, 2018).
114. *Id.* at 1–2.
115. *Id.* at 2–4.
116. *Id.* at 3.

board" when used by other employees and supervisors, prevented the employer from establishing that it would have taken the same action against the employee in the absence of his protected conduct.[117]

The Board claimed that its new approach, as set forth in *General Motors*, "harmonizes the conflict [between the employer's duties under the National Labor Relations Act and the anti-discrimination laws] by permitting an employer to show that its imposition of discipline was lawfully motivated by its efforts to fulfill its obligations under antidiscrimination laws."[118] Although the Board indicated a number of times in its decision that an employer "may" defend against claims of section 7 violations by showing that its actions were motivated by the anti-discrimination laws,[119] the Board did not indicate that such a showing was required by the employer in order to meet the *Wright Line* analysis. That is, it is not clear whether the employer is required to show that it was motivated by an effort to comply with the anti-discrimination laws or whether it could meet its burden merely by showing that its conduct would have been the same based on some other reason unrelated to the anti-discrimination laws.

The Board also gave no indication that, to the extent that the employer's action was motivated by its perceived obligations under the anti-discrimination laws, the employer's understanding of those obligations needed to be based on a reasonable interpretation of the anti-discrimination laws. That is, the Board's focus seems to be on the honesty of the employer's asserted justification for its reliance on the anti-discrimination laws, not the reasonableness of that justification. This raises the possibility that employers will be able to avoid liability for punishing employees for engaging in union or concerted activities based on unreasonable interpretations of the anti-discrimination laws, thereby elevating even unjustified employer attempts to comply with the anti-discrimination laws over the interests of employees in engaging in protected union and concerted activities.

Unlike the Board majority, the concurrence by Chair McFerran in the reconsidered *Constellium Rolled Products* case directly addressed the issue for which the court of appeals had remanded.[120] She would have found that the Board's initial decision in that case did not "create any conflict—actual or potential—" with the employer's obligations under the anti-discrimination

117. Constellium Rolled Products Ravenswood, LLC, 371 N.L.R.B. No. 16, at 2–4 (Aug. 25, 2021).

118. *Id.* at 2.

119. *Id.* at 2–4.

120. Chair McFerran indicated that she had not participated in the *General Motors* case and took no position on whether the case was correctly decided nor on "whether it 'harmonize[d] the potential conflict between an employer's duties under the [National Labor Relations] Act and under antidiscrimination laws' (as the majority asserts), or whether it is appropriate to apply that decision here." *Id*. at 4–5 (McFerran, concurring).

laws.[121] Citing to the law under Title VII, she noted that the employee's conduct "could not plausibly constitute a basis for establishing a hostile work environment claim under federal discrimination precedent."[122] She doubted whether the term "whore board," in context, could have been understood as a "gender-based slur," but that even if it could, the single written use of that term would not have been "sufficiently severe, pervasive, or disruptive to alter an individual's conditions of employment."[123] She also indicated that the Board's requirement that the employer cease and desist from disciplining the employee for engaging in protected activity would not have required the employer to tolerate a hostile work environment or otherwise prevented the employer from acting against Title VII misconduct.[124]

This case demonstrates not only that the Board's new standard for protecting union and concerted activities is unnecessary to ensure that employers are allowed to fulfill their obligations under the anti-discrimination laws, but that the new standard will allow employers to punish the workplace activities of employees even when the employer's actions themselves are unrelated to or not consistent with the purposes of those laws.

V. How to Balance Anti-Discrimination Requirements and the Need for Civility with Protection for Union Activities

A. Conflict Between Anti-Discrimination Law and Protection for Union Activities is Not Inevitable

The proper balance between the need to protect employees from discrimination and harassment in the context of the workplace, and even the right of employers to be able to enforce rules requiring workplace civility, with the need to protect the rights of employees to engage in union activities and other activities for their common interests raises difficult issues. Employers must remain able to prohibit certain forms of racial, sexual, and other offensive conduct in the workplace, not only to protect employees from that conduct but also to protect themselves from potential liability under the anti-discrimination laws. And employers need some leeway to prohibit offensive conduct that may fall short of being actionable under those anti-discrimination statutes, again, not only to protect employees from that behavior but also to

121. *Id.* at 5.
122. *Id.*
123. *Constellium Rolled Products Ravenswood, LLC*, 371 N.L.R.B. No. 16, at 5.
124. *Id.* at 5–6. Chair McFerran also noted in her opinion that the West Virginia case relied on by the employer as evidence of its potential liability was "easily distinguishable from the one here" because the incident in that case was "initiated by management, involved multiple comments, and implicated personal, gender-based slurs that referenced specific employees." *Id.* at 6.

ensure that employers can protect themselves from liability for conduct that has not yet crossed the line for liability but has the potential to do so. Employers may face liability for actionable discrimination and harassment that they have failed to act to prevent or correct before it became actionable. And harassing and discriminatory conduct that falls short of being actionable has the potential to do significant harm to the employees subjected to it.

But it is also problematic to adopt a rule that subordinates, in all circumstances, the ability of employees to engage in concerted activities that would ordinarily be protected by the provisions of the National Labor Relations Act simply because the conduct includes offensive behavior, even if that behavior has racial or sexual aspects or implicates other characteristics protected by the anti-discrimination laws, when that behavior would not actually be found to violate the anti-discrimination laws. If all, or even most, racially, sexually, or otherwise offensive conduct occurring in the context of the workplace was made unlawful under the anti-discrimination laws, the balance might well be different because of the concern that limiting employers' ability to prohibit that activity would in fact impose liability on employers under the anti-discrimination laws. But the anti-discrimination laws do not come close to prohibiting all racially, sexually, or otherwise offensive conduct in the workplace; those laws do not come close to prohibiting all such conduct even when it has been demonstrated to cause real harm to the employees subjected to it. Instead, the anti-discrimination laws prohibit only a narrow slice of such conduct, only when it can be said to meet a "high threshold" or be "extreme" in nature and, even then, only when it meets other elements of a claim of harassment or discrimination.

In this context, in which the anti-discrimination laws do not actually protect employees from significant amounts of offensive and harmful workplace behavior, and when those laws affirmatively protect employers from facing liability for significant amounts of such behavior, the balance ought to be different. Under these circumstances, it is wrong for employers to be shielded from the consequences of discriminatory behavior and harassment that they allow to occur or do not act to prevent, while allowing them to strip employees of protection from workplace conduct in the name of protecting themselves or their employees from that very same type of conduct.

Employers should not be able to insist on the right to punish employees for engaging in racially, sexually, or otherwise offensive conduct as part of concerted activity if the employer generally tolerates such conduct in other contexts. For example, an employer who fails to address racial, sexual, or other forms of harassment by supervisors or co-workers in an effective manner, such as by disciplining the harassers, should not be able to justify disciplining an employee for use of similarly offensive conduct in connection with concerted activity. Allowing an employer to take disciplinary action in such a situation would demonstrate that it was the concerted activity, not the

objectionable nature of that conduct, that was the focus of the employer's action. It is in only this narrow slice of cases that the Board's new reliance on the *Wright Line* analysis would find employers to have violated the Act by acting against offensive but otherwise protected concerted activity because only in these types of cases would the employer presumably not be able to establish that it would have reached the same conclusion even if the protected activity had not existed. If the employer were able to establish that it would have treated concerted activity and other types of activity in the same manner, then the employer would presumably escape liability under the Act, even if the concerted activity engaged in by the employee would have otherwise been protected by the Act.

While the National Labor Relations Act prohibits employer discrimination on the basis of union activity in section 8(a)(3),[125] the Act provides additional protections for union activity. Section 8(a)(1)[126] of the Act, which prohibits employers from interfering with union and other concerted activities protected by section 7[127] of the Act, also needs to be considered in determining whether the Board's standards are consistent with the underlying purposes of the Act. A violation of section 8(a)(1) does not depend on the existence of discriminatory intent or action by the employer;[128] interference with activity protected by section 7 is sufficient for a violation of the Act to be found,

125. Section 8(a)(3) of the National Labor Relations Act provides that it is an unfair labor practice for an employer "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).

126. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1).

127. 29 U.S.C. § 157.

128. Even the Board in the *General Motors* case seemed to recognize the possibility that "[n]ondiscriminatory discipline may violate Sec. 8(a)(1) if it interferes with Sec. 7 activity," although the Board in that case went on to say that "the Board has always categorized these cases as 8(a)(3) violations when involving union activity or 8(a)(1) violations when involving other protected concerted activity." Gen. Motors LLC, 369 N.L.R.B. No. 127, at 14 n.20. It is not clear whether the Board was also suggesting that interference with union activity always requires intent to discriminate, but if so, that conclusion is not consistent with the language of the Act. Nothing about Section 8(a)(1) suggests that it does not protect union activity; in fact, quite the opposite is true. Section 8(a)(1) makes it an unfair labor practice for employers to interfere with Section 7 rights, and Section 7 clearly protects union activity, like forming or joining a labor organization and engaging in collective bargaining. 29 U.S.C. §§ 157, 158(a)(1); *see also* PAUL M. SECUNDA ET AL., MASTERING LABOR LAW 107 (Carolina Academic Press 2014) ("There sometimes can be confusion over whether employer conduct violates Section 8(a)(1), Section 8(a)(3), or both. The main distinction between the two types of violations is that employer intent to encourage or discourage union activity is generally an element of a Section 8(a)(3) violation, whereas anti-union motive is not an element of a Section 8(a)(1) violation.").

regardless of the employer's motivation or the absence of anti-union animus.[129] And an employer who takes disciplinary action based on union and other concerted activities of employees can clearly interfere with the activities of employees sought to be protected by the Act, regardless of whether that employer possesses, or acts on the basis of, union animus. The Board's focus on employer discrimination against union or concerted activities as the determining factor in whether the employer who acts against an employee for engaging in those activities violates the Act gives insufficient attention to the purposes of the Act other than prohibiting discrimination. The purposes of the Act also aim to affirmatively protect the right of employees to engage in union activities and other concerted activities.

It is true that it might be more difficult to draw a line with respect to offensive conduct when an employer has not demonstrated different treatment of concerted activity and other types of workplace conduct or particular hostility toward union activities and other types of concerted activity. That is, when an employer cannot be shown to have disfavored concerted activity as compared to other types of workplace conduct, should employers be limited in taking action against offensive conduct that is part of such concerted activity, and under what circumstances? Should employers be able to prohibit all conduct that is racially, sexually, or otherwise offensive with respect to protected characteristics, in order to fulfill the purposes of the anti-discrimination laws to remove discriminatory and harassing conduct from the workplace? Should employers be able to ban all conduct that they find to be offensive, as part of a desire to instill a sense of workplace civility?

These are, indeed, difficult questions, which raise issues surrounding the underlying purposes of the anti-discrimination laws and the National Labor Relations Act, and whether those purposes can be reconciled with each other in the context of racially, sexually, or otherwise offensive conduct that is a part of what would otherwise be protected union or concerted activity on the part of employees. And even if there is recognition that the purposes of the two types of statutes can and must be reconciled, there are significant disagreements about how that reconciliation can be achieved.

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129. *See* Constellation Brands U.S. Operations, Inc. v. NLRB, 992 F.3d 642, 646 (7th Cir. 2021) ("To establish a violation of section 8(a)(1), '[n]o proof of coercive intent or effect is necessary,' and we ask only 'whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'"); Staffing Network Holdings, LLC. v. NLRB, 815 F.3d 296, 305 (7th Cir. 2016) ("An employer violates section 158(a)(1) when it threatens employees with discipline or discharge for engaging in concerted activity that is protected under section 157. Threats of discharge, discipline, other reprisals against employees for engaging in union activity violate the Act because 'these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce.' The tendency to coerce is judged from the viewpoint of the employee.") (citations omitted).

Some commentators have taken the position that at least certain forms of offensive speech should not have the protection of the National Labor Relations Act, even when that speech occurs in the context of union or concerted activities. Professor Michael Z. Green, in his article *The Audacity of Protecting Racist Speech Under the National Labor Relations Act,*[130] takes the not-unreasonable position that the National Labor Relations Board should not find racist speech to be protected activity, even when it occurs in connection with concerted activities, because of the real harm done by the presence of such speech in the workplace.[131] I have a certain sympathy with his contention, and I do believe that certain types of racist speech, particularly certain racial slurs and epithets, should not be tolerated even when part of concerted activities. My reason for this position is that there is real harm caused by such speech; in addition, I believe that such slurs and epithets should be found to be actionable harassment under the anti-discrimination laws, even if the courts do not always agree. But I still have concerns about using the anti-discrimination laws to justify this approach when those laws do not actually protect employees from all racist speech and do not impose liability on employers when they engage in or otherwise tolerate all such speech.

An example of a case in which an employer relied on a claimed conflict with the anti-discrimination laws to justify firing an employee for racist speech on a picket line, even though the employer seemed to acknowledge that that conduct was not sufficient to actually establish a violation of those laws, is *Cooper Tire & Rubber Co. v. National Labor Relations Board*.[132] The employer in that case locked out employees after negotiations failed for a new collective bargaining agreement and continued to operate with replacement workers. Many of the replacement workers were black, and a locked-out employee on the picket line directed racist comments at a van carrying replacement workers that had just crossed the picket line. The comments may not have been heard by the replacement workers, but many other employees in the crowd did hear the comments.[133] The employer did not recall that employee to work at the end of the lockout and discharged him for his comments on the picket line. Although an arbitrator found "just cause" for the employee's dismissal, the administrative law judge for the Board, and then the Board itself, concluded that the employer had violated the National Labor Relations Act by terminating the employee.[134]

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130. Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017 U. CHI. LEGAL F. 235 (2017).

131. *Id.* at 261–63.

132. Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885 (8th Cir. 2017).

133. The comments were, "Hey, did you bring enough KFC for everybody?" and "Hey anybody smell that? I smell fried chicken and watermelon." *Id.* at 889.

134. Cooper Tire & Rubber Co., 363 N.L.R.B. 1952, 1952 (2016).

In enforcing the Board's order, the court of appeals agreed that the racist nature of the employee's picket line conduct did not cause him to lose the protection of the Act. The court rejected the employer's contention that the order to reinstate the employee conflicted with the employer's obligations under Title VII, noting that "stray comments" are generally not sufficient to create a hostile working environment.[135] The court held that the employee's comments, "even if they had been made in the workplace instead of on the picket line—did not create a hostile work environment," citing to prior cases involving similar comments that had been held insufficient to violate Title VII.[136] The employer appeared to concede that the employee's racist statements were not sufficient to establish a violation of Title VII on the part of the employer, but it still argued that "it has the legal obligation under Title VII to apply its lawful policy prohibiting harassment to racist statements (even on the picket line)."[137] The court indicated that the employer's obligations under Title VII did not conflict with the order to reinstate the employee, in part because the employer was under no legal obligation to fire the employee.[138] The dissenting judge, on the other hand, stressed the requirements of the anti-discrimination laws and the obligation of the employer to comply with them, as well as the likely effect on the workforce of the inclusion of the employee, "by now well-established as a racial bigot, as a continuing member of Cooper Tire's workforce in a workplace potentially involving a number of African American employees."[139] This same judge, however, in an earlier case involving a racial harassment claim brought by a black employee, expressed considerably less concern about the effects of racist language on the employees subjected to it and any obligation of the part of the employer to address that conduct.[140] One

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135. *Cooper Tire & Rubber*, 866 F.3d at 892.

136. *See id.* The cases cited included *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1081, 1085–87 (8th Cir. 2010) (finding racial comments, including reference to "who else" when asked who brought fried chicken to potluck, insufficient to create a hostile work environment under Title VII for black employee), and *Reed v. Proctor & Gamble Mfg. Co.*, 556 F. Appx. 421, 433–34 (6th Cir. 2014) (white co-workers' comments about eating watermelon and fried chicken were offensive but not sufficiently severe or pervasive to create a hostile work environment under Title VII).

137. *Cooper Tire & Rubber Co.*, 866 F.3d at 892.

138. *Id.*

139. The dissenting judge declared that "[n]o employer in America is or can be required to employ a racial bigot" and seemed to agree with the argument of amicus curiae National Association of Manufacturers that the "court's requiring of the petitioner to do so here, 'is tantamount to requiring that Cooper Tire violate federal anti-discrimination and harassment laws.'" *Id.* at 894 (Beam, Cir. J., dissenting).

140. Interestingly, while Judge Beam in the *Cooper Tire* case seemed willing to assume that the single use of racist language by an employee would create a hostile work environment for other employees, *id.* at 894–95, he was not so willing to find a hostile work environment when an employee brought a Title VII action claiming that repeated use of racist language and other racial conduct created a hostile work environment. In *Reedy v. Quebecor Printing Eagle,*

might have expected the judge to be consistent with respect to his concern about the effect of racist language on employees, regardless of whether the issue arose in connection with the employer's liability for harassment or the employer's ability to punish concerted activities without liability.

It seems wrong to allow the employer to have it both ways—to disclaim any liability for itself under the anti-discrimination laws based on the racist actions of its employees, while still claiming the right to take employment action against an employee engaging in concerted activities based on its asserted obligations under the anti-discrimination laws. It also seems disingenuous for judges and courts to show more concern about the racially offensive nature of language when the context is whether employees' concerted activities are subject to protection under the National Labor Relations Act, while discounting the effect of racist language on employees when the context is whether they can state a claim for a hostile work environment under Title VII.

One might argue that racist speech and conduct is in a category by itself and therefore in particular should not be protected by the Act, even when it occurs in the context of concerted activity. But it is not just racist speech that poses a risk of harm in the workplace. Sexist and other types of discriminatory speech also pose real risks of harm in the workplace, and toleration of that speech can, in some circumstances, pose a risk of liability for employers. Accordingly, one might reasonably take the position that all sexist and other discriminatory speech should also be prohibited in the workplace, even when that speech occurs in the context of what would otherwise be protected concerted activities. And while I also have considerable sympathy for that position, I am also concerned about using the anti-discrimination laws to justify this approach because those laws generally extend even less protection to employees from sexist speech in the workplace than they do with respect to other forms of discriminatory speech.[141] Using the anti-discrimination laws to

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Inc., 333 F.3d 906, 908–10 (8th Cir. 2003), an African American employee alleged five incidents of racial harassment over seven months, including being called a "[f]ucking nigger" by a co-worker, witnessing similar racial epithets directed at other employees, and seeing racial graffiti, including a death threat, some directed at him. The court majority found that, although the case was a "close" one, the employee had made a submissible claim of a hostile work environment. *Id.* at 909. Judge Beam dissented, concluding that although it was a "close question," he would have found that the employee did not state a claim for a racially hostile work environment. *Id.* at 911 (Beam, Cir. J., concurring in part and dissenting in part).

141. While all forms of harassment are generally subject to the requirements discussed above, in Part II of the article, that make it difficult to prove the existence of actionable discrimination, including the requirements that the harassment occur "because of" a protected characteristic, that the harassment be "severe or pervasive," and that a basis for employer be established, plaintiffs who seek to establish sexual harassment are also confronted with the requirement that they establish what has traditionally been known as the "unwelcomeness" requirement, that they did not invite or solicit the conduct and that they found it offensive. *Supra* Part II. Rarely are plaintiffs who are subjected to racially or religiously offensive conduct asked to prove that they did not invite it or that they were offended by it.

justify depriving employees of protection for union and concerted activities because those activities include sexist conduct or speech seems disingenuous when those laws actually do not protect employees from much of that workplace conduct or speech.

An example of a case involving a claimed conflict between protected union activity and the anti-discrimination laws in the context of sexist speech is *Constellium Rolled Products Ravenswood, LLC*.[142] In that case, the employer had unilaterally implemented an overtime scheduling system after reaching an impasse in connection with the negotiation of a new collective bargaining agreement; under the new system, employees interested in working overtime signed up on sheets posted on a bulletin board seven days in advance and were subject to discipline for not working overtime after it was scheduled.[143] The union filed an unfair labor practice charge with respect to the overtime policy, and some employees organized a boycott and refused to sign up for overtime.[144] Employees, including supervisors, started calling the overtime signup sheets "whore board," and no employees were punished for using this expression.[145] One employee, however, wrote "whore board" at the top of the overtime signup sheets and was terminated as a result.[146] The Board held that the employee had been engaged in protected concerted activity as a continuation and outgrowth of the overtime boycott and that his conduct was not so egregious as to lose the protection of the Act.[147]

Applying the *Atlantic Steel* factors, the Board noted that while the location of the action and the provocation factor were neutral or favored loss of protection, the subject matter of the dispute—with the employee's action clearly protesting the overtime policy—and the nature of the conduct—with the employee's "one-time incident of graffiti [] likely spontaneous" and using an expression that had become common in the workplace without discipline—favored protecting the employee's conduct.[148] The Board reached the same result applying the totality-of-the-circumstances test.[149] The dissenting Board member would have held that the employee's action was unprotected because it constituted defacement of employer property.[150]

The United States Court of Appeals for the District of Columbia Circuit refused to enforce the Board's order, instead remanding the case for further

142. 366 N.L.R.B. No. 131 (July 24, 2018).
143. *Id.* at 1.
144. *Id.*
145. *Id.*
146. *Id.* at 2.
147. *Id.* at 2–4.
148. *Constellium Rolled Prods. Ravenswood, LLC*, 366 N.L.R.B. No. 131, at 2–4.
149. *Id.* at 4.
150. *Id.* at 6 (Emanuel, dissenting). The majority of the Board, however, noted that to the extent that the employer provided a reason for the termination of the employee, it was his "insulting and harassing conduct," not the defacement of property. *Id.* at 2 n.8.

proceedings, on the ground that the Board had failed to address the potential conflict between the National Labor Relations Act and the employer's obligations under anti-discrimination laws.[151] The employer had argued that precluding it from disciplining the employee would conflict with its obligations to provide a workplace free of sexual harassment.[152] The employer indicated that it had recently suffered a one million dollar jury verdict for creating a hostile work environment for two female employees and that the use of the word "'whore' 'was exactly the type of language . . . that a jury in West Virginia State Court found created a hostile and abusive work environment' at Constellium's plant."[153]

The state law case to which the employer was referring was *Constellium Rolled Products Ravenwood, LLC v. Griffith*.[154] In that case, the employer had a suggestion box for which employees could anonymously submit comment cards, and the company's policy was to post the comments from the box on its bulletin board, redacted to eliminate employee names, with responses from the Chief Executive Officer; the bulletin board was located at the entrance to the plant, accessible to all employees, contractors, and vendors.[155] When three comment cards were written about the two female employees, the company posted redacted copies of the comments, but the redacted copies still clearly identified the two female employees, who were the only women in the referenced department, and also made clear that the person who made the comments called them a "lazy worthless bitch" and "lazy ass," and referred to their "big lazy ass."[156] The comment cards remained on the bulletin board until the union complained, but after the cards were removed, they were copied and passed around the lunch table, taped to the walls, circulated around the plant, and placed on the company intranet.[157] After the comments were posted, the two female employees were shunned by their male co-workers; they indicated that the atmosphere became "one of 'male against female.'"[158]

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151. Constellium Rolled Prods. Ravenswood, LLC v. NLRB, 945 F.3d 546, 548–49 (D.C. Cir. 2019).

152. *Id.* at 551–552.

153. *Id.* at 552. The court of appeals did not substantially consider the employer's argument that there was in fact a conflict between the National Labor Relations Act and anti-discrimination laws, but the court faulted the failure of the Board to "advert to the potential conflict it was arguably creating between the NLRA and state and federal equal employment opportunity laws." *Id.*

154. 775 S.E.2d 90 (W.Va. 2015). That case involved two female employees of the employer and resulted in a judgment against the employer for $ 1 million, for gender discrimination and sexual harassment, before the Supreme Court of West Virginia decided that the employer's conduct did not merit a punitive damages award. *Id.* at 94.

155. *Id.*

156. *Id.* at 94–95.

157. *Id.* at 95.

158. *Id.*

In upholding the conclusion that the employer was liable for sexual harassment, the West Virginia Supreme Court held that there was sufficient evidence that the women were targeted for harassment because of their gender and that the jury could have found that the company endorsed the offensive, gender-based criticism of the employees by posting the comments without adequately redacting them, and thereby "encouraged an abusive environment based on gender."[159] The concurring and dissenting justices disagreed with the majority's decision to vacate the punitive damages award.[160] Those justices noted not only the company's "intentional publication of the comment cards with identifiable and derogatory information" concerning the plaintiffs but that the company posted responses that "failed to repudiate the disparaging and sexist nature of the comments;" the justices noted that the company also failed to attempt to determine who made the comments and, after the author confessed, failed to discipline or take any action against the author of the comments.[161]

The differences between the two situations relied on by the employer should be obvious. In the case that resulted in the jury verdict against the employer, the employer had actively participated in the dissemination of gender-based derogatory comments made against specific and clearly identifiable female employees, had failed to take any action, disciplinary or otherwise, against the author of the comments, and had apparently failed to act to prevent or respond to the further dissemination of the comments after they had been taken down from the bulletin board. In the case in which the employer sought to justify its termination of the employee engaged in concerted activity, an employee had written a gender-based derogatory term on the overtime signup sheet, a term that had become so common in the workplace that supervisors also used it. Additionally, the use of the term "whore," normally thought to be used derogatorily against women, was apparently directed mostly, or perhaps exclusively, against men.[162]

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159. *Id.* at 98.

160. *Constellium Rolled Prods. Ravenwood, LLC*, 775 S.E.2d at 101 (Davis, J., concurring in part and dissenting in part).

161. *Id.* (Davis, J., concurring in part and dissenting in part). Two other justices filed opinions concurring in part and dissenting in part; they would have concluded that the plaintiffs had not established viable claims for gender discrimination or sexual harassment. *Id.* at 103–04 (Ketchum, J., concurring in part and dissenting in part); *id.* at 104–05 (Loughry, J. concurring in part and dissenting in part). One of them indicated that while the language used by the employee submitting the comment cards was "highly inappropriate and certainly an unacceptable manner of referring to a female co-worker," the "incivility" in the case did not establish gender discrimination and that state and federal anti-discrimination laws are "not codes of civility." *Id.* at 104 (Loughry, J., concurring in part and dissenting in part).

162. The opinion of the administrative law judge in the *Constellium* case dealing with the discharge of the employee for writing "whore board" on the overtime signup sheet indicated that the signup sheet listed the names of thirty-four employees affected by the new overtime

The employer's attempt to use a case in which it had been found liable for creating a hostile work environment based on its active dissemination to its workforce of gender-based attacks on female employees to claim a conflict between the anti-discrimination laws and the National Labor Relations Act, in order to justify the termination of an employee for using an offensive term in connection with protected activities that it apparently tolerated when used by other employees and supervisors, is disingenuous. One might be more sympathetic to the employer's claimed conflict in a situation in which the employer had at least tried to comply with the legal obligations imposed upon it; instead, this employer apparently made no attempt to comply with either the anti-discrimination laws or the National Labor Relations Act, or so the Board ultimately found.

On remand from the court of appeals, the Board, applying the *Wright Line* analysis based on its intervening decision in the *General Motors* case, found that the employer had violated the National Labor Relations Act by terminating the employee because the employer had disciplined the employee based on the protected content of his writing. The Board also found that the employer did not establish that it would have terminated him under the anti-discrimination laws without regard to the protected activity because it tolerated extensive profanity and vulgarity in the workplace even after the adverse state court jury verdict.[163]

While using the anti-discrimination laws to exclude concerted activity that involves racist, sexist, or other discriminatory speech or conduct raises difficult issues, it is even more difficult to justify removing protection for union or other concerted activity on the grounds that it contains profanity or is otherwise uncivil, at least by resort to the anti-discrimination laws. The courts

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procedure, who could sign up for overtime by noting how many hours of overtime the employee was willing to work on a particular date. Constellium Rolled Prods. Ravenswood, LLC, 366 N.L.R.B. No. 131, at 8 n.2 (July 24, 2018). Of the thirty-four employees listed, thirty-one had "first names customarily used only by men," while three names—Bobby, Shannon, and Terry—"arguably might belong to either a man or a woman." *Id.* The signup sheet admitted into evidence indicated that three employees—named Robert, Tim, and Lewis—had applied to work overtime when the term "whore board" was written on the sheets. *Id.* at 8.

I do not mean to suggest that use of the term "whore" or other gender-derogatory terms normally used toward women cannot constitute harassment when they are directed at men; sometimes that is precisely the method used for harassment on the basis of sex or gender. I am merely suggesting that there might well be a substantive difference between directing gender-specific derogatory terms against particular individuals of that gender and a generalized use of a gender-derogatory terms in the context of the workplace, seemingly directed more at a practice than a person.

163. The Board indicated that "application here of *General Motors, LLC*, 369 N.L.R.B. No. 127 (2020), resolves potential conflict between the Board's finding of an NLRA violation in this proceeding and the Respondent's obligations under equal employment opportunity laws." Constellium Rolled Prods. Ravenswood, LLC, 371 N.L.R.B. No. 16, at 1 (Aug. 25, 2021).

have been clear that the anti-discrimination laws are not intended to reach profane language that is not otherwise discriminatory and those laws are not to be construed as imposing a code of workplace civility. Accordingly, it is inappropriate to use the anti-discrimination laws as a justification for depriving employees of protection for their union or other concerted activities because of the profane or uncivil nature of that activity.

A case in which an employer sought to justify the discharge of an employee for engaging in "uncivil" conduct in the course of union activities demonstrates the potential risk of determining whether an employer can penalize profanity used by an employee engaging in concerted activity without judging the context in which that conduct occurred. In *Cadillac of Naperville, Inc.*,[164] the employer discharged an employee, purportedly for violation of the employer's Standards of Conduct, after a meeting in which the company owner and the employee discussed the return-to-work process after a strike. The meeting ended after the owner told the employee to "get the fuck out before I throw you out," and the employee then called the owner a "stupid jack off" in Greek.[165] The employee was then discharged for his "inappropriate language."[166] Applying the *Atlantic Steel* factors,[167] the Board found that the employee's conduct did not lose the protection of the Act based on the fact that the conduct occurred in the employee's capacity as shop steward discussing the return to work of employees, including himself, that it occurred in the owner's office and was not observed by other employees, that the outburst was a brief "single name-calling incident," and the fact that the owner used vulgar language himself in that meeting, provoking the employee's comment.[168] The context in which the employee's "uncivil" conduct occurred was clearly important to the Board in determining whether the employee lost the protection of the Act and therefore could be discharged by the employer without violating the Act.[169] This case also raises issues about whether the employer was really concerned about civility in the workplace, given not only

164. 368 N.L.R.B. No. 3, at 2 (June 12, 2019).

165. *Id.*

166. *Id.*

167. Ironically, the administrative law judge had applied the *Wright Line* standard and the *Atlantic Steel* standard, but the Board held that that was in error, instead indicating that the only appropriate test was the *Atlantic Steel* standard. *Id.* at 2 n.6. After the case went to the court of appeals for review, the Board asked the court of appeals to remand the case to allow it to apply the *Wright Line* standard rather than the *Atlantic Steel* standard, in light of the intervening decision in *General Electric*; the court of appeals agreed to do so. Cadillac of Naperville, Inc. v. NLRB, 14 F.4th 703, 719–20 (D.C. Cir. 2021). It is possible that this remand to the Board, given the intervening change in the Board, may give the Board the opportunity to reconsider its decision in *General Electric* to apply the *Wright Line* standard rather than the *Atlantic Steel* standard to this type of case.

168. *Cadillac of Naperville, Inc.*, 368 N.L.R.B. No. 3, at 2.

169. *See id.* at 18.

the owner's own use of profanity, but that the owner, less than three weeks later, told employees that "if you fuck with me and my people, I'm going to eat your kidney out of your body and spit it at you."[170] This statement seems at odds with the employer's own Standards of Conduct and their professed desire to "provide the best possible work environment."[171]

B. How Context-Specific Standards Can Accommodate the Interests of Anti-discrimination Law and Protection for Concerted Activities

The proper accommodation between the interests of employees and employers in preventing harassment and discrimination in the workplace and the interests in allowing employees to engage in union activities and other concerted activities, even if some of those activities involve offensive or objectionable conduct, would seem to indeed be a balance. That is, a bright-line rule that deems unprotected any conduct with a racial, sexual, or otherwise discriminatory aspect would seem to give too much weight to the interests said to be protected by Title VII and the other anti-discrimination laws and too little weight to the important interests protected by the National Labor Relations Act.

But that does not mean that the Board should allow all racial, sexual, or otherwise discriminatory behavior to occur without discipline simply because the behavior is interconnected with union or other concerted activities. Some such behavior should not be tolerated because of its particularly harmful nature and because of the potential for employer liability if the employer does not act to prevent or punish that conduct. The difficult issues are where the lines should be drawn between behavior that the Board should protect because of the importance of allowing employees to engage in activities protected by the National Labor Relations Act, and behavior that the Board should not protect because of the importance of the interests in protecting employees from discriminatory and harassing workplace conduct.

The proper balance would seem to call for, rather than a bright-line rule, a more nuanced consideration of the circumstances and the context in which objectionable conduct occurs in connection with union or other concerted activities, as well as the particular nature of the conduct. This seems to be a situation in which context matters—in which the circumstances under

170. *Id.* at 3. Interestingly, while this was the most colorful language used by the owner in speaking with employees, it may not have actually been the most threatening. *See id.* at 14–16 (recounting a statement made by owner to employees, in which he ended with "[I]t's easy to be a prick to you; real easy. And they can't stop me from being a prick. So you should ask yourself a question, do you want to work for a prick? Think about it.").

171. *Id.* at 11.

which particular behavior and certain speech occurs matter in determining whether that behavior and speech is entitled to the protection of the National Labor Relations Act. That recognition of the importance of context suggests that a return to context-specific standards formerly used by the Board in determining the level of protection to be given to union activities and other concerted activities with an objectionable content would be appropriate. After all, those former standards expressly recognized that context matters—that the circumstances under which the objectionable conduct occurred should be relevant in determining whether it was to be found to be protected under the Act.

This does not mean that the Board should necessarily return to all of its prior precedent in applying context-specific standards or even that the Board should readopt the exact same context-specific standards that it used before the *General Motors* case.[172] It might well be appropriate to alter those standards in a number of ways, as well as reconsider the conclusions of the Board with respect to application of those standards.

There has been a good deal of criticism of the Board's application of its previous standard concerning conduct occurring on the picket line, which protected objectionable conduct as long as it did not reasonably tend to intimidate or coerce employees in the exercise of their rights. As applied to racially and sexually offensive behavior, some have argued that the Board had improperly protected such offensive behavior occurring on the picket line. For example, in her concurring opinion in *Consolidated Communications, Inc. v. National Labor Relations Board*,[173] Judge Patricia Anne Millett expressed her "substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes," indicating that the conduct allowed by the Board's decisions "encapsulates the very types of demeaning

172. The *General Motors* case was decided by the Board when it had only three members, all Republicans. The current Board, as of August 28, 2021, has not only a full complement of five members but also a Democratic majority. *See Members of the NLRB Since 1935*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/the-board/members-of-the-nlrb-since-1935 (last visited Sept. 2, 2022). Accordingly, modification by the Board of the new test adopted in that case is a realistic possibility.

173. 837 F.3d 1, 20–24 (D.C. Cir. 2016) (Millett, Cir. J., concurring). This case, in which Judge Millett wrote both the opinion for the court and a separate concurring opinion, involved a striking employee who was found to have grabbed his crotch while calling a female non-striking employee a "scab." Consol. Commc'ns, 360 N.L.R.B. 1284, 1293–94 (2014). The administrative law judge found that the employee's conduct was not sufficient to justify his discharge, expressly concluding that his gesture "cannot be legitimately characterized as 'sexual harassment'" because it was "a single incident not involving physical contact." *Id.* at 1296 n.21. The Board adopted the findings and conclusion of the judge with regard to this incident. *Id.* at 1284. The court of appeals agreed that the employee's "offensive, but fleeting and isolated, obscene gesture did not amount to striker misconduct so egregious that it forfeited the protection of the National Labor Relations Act." *Consol. Commc'ns, Inc.*, 837 F.3d at 20 (Millet, Cir. J., concurring). *See also id.* at 11–12 (majority opinion).

and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status."[174] She indicated that "[c]onduct that is designed to humiliate and intimidate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment":[175]

> So giving strikers a pass on zealous expressions of frustration and discontent makes sense. Heated words and insults? Understandable. Rowdy and raucous behavior? Sure, within lawful bounds. But conduct of a sexually or racially demeaning and degrading nature is categorically different. Calling a female co-worker a "whore" or exposing one's genitals to her is not even remotely a "normal outgrowth[]" of strike-related emotions. In what possible way does propositioning her for sex advance any legitimate strike-related message? And how on earth can calling an African-American worker "nigger" be a tolerated mode of communicating worker grievances?[176]

Judge Millet also questioned the assumption of the Board that gender- and race-based attacks can be contained to the picket line, suggesting that it can "be quite hard for a woman or minority who has been on the receiving end of a spew of gender or racial epithets—who has seen the darkest thoughts of a co-worker revealed in a deliberately humiliating tirade—to feel truly equal or safe working alongside that employee again," indicating that "[r]acism and sexism in the workplace is a poison, the effects of which can continue long after the specific action ends."[177]

Perhaps the picket line standard might be altered to prohibit more than just coercive or intimidating conduct, or perhaps it would be appropriate for the Board to understand that racially and sexually denigrating conduct can, in fact, be coercive and intimidating, even if not accompanied by threats of violence, and therefore not protected even when it occurs on the picket line. For example, I have some concern about the Board's application of this standard in the context of racist speech in *Airo Die Castings, Inc.*[178] In that case, the

174. *Consol. Commc'ns*, 837 F.3d at 20–21 (Millett, Cir. J., concurring).

175. *Id.* at 21 (emphasis in original).

176. *Id.* at 22.

177. *Id.* at 24.

178. 347 N.L.R.B. 810, 810 (2006). The discharged employee had approached a vehicle leaving the struck facility with a black security guard using a video camera, raised his middle fingers, and yelled "fuck you nigger." *Id.* at 811. The administrative law judge called the conduct "clearly repulsive and offensive," but indicated that "anyone examining the actual recording of [the employee's] activity would be hard pressed to see any threatening or aggressive conduct" and that "[i]t did not differ from the general atmosphere on the picket line with the usual tensions between strikers and replacement workers and the use of obscene gestures and vulgar language." *Id.* at 812. The judge did note that the employer had not been consistent in its treatment of the use of racial epithets in that a supervisor had used the same epithet in a conversation with an employee without being disciplined. *Id.* The Board adopted the findings

Board affirmed the conclusion of the administrative law judge that an employee had been unlawfully discharged when he made an obscene gesture and used a racial epithet to an African-American security guard because his conduct was not accompanied by any threats, coercion, or intimidating conduct.[179] It seems that the use of racial epithets in this context might well be viewed as threatening and intimidating conduct and therefore unlawful even under the standard previously used by the Board to judge whether picket line conduct was protected.

On the other hand, the Board's use of context-specific standards under the *Atlantic Steel* test and the totality of the circumstances analysis seems to have generally allowed the Board and the courts to distinguish between union and other concerted conduct that should be protected under the National Labor Relations Act and conduct that should lose protection under the Act because it crossed the line, even if the line being crossed was not a bright line rule but the result of a balancing test. The courts had generally upheld as a reasonable interpretation of the Act standards that take into account the context in which arguably offensive language occurs and the Board's determination that otherwise concerted activities would lose the protection of the Act only if sufficiently "opprobrious."[180]

This does not mean that I view every case to apply these standards or analysis to be rightly decided. A standard or test is not wrong just because those applying the standards and tests sometimes reach questionable decisions; it is sometimes the decisionmaker, not the standard, that is wrong in these cases. Instead, the proper determination would seem to be whether the standard asks the proper questions and generally provides considered and appropriate results.

The balancing tests used under the totality of the circumstances analysis and the *Atlantic Steel* test appear to ask the proper questions and generally provide appropriate results. For example, in *Kiewit Power Constructors Co. v. National Labor Relations Board*,[181] both the Board and the reviewing court of appeals agreed that the actions of two employees in protesting potential disciplinary action was protected concerted activity because their outbursts

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and conclusion of the judge, although two of the Board members indicated that there might be circumstances in which use of the racial epithet "itself may be so incendiary as to constitute an implied threat or an incitement to violence." *Id.* at 810 n.3.

179. *Id.* at 810.

180. *See, e.g.*, NLRB v. Honda of Am. Mfg., Inc., 73 F. App'x 810, 811–12, 815–16 (6th Cir. 2003) (unpublished) (referencing *Atlantic Steel* factors and holding that the Board's interpretation of the Act was not "an illogical, arbitrary, or unreasonable interpretation of the Act;" employee's statements in newsletter questioning the truthfulness and knowledge of management and other employees charged with explaining employee benefits did not lose the protection of the Act even though the employer claimed that they violated employer's harassment policy requiring "respect for the individual").

181. 652 F.3d 22 (D.C. Cir. 2011).

were not opprobrious as the employer claimed.[182] The threatened disciplinary action had to do with a claim that the employees were taking too long for their work breaks because the location of their break area meant that much of that break time was spent going to that area. The employer threatened to discipline employees if they took their breaks in the break area and instead told them to "break[] in place," that is, in their work areas.[183] When they were threatened with discipline, one replied that the supervisor "better bring [his] boxing gloves" and they both indicated that it was going to "get ugly."[184] Rejecting the employer's claim that the statements constituted physical threats, the Board found the employees' statements to be protected under the *Atlantic Steel* factors.[185] The court of appeals noted that the parties agreed that the subject matter of the statements—protesting the enforcement of the break policy—suggested that the statements should be protected, while the fact that the employees' outbursts were not provoked by an unfair labor practice cut against protection.[186]

With respect to the location of the discussion, the court of appeals agreed that the employees' outbursts were protected even though they occurred in front of other employees because it was the employer that decided to threaten discipline in front of other employees rather than privately.[187] The court of appeals agreed that it was reasonable for the two employees to object to the employer's action "when and where it was announced to them, lest their fellow workers think they consented to the change."[188] The court of appeals agreed with the Board's determination that it would not hold against the employee that an outburst occurred in front of fellow workers "when the company picks a public scene for what is likely to lead to a quarrel."[189]

The court of appeals also agreed with the Board that the nature of the employees' outburst did not remove them from the protection of the Act, finding, in context, that the employees' comments did not constitute physical threats and further that the comments were "intemperate," but not insubordinate. The court of appeals agreed that the purposes of section 7 of the Act would be defeated if workers could be lawfully discharged "every time they threatened to 'fight' for better working conditions."[190] At both the Board and the court of appeals, a dissenter would have concluded that the statements of

182. *Id.* at 27–29.
183. *Id.* at 24.
184. *Id.*
185. *Id.*
186. *Id.* at 26.
187. *Kiewit Power Constructors Co.*, 652 F.3d at 26–27.
188. *Id.*
189. *Id.*
190. *Id.* at 28–29.

the employees were in fact physical threats and therefore unprotected.[191] This sort of disagreement about the application of the standards to judge whether employees are entitled to the protection of the Act is almost inevitable when balancing tests are involved and does not raise issues about the appropriateness of the standards themselves. Other cases also indicate the ability of the Board and the courts to apply those factors to reach reasonable and considered results.[192]

VI. CONCLUSION

The National Labor Relations Board in 2020 fundamentally changed the rules that it had traditionally applied to determine whether union and other concerted activities engaged in by employees were entitled to the protection of the Act, when those activities included racially, sexually, or otherwise offensive conduct. Instead of considering the context-specific circumstances in which the conduct occurred and the nature of that conduct in determining whether the conduct had lost the protection of the Act, the Board instead adopted a rule focusing on whether the employer had been motivated by anti-union animus and had engaged in discrimination toward that protected activity.

Scholars and practitioners of labor law understand that the Board frequently changes its position on issues of the interpretation of the Act, generally depending on whether any particular iteration of the Board is dominated by Board members that hold "Democratic" or "Republican" seats on the Board. For example, the present Board has recently indicated an intent to examine whether to adopt a "new" standard—or return to its previous standard—on the issue of an employer's maintenance of a facially neutral work rule alleged to violate section 8(a)(1) of the Act, suggesting the possibility of

191. *Id.* at 32–36 (Henderson, Cir. J., dissenting) (referencing the dissent by member Schaumber from the Board's decision).

192. *See, e.g.*, Inova Health Sys. v. NLRB, 795 F.3d 68, 86–87 (D.C. Cir. 2015) (applying *Atlantic Steel* factors to conclude that a nurse who touched shoulder of human resources employee in non-work area in connection with a group protest of the unlawful termination of another nurse, when that contact was "mild" and "not done in an aggressive manner," was "[h]ardly opprobrious" conduct that caused nurse to lose the protection of the Act; the court noted that the Board and the courts had recognized that "labor relations often involve heated disputes 'likely to engender ill feelings and strong responses'" and that "an employee's right to engage in concerted activity 'permit[s] some leeway for impulsive behavior'"); Murphy v. NCRNC, LLC, 474 F. Supp. 3d 542, 550-51, 559 (N.D.N.Y. 2020) (holding that if employer's version of facts was accepted, in which employee allegedly said that he did not need "fucking job" and threw his badge before walking out and slamming the door, his conduct was still protected under the *Atlantic Steel* factors because it occurred in private area of facility, the outburst originated out of a discussion about the union, the conduct included profanity but was not threatening, and the outburst was provoked by the action of accusing him and suspending him for handing out union authorization cards, which was protected union activity).

overturning the prior Board's decision in *The Boeing Co.,*[193] which had itself overturned prior Board precedent.[194]

Similarly, the Board should reconsider the decision in the *General Motors* case, which fundamentally and illogically changed the rules concerning the nature of union and other concerted activities that would retain the protection of section 7 of the Act, focusing not on the nature of that activity and whether it deserves protection but instead on the motivation behind the employer's action against that otherwise protected activity. By prioritizing the prohibitions of section 8(a)(3) against employer discrimination against union and concerted activity over the prohibitions of section 8(a)(1) against employer interference with union and concerted activity, the *General Motors* Board failed to ensure that all of the purposes of the National Labor Relations Act were fulfilled. The present Board should restore its traditional focus[195] on the context in which union and other concerted activities occur and apply those standards in such a way to ensure that both the purposes of the National Labor Relations Act and those of the anti-discrimination statues are given appropriate consideration.[196]

193. The Boeing Co., 365 N.L.R.B. No. 154, at 7 (Dec. 14, 2017).

194. *See* Stericyle, Inc., 371 N.L.R.B. No. 48, at 1–2 (Jan. 6, 2022) (seeking briefs from parties and amici on whether to continue to adhere to the standard adopted in *The Boeing Co.* and noting that "the *Boeing* Board reversed well-established precedent sua sponte and acted without the benefit of first seeking public participation").

195. For those who might object to frequent changes in position on the part of the Board for the reason that it decreases the stability of labor law and the ability of employers and employees to rely on the rules set forth by the Board, it is important to note that the decision of the Board in *General Motors* in 2020 overruled Board precedent that had been in effect for some forty-one years. It was the Board's decision in *General Motors*, not a future Board decision to return to the use of context-specific standards, that is a threat to an interest in the stability of labor law.

196. There is some indication that the Board may be asked to reconsider the continued application of the standard adopted in *General Motors* case. In August of 2021, the new General Counsel for the Board, Jennifer A. Abruzzo, sent a memorandum to the Regional Directors for the Board directing that certain issues involving changes to precedent in the last several years be submitted the Board's Division of Advice "allow the Regional Advice Branch to reexamine these areas and counsel the General Counsel's office on whether change is necessary to fulfill the Act's mission." OFF. OF THE GEN. COUNS., MEMORANDUM GC 21-04, MANDATORY SUBMISSIONS TO ADVICE (2021). One of those issues identified for mandatory submission to Advice was "Cases involving the applicability of *General Motors*, 369 NLRB No. 127 (2020) (overruling *Atlantic Steel*, 245 NLRB 814 (1979) and calling other site-specific standards into question and, instead, requiring the application of *Wright Line* in most adverse action cases)." *Id.*