DRIVING THE NATIONAL LABOR RELATIONS ACT FORWARD: ANALYZING ABUSIVE CONDUCT THAT OCCURS IN THE COURSE OF PROTECTED ACTIVITY AFTER *GENERAL MOTORS LLC*

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INTRODUCTION

On the day of his inauguration, President Biden fired former National Labor Relations Board (Board) General Counsel Peter Robb.[1] President Biden eventually replaced Robb with General Counsel Jennifer Abruzzo,[2] who in August 2021 released a list of Board dispositions made during the Trump Administration that she wanted to revisit.[3] Included in that list was *General Motors*,[4] a July 2020 Board decision which some cheered as a step to making the workplace safer and more civil,[5] and which others derided as yet another unnecessary concession to employers by the Trump Board.[6] Pronouncing the end of what it termed "setting-specific" standards, the *General Motors* Board held that the only standard for determining when employers violated

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1 Noam Scheiber, *The Biden Administration Fired a Trump Labor Appointee*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/politics/peter-robb-nlrb-fired.html [https://perma.cc/8ZZ6-LFG7].

2 *The NLRB Welcomes Jennifer Abruzzo as General Counsel*, NAT'L LAB. RELS. BD. (July 22, 2021), https://www.nlrb.gov/news-outreach/news-story/the-nlrb-welcomes-jennifer-abruzzo-as-general-counsel [https://perma.cc/3G7L-2HSW].

3 OFF. OF GEN. COUNS., NAT'L LAB. RELS. BD., GC 21-04, MANDATORY SUBMISSIONS TO ADVICE 1 (2021) ("[O]ver the past several years, the Board has made numerous adjustments to the law, including a wide array of doctrinal shifts. These shifts include overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers.").

4 Gen. Motors LLC, 369 N.L.R.B. No. 127 (July 21, 2020); *see* MANDATORY SUBMISSIONS TO ADVICE, *supra* note 3, at 3.

5 Sara Schretenthaler Staha & Frederick D. Braid, *NLRB Restores Civility to Workplace*, HOLLAND & KNIGHT (Aug. 6, 2020), https://www.hklaw.com/en/insights/publications/2020/08/nlrb-restores-civility-to-workplace [https://perma.cc/DH6B-TZZK]; Sean P. Redmond, *NLRB Gets It* Wright *on Abusive Behavior*, U.S. CHAMBER OF COM. (July 21, 2020), https://www.uschamber.com/employment-law/unions/nlrb-gets-it-wright-abusive-behavior [https://perma.cc/HD6U-ZXPV].

6 COMM. ON EDUC. & LAB., CORRUPTION, CONFLICTS, AND CRISIS: THE NLRB'S ASSAULT ON WORKERS' RIGHTS UNDER THE TRUMP ADMINISTRATION 4–6 (2020), https://edlabor.house.gov/download/corruption-conflicts-and-crisis-the-nlrbs-assault-on-workers-rights-under-the-trump-administration [https://perma.cc/V2GC-4V3K].

Section 8(a)(3)[7] of the National Labor Relations Act (the Act)[8] by disciplining abusive worker conduct would be drawn from its old and reliable *Wright Line* test.[9]

Section 8(a)(3) prohibits employers from discriminatorily disciplining—for example, terminating, demoting, suspending—workers for engaging in conduct that is protected by the Act.[10] The setting-specific standards replaced by *Wright Line* had applied to employee conduct in the workplace, on the picket line, and on the Internet, and before *General Motors* they had provided the tests that the Board applied in dual motive cases when determining whether discriminatory Act violations had occurred following confrontations in each setting, respectively.[11]

The three overturned standards were known as *Atlantic Steel*, *Clear Pine Mouldings*, and *Pier Sixty*.[12] *Atlantic Steel* provided the test for workplace confrontations,[13] *Clear Pine Mouldings* supplied the test for the picket line,[14] and *Pier Sixty* set forth standards governing social media.[15] Each test applied different criteria based on the setting for which it was created, but they all existed in order to answer the same question: Was an employee who was engaging in behavior protected by the Act legally disciplined by the employer based on that conduct?[16] If

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7 *General Motors* also affected Section 8(a)(1) analyses because 8(a)(1) applies in place of 8(a)(3) when a nonunion worker is illegally disciplined under the Act. Because 8(a)(3) was the relevant provision in *General Motors* and because continually making this qualification would be unwieldy, this Note will simply refer to 8(a)(3). *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 1 (explaining when 8(a)(1) applies instead of 8(a)(3) in dual motive cases).

8 29 U.S.C. § 158(a)(3) ("It shall be 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 . . . ."). Section 8(a)(1) makes it an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of" Section 7 rights, but does not require discrimination evidence. *Id.* § 158(a)(1). All Section 8(a)(3) violations also constitute "derivative" 8(a)(1) violations, even when independent 8(a)(1) violations cannot be found. *See, e.g.*, Cox Commc'ns Gulf Coast, L.L.C., 343 N.L.R.B. 164, 168 (2004).

9 *Gen. Motors*, 369 N.L.R.B. No. 127, slip. op. at 15; *see* Wright Line, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

10 29 U.S.C. § 158(a)(3); *see* Nichols Aluminum, LLC v. NLRB, 797 F.3d 548, 554 (8th Cir. 2015).

11 *See* Atl. Steel Co., 245 N.L.R.B. 814 (1979); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984); Pier Sixty, LLC, 362 N.L.R.B. 505 (2015).

12 *Atl. Steel*, 245 N.L.R.B. 814; *Clear Pine Mouldings*, 268 N.L.R.B. 1044; *Pier Sixty*, 362 N.L.R.B. 505.

13 *Atl. Steel*, 245 N.L.R.B. at 816.

14 *Clear Pine Mouldings*, 268 N.L.R.B. at 1046–47.

15 *Pier Sixty*, 362 N.L.R.B. at 506.

16 *Atl. Steel*, 245 N.L.R.B. 814; *Clear Pine Mouldings*, 268 N.L.R.B. 1044; *Pier Sixty*, 362 N.L.R.B. 505.

not, then disciplining the employee constituted an unfair labor practice (ULP), an illegal Act violation.[17]

Federal labor law has increasingly struggled when dealing with employee misconduct in the context of otherwise protected activity. Such misconduct may conflict with employer policies or even other workplace antidiscrimination protections but still implicate the Act's core rights. And employers may not punish protected activity as they please.[18] However, engaging in protected activity does not render an employee untouchable;[19] an employer may possess legitimate reasons for disciplining a worker in response to her protected activity, and the Board had created tests over the years for determining when that was the case.[20] Before *General Motors*, the *Wright Line* test was not relevant to making such determinations because it only applied when misconduct and protected activity were not intertwined.[21] For example, if an employee was terminated on Wednesday after filing a workplace grievance on Monday and vandalizing the company bathroom on Tuesday, *Wright Line*'s test was previously—and is still now—applied to determine whether the employee was truly fired for her misconduct, or whether she was actually fired for filing the grievance.[22] A finding that the employer's real motivation was illegal discriminatory animus would constitute a ULP.[23]

The setting-specific standards applied similarly, with two notable differences.[24] First, they only applied when the protected activity and opprobrious conduct occurred simultaneously, or in the Board's language, formed part of the same res gestae.[25] For instance, if while complaining to a manager about a collective-bargaining agreement (CBA) violation a worker also threatened visiting the manager's home

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17 *Atl. Steel*, 245 N.L.R.B. 814; *Clear Pine Mouldings*, 268 N.L.R.B. 1044; *Pier Sixty*, 362 N.L.R.B. 505.

18 NAT'L LAB. RELS. BD., *Protected Concerted Activity*, https://www.nlrb.gov/about-nlrb/rights-we-protect/our-enforcement-activity/protected-concerted-activity [https://perma.cc/6GWZ-MQHU].

19 NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 837 (1984) ("The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7.").

20 *Id. See generally Atl. Steel*, 245 N.L.R.B. 814; *Clear Pine Mouldings*, 268 N.L.R.B. 1044; *Pier Sixty*, 362 N.L.R.B. 505.

21 Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 1–2 (July 21, 2020).

22 *See generally* NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981).

23 *See* 29 U.S.C. § 158(a).

24 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 1.

25 *See, e.g.*, Stanford New York, LLC, 344 N.L.R.B. 558, 558 (2005). The "res gestae" was the "course" of exercising protected activity and included all behavior in that "course." Roemer Indus., Inc., 362 N.L.R.B. 828, 833 (2015).

later that night and burning it to the ground, the resulting disciplinary action against the worker for such behavior would implicate the setting-specific standards. In such an instance, the protected activity—complaining about the violation—and the opprobrious conduct—making the threat—would have been considered inseparable because they occurred at the same time. According to previous Boards, such circumstances made it inescapable that the employer retaliated against the protected activity in at least some sense, and thus required a standard that presumed the employer acted out of anti-union animus if the worker's behavior was sufficiently mild to retain statutory protections.[26]

Second, as the term "setting-specific" suggests, which analysis applied depended on the setting where the simultaneous protected activity and opprobrious conduct transpired.[27] Opprobrious conduct comprised behavior that was deemed inappropriate, including profane or threatening language, and the Board would assess the degree of opprobriousness based on how inappropriate the conduct was for the setting.[28] Thus, opprobrious or abusive conduct on the picket line underwent one analysis, on the Internet another, and at the workplace yet another, with every test meant to allow for different degrees of leeway based on how the relevant settings implicated the Act's protections.[29] If the employee's conduct in the given setting was sufficiently abusive, he would lose the protections he had otherwise invoked and therefore could legally be disciplined for such behavior.[30]

The *General Motors* decision made *Wright Line* the only test for all dual motive reprisals involving abusive conduct,[31] but making *Wright Line* the test for misconduct in the course of protected activity was a mistake. Although the *General Motors* Board identified legitimate

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26 *Roemer Indus.*, 362 N.L.R.B. at 834 n.15 ("Where an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee's protected activity, *Wright Line* is inapplicable. This is because the causal connection between the protected activity and the discipline is not in dispute.").

27 *See* Atl. Steel Co., 245 N.L.R.B. 814 (1979); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984); Pier Sixty, LLC, 362 N.L.R.B. 505 (2015).

28 *See Atl. Steel*, 245 N.L.R.B. at 819. When it came to abusive language at the workplace, the Board considered specific context when assessing how opprobrious the language was, meaning that the exact same language may have been judged more opprobrious at one workplace than at another. *See* Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 986 (2014).

29 *See Atl. Steel*, 245 N.L.R.B. 814; *Clear Pine Mouldings*, 268 N.L.R.B. 1044; *Pier Sixty*, 362 N.L.R.B. 505.

30 *See* Trus Joist MacMillan, 341 N.L.R.B. 369, 370 (2004) ("[W]here an employee engages in indefensible or abusive conduct, his concerted activity will lose the protection of the Act.").

31 Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 15–16 (July 21, 2020). The remaining exception to *Wright Line* applies only when the central question is whether the alleged misconduct occurred at all. *See infra* notes 201–05 and accompanying text.

problems with the setting-specific standards, including that such standards had problems with consistency and predictability and, even worse, that those standards occasionally shielded horribly racist and sexist behavior, there were alternative ways to address those flaws without diminishing Section 7 protections so greatly. Instead, the *General Motors* Board disregarded longstanding Board precedent by deciding that abusive conduct committed in the course of protected activity should not undergo a distinct test that grants more expressive leeway for workers, and thereby radically weakened the Act's protections.

This Note will argue that the Board should overrule *General Motors* but not return to any of the old setting-specific standards. Instead of *Wright Line*, the Board should apply a new three-factor test—the Res Gestae standard—when analyzing a worker's abusive conduct that occurred in the course of protected activity, regardless of location.[32] Drawing from past setting-specific standards, the Res Gestae standard will consider: (1) the place of the outburst, (2) the outburst's nature, and (3) whether the outburst was provoked by the employer.[33] These factors should be weighted, meaning that if two factors favor the worker, her conduct is protected. However, there should be an exception to this calculus concerning only the second factor. If the nature of the worker's abusive conduct sufficiently implicates other workplace antidiscrimination laws or constitutes violent threats, the conduct may lose protection even when the other two factors weigh in the worker's favor.

Part I of this Note begins by reviewing the Board and the three overturned setting-specific standards. It then examines the *Wright Line* test and the conceptual divides separating it from the defunct setting-specific standards. Part II analyzes the setting-specific standards' strengths and weaknesses, and the effects of replacing them with *Wright Line*. Part III proposes making the Res Gestae test the only standard for overlapping protected activity and abusive conduct analyses, regardless of location.

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32 Before this Note was published, at least one author called for making *Atlantic Steel* the lone setting-specific standard for analyzing abusive conduct in the course of protected activity, regardless of location, but keeping *Wright Line* as the test when misconduct in the course of protected activity does not rise to the level of "abusive." *See* Casey Thibodeaux, Comment, *It's What You Said and How You Said It: The NLRB's Attempt to Separate Employee Misconduct from Protected Activity in* General Motors LLC, 82 LA. L. REV. 227, 260–69 (2021). For reasons that follow, this Note maintains that *Wright Line* should never apply when analyzing misconduct in the course of protected activity, and further, that creating a new test to replace the setting-specific standards is the better approach. *See infra* note 238 and accompanying text.

33 *See* discussion *infra* Sections I.B–I.C.

I. BACKGROUND

A. *The Board's Role*

Congress passed the Act and created the Board for enforcing the Act in 1935.[34] The Board is an independent federal agency overseen by up to five Members, each of whom is nominated by the President and confirmed by the Senate.[35] Every year, one Board Member's term expires.[36] The Board issues decisions after reviewing administrative law judge (ALJ) rulings,[37] which are themselves subject to review by the federal circuit courts.[38] Parties bring their claims—"charges" in the language of the Board—at the regional level, where staff investigates the charges and decides whether to pursue adjudicatory actions in front of an ALJ.[39] The Board's General Counsel oversees investigating and prosecuting ULPs, and operates independently from the Board.[40] Following an ALJ decision, a party may file exceptions with the Board.[41] If exceptions are filed, a Board panel will then review the entire ALJ record and issue a decision.[42] Parties may thereafter petition for review of the Board decision in the federal courts of appeals.[43]

The Act gives the Board two primary functions: investigating and determining ULPs and certifying organizing elections.[44] The Act's core

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[34] *Who We Are*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are [https://perma.cc/6PHZ-S8G5]; *National Labor Relations Act*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/QR7A-E3ZY].

[35] *Who We Are*, *supra* note 34.

[36] *Id.*

[37] In order for Board decisions to have binding effect, the Board must have at least three Members constituting a quorum at the time of the decision. *See* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010).

[38] 29 U.S.C. § 160(f). Those seeking review may choose between the circuit where the challenged practice occurred, where the party lives, or the D.C. Circuit Court of Appeals. *Id.*

[39] ROBERT A. GORMAN, MATTHEW W. FINKIN & TIMOTHY P. GLYNN, COX AND BOK'S LABOR LAW 74 (16th ed. 2016).

[40] The General Counsel is appointed by the President to four-year terms. *General Counsel*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/bio/general-counsel [https://perma.cc/YAZ3-FF7E].

[41] GORMAN, FINKIN & GLYNN, *supra* note 39, at 75–76.

[42] *Id.* at 76.

[43] Alternatively, the Board may itself petition the federal appellate courts for enforcement if a party does not comply with a Board order. *Id.* at 76–77.

[44] *What We Do*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do [https://perma.cc/9VBS-VFLN].

is Section 7, which defines employee workplace rights.[45] Section 8 sets out what employer or union behavior constitutes ULPs violating those rights.[46] Employers who unlawfully interfere with protected conduct must provide some combination of "make-whole remedies" following Board enforcement, such as reinstatement with backpay for terminated workers, and "informational remedies," such as posting workplace notices.[47] However, the Board cannot assess penalties for ULPs.[48] Since the Act only covers private sector employees, the Board does not investigate public sector ULPs.[49] Additionally, certain private employee categories are completely excluded from the Act's protections.[50]

B. *The Setting-Specific Standards*

While the first several enumerated Section 7 rights—self-organizing, joining labor organizations, bargaining collectively[51]—are relatively straightforward, defining Section 7 protections regarding "other concerted activities for the purpose of . . . mutual aid or protection" has proven more difficult, reflecting the term's more open-ended nature.[52] The Board has maintained that in order for employee activity to fall under the provision's "other concerted activities" scope,

45 "Employees 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 or all of such activities . . . ." 29 U.S.C. § 157.

46 29 U.S.C. § 158. The Act also prohibits labor organizations from committing ULPs against workers. *See id.* § 158(b). The Act spans 29 U.S.C. §§ 151–169, and its U.S. Code designations do not align with its numerated sections as originally written.

47 *Investigate Charges*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges [https://perma.cc/RS6E-ASJC].

48 *Id.*

49 *Frequently Asked Questions—NLRB*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/resources/faq/nlrb [https://perma.cc/7CZE-48SV].

50 *See* 29 U.S.C. § 152(3) ("The term 'employee' shall . . . not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or . . . employed by his parent or spouse, or any individual having the status of an independent contractor, or . . . employed as a supervisor . . . .").

51 *See* 29 U.S.C. § 157.

52 *Id.* Some clear examples include talking with coworkers about wages, benefits, or working conditions, joining in with a group refusing to work in protest of conditions, and confronting your employer over workplace conditions with a group of coworkers. *See Concerted Activity*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/concerted-activity [https://perma.cc/V25E-QXQN].

the activity must be both "protected" and "concerted,"[53] hence the term protected concerted activity.[54]

Although the Act shields employees from certain forms of workplace retaliation, it obviously does not give them free rein whenever they engage in protected activity.[55] *Atlantic Steel* and the other two setting-specific standards were created for determining when employees crossed a behavioral line allowing employers to discipline them legally, even though the discipline was in response to the exercise of Section 7 rights.[56] Fixing the line was one of the Board's most enduring and controversial problems,[57] and was the issue it addressed in *General Motors* when reviewing how an ALJ applied *Atlantic Steel*'s workplace test.[58]

The three setting-specific standards were modeled differently from *Wright Line* based on one main belief: distinguishing where protected activity stopped and opprobrious conduct began when part of the same interaction would necessarily undermine the Act's protections.[59] For previous Boards, the employee-employer relationship was inherently

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[53] Meyers Indus., Inc., 268 N.L.R.B. 493, 494 (1984); Alstate Maint., LLC, 367 N.L.R.B. No. 68, slip op. at 2–3 (Jan. 11, 2019).

[54] An analysis of concerted activity's precise contours is outside of this Note's scope, and thus all future references to protected activity presume it is also concerted.

[55] *See* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 837 (1984); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."); Media Gen. Operations, Inc. v. NLRB, 560 F.3d 181, 188 (4th Cir. 2009) ("The Act's protections are not limitless . . . and where they do not reach, employers cannot be compelled to tolerate language or behavior that undermines workplace discipline."); *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 [https://perma.cc/8TJF-8X77] ("An employee engaged in otherwise protected, concerted activity may lose the Act's protection through misconduct.").

[56] *See* Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984); Pier Sixty, LLC, 362 N.L.R.B. 505, 506 (2015).

[57] Onlookers frequently criticized decisions made under these standards. *See, e.g.*, Glenn S. Grindlinger & Matthew C. Berger, *Even Profane Emails of Employees May Be Federally Protected*, FOX ROTHSCHILD LLP (Oct. 22, 2019), https://www.foxrothschild.com/publications/even-profane-emails-of-employees-may-be-federally-protected [https://perma.cc/54WF-LSGC]; Stephanie M. Caffera, *#$@&%*!: Second Circuit Upholds NLRB's Finding that an Employee's Vulgar Facebook Rant Toward His Supervisor Was Protected Under the NLRA*, NIXON PEABODY (Apr. 28, 2017), https://www.nixonpeabody.com/en/ideas/articles/2017/04/28/second-circuit-upholds-nlrb-finding-employee-facebook-rant-protected-under-nlra [https://perma.cc/K7BE-9WYV]; *Abusive Employee Retains NLRA Rights*, KAUFF MCGUIRE & MARGOLIS LLP (June 12, 2003), https://www.kmm.com/articles-269.html [https://perma.cc/UN8X-XRV2].

[58] *See* Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 1–2 (July 21, 2020).

[59] Consumers Power Co., 282 N.L.R.B. 130, 132 (1986) ("[T]here are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take into account . . . the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.").

contentious and adversarial in nature, and thus there were times when the Act needed to shield workers when workplace disputes inevitably turned hostile.[60] In other words, allowing employers to use their normal disciplinary standards in response to protected activity would unacceptably weaken Section 7 in certain especially meaningful circumstances, and therefore the Board applied setting-specific standards that provided greater employee freedom of action in those situations.[61] These standards stood in contrast to the Board's *Wright Line* test, which before *General Motors* applied only when protected activity and opprobrious conduct were not part of the same event that was subject to employer discipline.[62]

1. Applying *Atlantic Steel*'s Workplace Test

Before being overturned in the Board's *General Motors* decision,[63] *Atlantic Steel* was the test for determining whether an employee's workplace activity was protected based on his simultaneous, opprobrious conduct.[64] The test considered: (1) the discussion's place, (2) the discussion's subject matter, (3) the outburst's nature, and (4)

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60 *See id.*; Guardian Indus. Corp., 319 N.L.R.B. 542, 549 (1995) ("The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. . . . Not every impropriety . . . places the employee beyond the protection of the Act." (quoting Health Care & Retirement Corp., 306 N.L.R.B. 63, 65 (1992))).

61 *See Consumers Power Co.*, 282 N.L.R.B. at 132; Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 978 (2014); Airo Die Casting, Inc., 347 N.L.R.B. 810, 812 (2006). The federal circuit courts generally recognized and affirmed the substance of this reality as asserted by previous Boards, even if not always accepting individual applications of the Board's setting-specific standards. *See, e.g.*, Cooper Tire & Rubber Co., 866 F.3d 885, 889 (8th Cir. 2017) (accepting the reasoning behind applying *Clear Pine Mouldings*'s more permissive picket line standard given the nature of picketing); NLRB v. Starbucks Corp., 679 F.3d 70, 79–80 (2d Cir. 2012) (accepting that *Atlantic Steel*'s more permissive standard should apply in certain workplace scenarios, but not for behavior performed in front of customers); Kiewit Power Constructors Co. v. NLRB, 652 F.3d 22, 29 (D.C. Cir. 2011) ("It would defeat section 7 if workers could be lawfully discharged every time they threatened to 'fight' for better working conditions."); NLRB v. Ben Pekin Corp., 452 F.2d 205, 207 (7th Cir. 1971); NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965) ("[N]ot every impropriety committed during such [Section 7] activity places the employee beyond the protective shield of the act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.").

62 *See* discussion *infra* Section I.E.

63 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 12.

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

whether the employer provoked the outburst by committing a ULP.[65] The Board never formulated specific weights for any of the individual factors.[66]

The ALJ in *General Motors* decided that the charging party—Robinson—was engaged in protected activity during three workplace incidents, and applied *Atlantic Steel*'s four-factor test in order to determine if Robinson's behavior was sufficiently opprobrious to lose the Act's protection during any of those confrontations.[67] Robinson was an African-American union committeeperson and delegate at General Motors's Kansas City, Kansas automotive assembly facility, where he had worked for over twenty years.[68] He brought ULP charges in response to three suspensions.[69]

Robinson's first confrontation occurred on the shop floor, when he spoke with a supervisor regarding overtime pay for cross-training.[70] In the course of the meeting, the conversation between Robinson and the supervisor became heated, and Robinson told the supervisor to "shove the fuckin' cross-training up his ass," which led to a suspension.[71] Despite his profane language, the ALJ found Robinson did not lose the Act's protection, and thus his suspension constituted a ULP.[72]

All four *Atlantic Steel* factors weighed in Robinson's favor relating to the first incident.[73] Even though the confrontation happened on the shop floor, the place of confrontation factor was in Robinson's favor: the only witnesses were management officials, and he did not disrupt the employer's operations.[74] The subject matter factor was also in Robinson's favor, since the conversation related to overtime pay that he believed was mandated by the CBA.[75] The nature-of-the-outburst factor

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65 *Id.* In the Board's exact language, the factors were: "(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." *Id.*

66 *See id.* (holding that the "Board . . . must carefully balance" the test's "various factors," but not giving relative weight to any of them); *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 6 ("The Board has not assigned specific weight to any of the [*Atlantic Steel*] factors generally.").

67 *Gen. Motors*, 369 N.L.R.B. No. 127, slip. op. at 3.

68 Gen. Motors LLC, No. 14-CA-208242, slip. op. at 1–2 (N.L.R.B. Div. of Judges Sept. 18, 2018).

69 *Id.* at 1.

70 *Id.* at 3–4.

71 *Id.* at 7. Although Robinson and the other parties involved in the three incidents made conflicting claims regarding what transpired, the ALJ generally credited the claims from those who testified on behalf of the employer for all three. *Id.* at 10–11.

72 *Id.* at 18–21.

73 *Id.*

74 *Id.* at 18.

75 *Id.*

also weighed in his favor because his profanity did not rise to the level of a threat, nor did he otherwise physically threaten anyone.[76] Finally, the fourth factor—provocation by a ULP—was in Robinson's favor, given that he honestly believed there was an understanding that overtime pay was agreed upon for cross-training, and thus the supervisor's refusal to grant overtime would have been a ULP.[77]

In relation to the second incident, two *Atlantic Steel* factors weighed against Robinson, including the nature-of-the-outburst factor, which weighed against him "moderately," and thus he lost the Act's protection and was legally suspended.[78] This incident occurred during a closed-door meeting over subcontracting, during which Robinson persistently and loudly repeated questions regarding certain cost figures.[79] After being asked to stop talking so loudly and to wait for the information later, Robinson began speaking in a "slave-like vernacular" and asked a manager if he wanted him to behave like "a good black man."[80] The ALJ determined the place of confrontation factor weighed in Robinson's favor because it was a closed-door meeting with management, and the subject matter factor also weighed in his favor because the meeting concerned terms and conditions of employment.[81] However, the nature-of-the-outburst factor weighed against Robinson based on the ALJ's conclusion that his slave caricature was solely a personal attack against one of the management officials at the meeting.[82] Finally, Robinson was not provoked by a ULP given that the management representatives simply asked him to narrow his information request and told him he would receive information later.[83]

Two *Atlantic Steel* factors also weighed against Robinson in connection with the third incident, including the nature-of-the-outburst factor which weighed "heavily" against him, meaning he again lost the Act's protection.[84] This incident occurred during another meeting with management, this time about shift changes at the facility.[85] Robinson took exception to something a manager present at the meeting said, responding he would "mess" him up, and after that

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76 *Id.* at 19.

77 *Id.* at 21. There was uncertainty over whether this contract term actually existed, but if it did, it was reached by verbal agreement. *Id.* at 3.

78 *Id.* at 22–23.

79 *Id.* at 8.

80 *Id.* at 9–11. Robinson's comments also included, "Yes, Master, I'll do whatever you say Master," and "You want me to talk like this, Master?" *Id.* at 9.

81 *Id.* at 22.

82 *Id.* at 22–23.

83 *Id.* at 23.

84 *Id.* at 25.

85 *Id.* at 11.

Robinson played loud music on his phone during the remaining portions of the meeting.[86] On his way out of the meeting, Robinson directed profanities at those who were still inside.[87] The fact that the incident again occurred in a closed-door meeting put the place of confrontation factor in Robinson's favor, and the subject matter factor was also in his favor because the meeting was called for discussing terms related to the CBA.[88] However, the combination of Robinson remarking about "messing" up a manager, playing loud music, and using profane language set the nature-of-the-outburst factor against him; nor was there ULP evidence, setting the provocation factor against him.[89] Ultimately, the ALJ ordered General Motors to make Robinson whole for any losses he suffered from his first suspension, but not for the other two.[90]

C. *The Other Two Setting-Specific Standards*

Although the ALJ who made the decision under review in *General Motors* only applied *Atlantic Steel* factors, the *General Motors* Board considered *Pier Sixty* and *Clear Pine Mouldings* alongside *Atlantic Steel* in its analysis.[91] While *Atlantic Steel* was characterized as the workplace discussion standard, *Pier Sixty* and *Clear Pine Mouldings* were described as the social media and picket line activity tests, respectively.[92]

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86 *Id.* at 11–12; Robinson testified he played the country song "Friends in Low Places." Others who were present testified he played several rap songs, such as "Fuck the Police." *Id.* at 13; *see* GARTH BROOKS, *Friends in Low Places*, *on* NO FENCES (Capitol Nashville 1990); N.W.A., *Fuck Tha Police*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records 1988).

87 *Gen. Motors*, No. 14-CA-208242, at 14. Robinson said something along the lines of "y'all can kiss my MF'g ass." *Id.*

88 *Id.* at 18.

89 *Id.* at 24–25.

90 *Id.* at 27.

91 Gen. Motors LLC, 369 N.L.R.B. No. 127 (July 21, 2020); Pier Sixty, LLC, 362 N.L.R.B. 505 (2015); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984).

92 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 6–10. While the Board also characterized *Pier Sixty* as a standard for "workplace discussions among coworkers," the test was created for a social media analysis and was largely understood as an online activity test before being overturned. *Id.* at 9; *see also Pier Sixty*, 362 N.L.R.B. at 505; Christine Neylon O'Brien, *I Swear! From Shoptalk to Social Media: The Top Ten National Labor Relations Board Profanity Cases*, 90 ST. JOHN'S L. REV. 53, 86–90 (2016) (analyzing *Pier Sixty* as a new Board approach to changes in worker interactions caused by social media); Ariana R. Levinson, *Solidarity on Social Media*, 2016 COLUM. BUS. L. REV. 303 (arguing the Board acted appropriately when creating new tests such as *Pier Sixty* for social media).

1. *Pier Sixty*: The Social Media Standard

In *Pier Sixty*, the Board approved a then-new social media test which the ALJ had applied to an employee's profane Facebook post.[93] The charging party—Perez—was a server for Pier Sixty, a catering service company located in Manhattan.[94] The company's employees were in the process of a union campaign, and the election vote was scheduled for the day after the incidents involving Perez occurred.[95] While serving drinks at a fundraiser, Assistant Director Bob McSweeney admonished Perez and some coworkers to stop talking and keep their eyes on the customers.[96] Later the same night, McSweeney used a raised tone to order Perez and others to clear the customers' plates, and repeated a similar order a few moments later in a similar tone.[97]

Apparently unhappy with McSweeney's behavior, Perez complained to the head of the union organizing campaign, then took a break.[98] When alone and waiting outside of the event space, Perez accessed Facebook from his cell phone and on his personal page posted a profane message directed at McSweeney that included a reference to the union election.[99] The post was only visible to his Facebook friends, which included several coworkers.[100] Perez deleted the post three days later, but not before one of Pier Sixty's managers saw it and notified human resources.[101] Pier Sixty later discharged Perez, saying that his Facebook post violated its policies.[102] However, since the post included an explicit reference to the union election, Perez charged that his termination constituted retaliation for his online protected activity.[103] For the Board, Perez's post was clearly protected activity: it came in response to alleged workplace mistreatment and it indicated that the upcoming union election was a way of improving working life at Pier

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93 *Pier Sixty*, 362 N.L.R.B. at 505.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* The Board accepted findings that McSweeney's tone was "raised" and "harsh." *Id.*

98 *Id.*

99 *Id.* ("Bob [McSweeney] is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!").

100 *Id.* at 506.

101 *Id.*

102 *Id.*

103 *Id.*

Sixty.[104] The Board was then left to evaluate whether Perez's online profanity was sufficiently opprobrious to lose the Act's protection.[105]

Rather than applying *Atlantic Steel*'s four-factor test, however, the Board approved the ALJ's new nine-factor totality of the circumstances test.[106] According to the Board, *Atlantic Steel* was the wrong test because the post was intended for other employees in a nonwork setting—Facebook—and did not arise in a conversation with management.[107] The test's nine factors were: (1) whether the record showed evidence of employer anti-union hostility; (2) whether the employer provoked the conduct; (3) whether the online conduct was impulsive or deliberate; (4) the post's location; (5) the post's subject matter; (6) the post's nature; (7) how the employer treated otherwise similar, profane language; (8) whether the employer specifically prohibited the relevant profane language; and (9) whether the discipline was an incongruent response when compared with responses to similar employee behavior.[108] Like the *Atlantic Steel* test, no specific weight was assigned to any factors.[109]

The Board found that all nine factors weighed in Perez's favor, and thus his discharge violated his Section 7 rights.[110] The first factor weighed against the employer because the record showed Pier Sixty had disparately applied a "no talk" workplace rule leading up to the union election in an apparent attempt to prevent union discussion.[111] Regarding the second factor, the evidence showed that Perez posted the message in direct response to McSweeney's workplace behavior, while the third also weighed in his favor because the post appeared to be an impulsive expression.[112] Factors four and five weighed in Perez's favor given that he posted the comment while on break and outside of the employer's facility, and that his online comments in no way affected the employer's operations at the time.[113] Factor six weighed in Perez's favor because evidence showed profanity was tolerated at the workplace, and his references to McSweeney's family did not constitute opprobrious conduct pursuant to factor seven.[114] Factor eight supported Perez because Pier Sixty's policies did not generally prohibit offensive

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104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* at 506–07; *see* Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979).

110 *Pier Sixty*, 362 N.L.R.B. at 506.

111 *Id.*

112 *Id.* at 506–07.

113 *Id.* at 507.

114 *Id.* ("Perez'[s] comments were not a slur against McSweeney's family but, rather, 'an epithet directed to McSweeney himself.'").

language.[115] Finally, there was no evidence that Pier Sixty ever discharged another employee for using offensive language, putting factor nine on his side.[116] Thus, the Board ordered Pier Sixty to reinstate Perez and compensate him for any lost backpay.[117]

2. *Clear Pine Mouldings*: Confrontations on the Picket Line

Clear Pine Mouldings addressed a third scenario: picket line misconduct.[118] Picketing is explicitly protected by the Act.[119] And given that the picket line is a clear point of struggle and contention during a labor dispute, it is not surprising that, in efforts to ensure picketing was in fact protected, the Board's picket line standard for opprobrious conduct was especially lenient.[120] Only behavior that "reasonably tend[ed] to coerce or intimidate" other employees lost the Act's protections, meaning anything short of threatening or violent behavior would likely be considered protected.[121] As a result, the Board had historically found that what in any other context would be seen as extraordinarily reprehensible conduct was actually shielded on the

115 *Id.*

116 *Id.* at 508.

117 *Id.*

118 Atl. Steel Co., 245 N.L.R.B. 814 (1979); *Pier Sixty*, 362 N.L.R.B. 505; Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984).

119 29 U.S.C. § 158(b)(7); *see Recognitional Picketing (Section 8(b)(7))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/recognitional-picketing-section-8b7#:~:text=%22Picketing%22%20includes%20what%20that%20word,boycotts%2C%22%20for%20more%20information [https://perma.cc/W426-EDBK] ("'Picketing' includes what that word typically calls to mind: persons patrolling at the entrance to a targeted business, carrying signs affixed to sticks. But it is not limited to such conduct.").

120 *Clear Pine Mouldings*, 268 N.L.R.B. at 1046 (acknowledging the fact that "any strike which involves picketing may have a coercive aspect" distinguishes the picket line).

121 *Id.* at 1046–47. Unlike *Atlantic Steel* and *Pier Sixty*, this standard primarily focuses on offensive conduct directed toward similarly situated employees, not management. *Id.* at 1046 ("[T]he making of abusive threats against nonstriking employees equate[s] to 'restraint and coercion' prohibited elsewhere in the Act."). This reflects the fact that picketers often confront nonstriking coworkers and replacement workers (scabs) on the line.

picket line,[122] prompting many to criticize the Board's approach as enabling hateful behavior.[123]

One of the more recent cases that drew negative attention to the Board's *Clear Pine Mouldings* standard was *Cooper Tire*.[124] The charging party in the case was Runion, who was part of a union that was being locked out of work in the midst of collective bargaining negotiations.[125] The employer had hired replacement workers, many of whom were African-American.[126] One day, as the replacement workers were exiting the worksite in employer-provided vans, Runion and a large group of union members were present and picketing.[127] As the replacement workers passed by, Runion made racist comments that were captured on the employer's security tapes.[128] After reviewing the tapes, the employer terminated him for the comments.[129]

Applying *Clear Pine Mouldings*'s picketing standard, the ALJ ruled that Runion's comments could not reasonably be seen as coercing the

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122 *See* Cooper Tire & Rubber Co., 363 N.L.R.B. 1952 (2016); Airo Die Casting, Inc., 347 N.L.R.B. 810, 811 (2006) (ruling that picketer who approached a car with a nonstriking African-American company security guard inside and yelled "fuck you n*****" with both middle fingers raised did not lose the Act's protection); Nickell Moulding, 317 N.L.R.B. 826, 826 (1995) (deciding that picketer holding a sign reading "Who Is Rhonda F [with an X through the F] Sucking Today?" about a nonstriking coworker did not lose the Act's protection).

123 Frequently, these critiques focused on tensions between the noxiously racist speech protected by the Board under *Clear Pine Mouldings* and employers' Civil Rights Act Title VII obligations. *See, e.g.*, Carly Thelen, Note, *Hate Speech as Protected Conduct: Reworking the Approach to Offensive Speech Under the NLRA*, 104 IOWA L. REV. 985, 999–1000 (2019) (citing *Airo Die Casting* and *Cooper Tire* in argument for reevaluating hate speech under the Act); Michael H. LeRoy, *Slurred Speech: How the NLRB Tolerates Racism*, 8 COLUM. J. RACE & L. 209, 268 (2018) (using *Airo Die Casting* and *Cooper Tire* as examples of how the Board was protecting speech that conflicted with Title VII); Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017 U. CHI. LEGAL F. 235, 257–58 (arguing the Board should reverse *Airo Die Casting* and *Cooper Tire* and change its approach to racist speech); Matt Stokely, *Racist Comments Protected Under Federal Law? Labor Board Says "Yes*,*"* PICKREL SCHAEFFER & EBELING, https://www.pselaw.com/racist-comments-protected-under-federal-law-labor-board-says-yes [https://perma.cc/FJ3T-FXZQ] ("Should employers commit an unfair labor practice by terminating a racist employee on the picket line, or should they create a hostile work environment by *failing* to terminate the employee? This tension is the inevitable result of the *Cooper Tire* decision.").

124 Cooper Tire & Rubber Co., 363 N.L.R.B. 1952 (2016), *enforced*, Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885 (8th Cir. 2017).

125 *Id.* at 1952–53.

126 *Id.* at 1954.

127 *Id.*

128 *Id.* at 1954, 1955 ("Hey, did you bring enough KFC for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon.").

129 *Id.* at 1955.

replacement employees, and thus he did not lose the Act's protection.[130] Although the statements were racist and offensive, according to the ALJ, they did not contain threats, they were not spoken in connection with any acts of physical intimidation, and they did not increase the likelihood of imminent violence.[131] Based on this determination, the employer committed a ULP when it discharged Runion because of his comments, and the ALJ ordered he be reinstated.[132] The Board later affirmed the ALJ's findings, as did the Eighth Circuit Court of Appeals.[133]

D. *The* General Motors *Board Decision: Ending Setting-Specific Standards*

The *General Motors* Board not only overturned *Atlantic Steel*—the setting-specific standard applied to Robinson's conduct by the ALJ[134]—but also announced the end of *Pier Sixty*, *Clear Pine Mouldings*, and setting-specific standards for abusive employee conduct generally.[135] The Board clarified that its decision applied to "[a]busive speech and conduct," opting for "abusive" over "opprobrious," the latter of which was often a term that the Board had used when referring to misconduct that could cause Section 7 activity to lose protection.[136] While the Board did not closely define "abusive conduct," it cited "profane ad hominem attack[s]" and "racial slur[s]" as examples.[137]

The Board gave several reasons for its decision, starting with fairness and predictability.[138] According to the Board, past rulings showed that *Atlantic Steel*'s multifactor test was applied inconsistently, and this inconsistency was caused by its unweighted factors.[139] Different ALJs accorded varying significance to the test's factors based on the case

130 *Id.* at 1958. This is an objective standard, meaning that an employee's subjective claims about feeling coerced by a picketer's behavior would not necessarily affect the Board's analysis. *Id.*

131 *Id.* at 1959.

132 *Id.* at 1961.

133 *Id.* at 1952; Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885 (8th Cir. 2017).

134 *See* Section I.C.

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

136 *Id.* at 13; *see id.* at 9 n.16 ("[T]oday's decision only addresses abusive conduct."). The term "opprobrious" did not appear in the Board's decision at all, whereas the ALJ in *General Motors* used "opprobrious" when applying *Atlantic Steel*, *see* Gen. Motors LLC, No. 14-CA-208242 (N.L.R.B. Div. of Judges Sept. 18, 2018), as did the Board in Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979), and dissent in Pier Sixty, LLC, 362 N.L.R.B. 505, 509 (2015) (M. Johnson, dissenting).

137 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 13.

138 *Id.* at 1.

139 *Id.* at 7–9.

at hand, supposedly leaving no possible way to review whether the factors were correctly applied.[140] Moreover, *Atlantic Steel*'s second factor—discussion subject matter—always weighed in the employee's favor, since by necessity the test only applied when what would otherwise be protected activity was implicated.[141] For the Board, having a factor that always leaned in the employee's favor was unfair.[142] Although the Board dedicated much less space to reviewing *Pier Sixty* than *Atlantic Steel*, the same general analysis led to the conclusion that the former was perhaps even worse: if four unweighted factors created unpredictable and unfair outcomes, *Pier Sixty*'s nine unweighted factors went further in the wrong direction.[143]

Second, the Board claimed that its setting-specific standards were permitting abusive employee conduct, sometimes in violation of workplace antidiscrimination laws such as Title VII.[144] This section of the Board's analysis focused in particular on cases decided under *Clear Pine Mouldings*'s reasonably tending to coerce standard for picket line behavior.[145] For the Board, the idea that employees needed additional "leeway" in some instances in order to make Section 7 protections meaningful had become stretched too far, and as a result, was actually preventing employers from maintaining respectful and orderly working environments.[146] Nothing in the Act prevented Section 7 protections from harmoniously coexisting with other workplace protections, but these tests had supposedly created statutory conflicts.[147]

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140 *Id.* at 9 ("Multi-factor tests 'lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so' . . . . Such 'totality of the circumstances' analyses can become 'simply a cloak for agency whim.'" (quoting LeMoyne-Owen College v. NLRB, 357 F.3d 55, 61 (D.C. Cir. 2004))).

141 *Id.* at 7.

142 *Id.*

143 *Id.* at 9.

144 *Id.* at 10–11. This conclusion echoed concerns raised by numerous commenters. *See supra* note 123. In response to a request from the Board, the Equal Employment Opportunity Commission (EEOC) submitted an amicus brief supporting the employer in *General Motors*. While the EEOC did not explicitly recommend that the Board overturn any of its setting-specific standards, the brief explained that protected racist and sexist employee language from several Board decisions—including *Airo Die Casting* and *Cooper Tire*—may have violated Title VII. *See* Brief of the Equal Employment Opportunity Commission as Amicus Curiae Supporting Respondents, Gen. Motors, LLC, 369 N.L.R.B. No. 127 (2018), https://www.eeoc.gov/sites/default/files/2020-05/general_motors.html#_BA_Cite_CBC495_000256 [https://perma.cc/YND4-X84U]. For a general discussion regarding some of the conceptual tensions historically existing between organizational solidarity and individual rights legislation such as Title VII, see NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 191–211 (2013).

145 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 10.

146 *Id.* at 12–13.

147 *Id.*

Finally, the Board argued there was no reason why its *Wright Line* test should not apply in place of the setting-specific standards.[148] The *General Motors* Board rejected the claims made by past Boards that when abusive conduct occurred in conjunction with protected activity, it was analytically inseparable.[149] According to the *General Motors* Board, abusive conduct and protected activity were indeed distinguishable when they occurred as part of the same interaction. Thus, there was no reason to apply a different dual motive test from *Wright Line* in such instances, especially since those other tests were unpredictable and facilitated abusive conduct.[150]

By eliminating all setting-specific exceptions to *Wright Line*, the Board made *Wright Line* the universal standard for evaluating abusive behavior when the abusive conduct formed the same course of conduct as protected activity.[151] However, in a footnote related to *Pier Sixty* and social media posts, the Board clarified that its "decision only addresses abusive conduct, [and] precedent on disparagement or disloyalty is beyond its scope."[152] For reasons addressed later, this language limits *General Motors*'s holding less than it may seem.[153]

E. *Applying* Wright Line *to All Dual Motive Analyses*

Wright Line is the traditional test for determining employer liability in dual motive ULP charges,[154] and following *General Motors*, it is now the only test when considering abusive conduct.[155] The basic issue *Wright Line* tries resolving is the same question that the setting-specific standards addressed: Did the employer illegally retaliate against a worker for engaging in protected activity, or did the employer discipline the worker for legitimate reasons?[156] However, *Wright Line* takes a rather different approach from the multifactor test in *Atlantic*

148 *Id.* at 14–15.

149 *Id.* at 15.

150 *Id.* at 15–16.

151 *Id.* at 15.

152 *Id.* at 9 n.16.

153 *See infra* notes 207–10 and accompanying text.

154 NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981); *see also* NLRB v. Transp. Mgmt. Corp., 482 U.S. 393 (1983) (holding that the Board's *Wright Line* burden shifting approach was consistent with the Act).

155 *Gen. Motors*, 369 N.L.R.B. No. 127.

156 *Wright Line*, 662 F.2d at 901; Tschiggfrie Props., Ltd., 368 N.L.R.B. No. 120, slip op. at 10 (Nov. 22, 2019) ("The framework established by the Board in *Wright Line* is inherently a causation test.").

Steel, the nine-factor totality of the circumstances test in *Pier Sixty*, or the coercion standard in *Clear Pine Mouldings*.[157]

Those differences were based on one main conceptual distinction between *Wright Line* and the setting-specific standards: the latter only applied when it was clear that the employer's retaliation came in response to protected activity, hence the need to decide if the activity was sufficiently opprobrious to lose protection.[158] In other words, it was essentially presumed that the protected activity had a relationship to the employer's disciplinary action because such situations made it too risky to try to discern whether the employer was illegally punishing protected activity or only permissibly disciplining misconduct.[159] In contrast, *Wright Line* was exclusively used when the opprobrious conduct and protected activity were somehow separated in time or place.[160] Thus, the *Wright Line* test focuses on whether protected activity was truly the cause of the employer's disciplinary actions, not if the employee's existing protections were lost.[161]

Under *Wright Line*, an employee who brings a ULP charge after being disciplined must show that her protected activity was a "motivating factor" in the employer's response, and that she would not have been disciplined so severely absent her protected activity.[162] To make a prima facie showing that illegal animus was a "motivating factor" in the disciplinary action,[163] there are three necessary elements: (1) the employee was engaged in protected activity; (2) the employer knew about this activity; and (3) the employer disciplined the employee in retaliation for engaging in the activity.[164] The third *Wright Line* prima facie element demands that the General Counsel present evidence that the employer harbored anti-union animus.[165]

Once the General Counsel presents a prima facie claim, the burden of proof shifts to the employer.[166] The case will ultimately be decided

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157 *See Wright Line*, 662 F.2d 899; Atl. Steel Co., 245 N.L.R.B. 814 (1979); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984); Pier Sixty, LLC, 362 N.L.R.B. 505 (2015).

158 *See Gen. Motors*, 369 N.L.R.B. No. 127.

159 *See* Roemer Indus., Inc., 362 N.L.R.B. 828, 834 n.15 (2015).

160 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 16. This is assuming there was opprobrious conduct or anything otherwise justifying discipline relating to an employee who has been engaged in protected concerted activity. Absent claimed employee misconduct, the employer is obviously in a more difficult position to show its disciplinary decision rested on a legal basis.

161 *See* Postal Serv., 360 N.L.R.B. 677, 682 (2014).

162 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 16.

163 *See* Electrolux Home Prods., Inc., 368 N.L.R.B. No. 34, slip op. at 3 (Aug. 2, 2019).

164 *See* OFF. OF GEN. COUNS., NAT'L LAB. RELS. BD., GC 06-09, THE GENERAL COUNSEL'S BURDEN UNDER *WRIGHT LINE* 4 (2006).

165 Mondelez Glob., LLC, 369 N.L.R.B. No. 46, slip op. at 2 (Mar. 31, 2020).

166 NLRB v. Wright Line, 662 F.2d 899, 904 (1st Cir. 1981).

based on the preponderance of the evidence regarding the employer's motivation, so in order to triumph, the employer must provide evidence that convinces the trier of fact that the General Counsel cannot meet her burden.[167] Thus, the employer need not prove that its explanation was legitimate; rather, it must merely prevent the General Counsel from persuading the trier of fact that the real disciplinary motive was illegal animus.[168]

Reviewing the facts of the case in *Wright Line* is helpful for distinguishing its test from the setting-specific analyses. The charging party in *Wright Line* was Lamoureux, a shop inspector.[169] Lamoureux had been active in two different unsuccessful organizing campaigns, and the employer knew about his involvement.[170] The events leading to his discharge occurred about two months after the most recent union vote, and started with one of Lamoureux's supervisors noticing him entering the bathroom with a newspaper in hand.[171] After seeing him outside the bathroom, the supervisor waited by Lamoureux's departments, noting when he returned thirty-five minutes later.[172]

The supervisor did not say anything to Lamoureux nor attempt to locate him over that time period, despite knowing that Lamoureux's job responsibilities often took him away from his departments.[173] The next day, the supervisor checked Lamoureux's Daily Activity Sheet and found that Lamoureux had claimed he was making department inspections over the time period when he was away.[174] The supervisor brought the discrepancy to management officials, and Lamoureux was thereafter terminated.[175]

The First Circuit affirmed that Lamoureux's termination was a ULP.[176] The Board had claimed Lamoureux was truly terminated in retaliation for his previous organizing activity, whereas the employer claimed it terminated him for falsifying the time sheet.[177] The court reviewed whether it was the case that but-for Lamoureux's protected activity, he would not have been discharged, and found the Board's

167 *Id.* at 904–05.
168 *Id.* at 905.
169 *Id.* at 900.
170 *Id.*
171 *Id.* at 900–01.
172 *Id.* at 900.
173 *Id.*
174 *Id.* at 900–01.
175 *Id.* at 901.
176 *Id.* at 907.
177 *Id.* at 908–09.

decision was supported by a preponderance of the evidence.[178] The record clearly showed that the employer knew about Lamoureux's organizing activities and waged a "hostile" anti-union campaign.[179] In addition, the fact that management was closely monitoring Lamoureux's performance but never confronted him about the sheet before discharging him suggested they were actively looking for an excuse to do so.[180] Moreover, inspection timing bore little operational significance as long as the tasks were accomplished.[181] Finally, the employer had previously treated other employees who committed similar falsifications much more leniently.[182]

As in *Wright Line* itself, disciplinary record disparities often constitute important evidence in dual motive *Wright Line* analyses.[183] Other discriminatory evidence may come from the action's timing, the existence of other ULPs, employer anti-union statements, and a demonstrably pretextual employer explanation.[184] However, animus statements alone are not sufficient evidence that an employer's action was itself driven by animus.[185] In *Tschiggfrie Properties*, the Board clarified that there must be a "causal relationship" between the expressed animus and the action, meaning, for instance, that general anti-organizing hostility would not provide sufficient evidentiary support for a prima facie claim.[186] The General Counsel has the burden of showing a closer link between the animus statement and the disputed action.[187]

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178 *Id.* at 907 ("If the discharge would have taken place irrespective of the anti-union motive, no unfair labor practice took place . . . .").

179 *Id.*

180 *Id.*

181 *Id.* at 908.

182 *Id.* at 909.

183 *See id.* at 908; Ozburn-Hessey Logistics, LLC v. NLRB, 833 F.3d 210, 223–24 (D.C. Cir. 2016); Southwire Co. v. NLRB, 820 F.2d 453, 460 (D.C. Cir. 1987). This may apply even if the charging parties indisputably violated a company policy. The Board focuses on the disparities between employer treatment of those who broke the same rules and who also happened to be involved in protected activity, and those who violated the same or similar rules and were not engaged in any protected activity. *See* Mondelez Global, LLC, 369 N.L.R.B. No. 46, slip op. at 3–4 (Mar. 31, 2020) (discharging time-thieving employees who were outspoken union leaders but not discharging other time-thieving employees presented animus evidence).

184 OFF. OF GEN. COUNS., *supra* note 164.

185 *See* Tschiggfrie Props., Ltd., 368 N.L.R.B. No. 120 (Nov. 22, 2019).

186 *Id.* at 5.

187 *Id.* at 11. The Board explicitly disavowed approaches that treated any and all animus statements as sufficient evidence allowing for the General Counsel to bring prima facie claims. *Id.* at 10.

II. ANALYSIS

A. *Wright Line* Is the Wrong Test When Analyzing Abusive Conduct in the Course of Protected Activity

Although the Board and many legal observers championed the *General Motors* decision as a victory for "workplace civility" and a means of withdrawing Act protections for troubling speech,[188] completely abandoning setting-specific standards was a mistake.[189] The Board and federal appellate courts have long understood that protected activity constitutes a struggle between workers and employers, and that by definition, labor battles frequently do not comport with idealized workplace images.[190] Some circumstances call for giving workers greater expressive freedom at the employer's expense, and by ignoring this reality, the Board effectively undermines the Act's purpose.[191] Those circumstances exist when employees simultaneously engage in protected activity and allegedly abusive or opprobrious conduct, instances when the danger that employers may illegally punish Section 7 behavior directly is especially high.[192]

The analysis regarding *Wright Line*'s third element—retaliation based on anti-union animus—favors employers in such instances by giving them more authority to define acceptable conduct.[193] The third

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188 *See* Gen. Motors LLC, 369 N.L.R.B. No. 127 (July 21, 2020). Two former Board Members who have since gone into private practice were among those happy with the decision. Harry I. Johnson III, Philip A. Miscimarra, David R. Broderdorf & Crystal S. Carey, *NLRB Limits Protection Given to Abusive, Profane, or Offensive Workplace Conduct*, MORGAN LEWIS (July 27, 2020), https://www.morganlewis.com/pubs/2020/07/nlrb-limits-protection-given-to-abusive-profane-or-offensive-workplace-conduct [https://perma.cc/72Z8-NN98] ("In a welcome return to common sense, the Board has finally recognized that its prior standards failed to properly consider employers' legal obligations to prevent harassment and a hostile work environment, as well as to maintain order and respect at work.").

189 *See* Christine Neylon O'Brien, *Twenty-First Century Labor Law: Striking the Right Balance Between Workplace Civility Rules that Accommodate Equal Employment Opportunity Obligations and the Loss of Protection for Concerted Activities Under the National Labor Relations Act*, 12 WM. & MARY BUS. L. REV. 167, 212–13 (2020).

190 *See, e.g.*, Consumers Power Co., 282 N.L.R.B. 130 (1986); NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965); Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333 (1st Cir. 1977); NLRB v. Caval Tool Div., 262 F.3d 184 (2d Cir. 2001).

191 *See* O'Brien, *supra* note 189, at 213–14.

192 *See Consumers Power Co.*, 282 N.L.R.B. at 132; Green, *supra* note 123, at 255–56.

193 *See* O'Brien, *supra* note 189, at 213–18 (arguing that *General Motors* makes it too easy for employers to punish workers for Section 7 activity); Zachary Schurin, *Speak No Evil: The NLRB Drops "Setting-Specific" Standards for Cases Involving Abusive Employee Speech Made in the Course of Protected Concerted Activities*, JD SUPRA (July 29, 2020), https://www.jdsupra.com/

element's analysis is often comparative: the finder of fact will frequently rely on comparing disciplinary records between the disciplined employee and others in order to determine whether the misconduct truly was the disciplinary motivation.[194] This may make sense when the protected activity and abusive conduct are distinct, but this approach is troubling when the misconduct and protected activity formed the same res gestae. Writing in dissent when the Board called for briefing on *General Motors*, Member McFerran pointed out that changing the setting-specific standards "runs the risk of allowing *employers* to limit the scope of the Act's protections through their own, unilaterally imposed definitions of civil workplace behavior."[195]

While the setting-specific standards did consider workplace context and policies, they were also informed by Board policies and concerns.[196] But now, employers may create draconian civility policies, and as long as they apply those policies evenly, use them to justify disciplining employees who exercise Section 7 rights in ways that may violate such policies.[197] The greater cause for concern here, unlike the instances in which *Wright Line* has always applied, is that when an employer disciplines a worker for misconduct committed in the course of protected activity, the prospect that the employer is truly punishing the worker for engaging in Section 7 activity is especially high.[198] There is no clear way of distinguishing protected activity from misconduct and determining which was truly punished in such instances, and other than making conclusory statements that protected activity and abusive conduct in the course of protected activity could in fact be analytically

legalnews/speak-no-evil-the-nlrb-drops-setting-27270 [https://perma.cc/DD5R-ZAGX] ("The *General Motors LLC* decision is certainly a victory for employers who want greater leeway in enforcing workplace speech and civility rules . . . .").

194 *See supra* Section I.E.

195 Gen. Motors LLC, 368 N.L.R.B. No. 68, slip op. at 5 n.14 (Sept. 5, 2019) (M. McFerran, dissenting). Member McFerran was named Board Chairman in January of 2021. *See Lauren McFerran*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/bio/lauren-mcferran [https://perma.cc/7B4R-2DAL].

196 *See* Atl. Steel Co., 245 N.L.R.B. 814 (1979); Pier Sixty, LLC, 362 N.L.R.B. 505 (2015); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984).

197 Andrew Baker, *Trump NLRB Destroys Historic Protections for Workers Engaged in Union Activities*, BEESON TAYER & BODINE (Aug. 31, 2020), https://www.beesontayer.com/2020/08/trump-nlrb-destroys-historic-protections-for-workers-engaged-in-union-activities [https://perma.cc/AC2H-6YUL] ("Under the new *GM* standard, the employee's intemperate speech will be completely severed from the union activity in which it occurred, and the employee will be subject to discipline if the employer can simply prove that the offensive speech by itself warranted the discipline.").

198 *See supra* notes 59–61 and accompanying text.

separated after all, the *General Motors* Board did not explain how it uncovered wisdom that had eluded previous Boards for decades.[199]

Further, unlike the behavior at issue in *Wright Line* analyses, there are legitimate reasons why Section 7 activity may violate workplace civility codes. As the Board has long recognized, Section 7 protections "would be meaningless were we not to take into account . . . the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses."[200] This is precisely the reason why the setting-specific standards were created in the first place, and why an alternative to *Wright Line* remains necessary when abusive conduct occurs in the course of protected activity.

In apparent recognition of the need for alternatives to *Wright Line*, some ALJ dispositions have seized on using the *Burnup & Sims* test since *General Motors* was decided,[201] a test which the *General Motors* Board expressly left intact[202] but which does not ameliorate the issues caused by overruling the setting-specific standards. Under *Burnup & Sims*, an employer must have an "honest belief" that the alleged misconduct in the course of protected activity occurred in order to discharge a worker for such misconduct.[203] If the employer can show its honest belief that the misconduct in the course of protected activity occurred, the burden then falls on the General Counsel to show that it did not actually occur.[204] While it is fortunate that this test was not also overturned, it is obvious why *Burnup & Sims* is not a sufficient alternative for all cases involving misconduct in the course of protected

[199] Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 15 (July 21, 2020); *see* Roemer Indus., Inc., 362 N.L.R.B. 828, 834 n.15 (2015) (citing decisions showing how the Board had historically assumed a causal connection between discipline for opprobrious conduct in the course of protected activity and the protected activity rather than trying to separate the misconduct from the protected activity). For an overview of some of the evidentiary problems raised by replacing the setting-specific standards with *Wright Line*, see Marcus Reed, Note, *The NLRB Champions "Civility" in the Workplace in* General Motors*: Altruism or Duplicity?—the Union Perspective*, 53 U. TOL. L. REV. 179, 200–01 (2021).

[200] Consumers Power Co., 282 N.L.R.B. 130, 132 (1986).

[201] *See, e.g.*, List Indus., Inc., No. 13-CA-278746, at 63–66 (N.L.R.B. Div. of Judges Apr. 18, 2022) (applying *Burnup & Sims* in addition to *Wright Line*); Amazon.com Servs. LLC, No. 29-CA-261755, at 11–12 (N.L.R.B. Div. of Judges Apr. 18, 2022) (same); Wismettac Asian Foods, Inc., No. 21-CA-207463, at 6–8 (N.L.R.B. Div. of Judges Jan. 19, 2021) (same), *adopted as modified by* 371 N.L.R.B. No. 9 (July 16, 2021).

[202] *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 16 n.27.

[203] Pepsi-Cola Co., 330 N.L.R.B. 474, 474 (2000) ("When an employer discharges an employee for misconduct arising out of a protected activity, under *Burnup & Sims* the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct."); *see* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

[204] *Pepsi-Cola*, 330 N.L.R.B. at 474.

activity. Because the test ultimately boils down to whether the misconduct happened or not, *Burnup & Sims* is not applicable in any instances in which there is no question that employer-defined misconduct did transpire.[205] That means that *Wright Line* applies instead of *Burnup & Sims* to everything except that sliver of cases.

A recent First Circuit Court of Appeals case describes other limits to *General Motors*'s effects on workers, but again, these limits in no way neutralize all of the problems created by the Board's decision to substitute *Wright Line* for setting-specific standards. In *NLRB v. Maine Coast Regional Health Facilities*, the First Circuit recognized that *General Motors* only applies to cases involving abusive conduct.[206] Citing a footnote from *General Motors*, the court wrote that "the Board cabined its holding to cases involving abusive conduct, specifically exempting mere disparagement or disloyalty."[207] While this was relevant to the facts in *Maine Coast* since that case involved third-party communications,[208] this claim about *General Motors* appears to apply only to cases concerning third-party communications. The language

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205 *See* Nestle USA, Inc., 370 N.L.R.B. No. 53, slip op. at 1 n.2 (Dec. 7, 2020) (stating "that application of the *Wright Line* standard 'presupposes that the employee actually engaged in the misconduct,' and that nothing in *General Motors* should be read as conflicting with [*Burnup & Sims*]." (quoting *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 10 n.27)); *see also* Hood River Distillers, Inc., No. 19-CA-268290, at 52 n.46 (N.L.R.B. Div. of Judges Dec. 10, 2021) ("The *Burnup & Sims* standard survives notwithstanding the Board's decision in *General Motors* but applies only when it is shown that the employer discharged the employee for an alleged act of misconduct for which the employee was not, in fact, guilty.").

206 NLRB v. Me. Coast Reg'l Health Facilities, 999 F.3d 1, 12 (1st Cir. 2021).

207 *Id.* The court also claimed that *General Motors* did not change the analysis for cases in which "an employee's discharge is based upon a single act." *Id.* at 11. To the extent that this claim applies only to the analysis for third-party communications, it seems to make sense because there are specific standards governing such communications. *See, e.g.*, NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (*Jefferson Standard*), 346 U.S. 464 (1953). However, to the extent that the language is taken to suggest that other § 8(a)(3) misconduct analyses have not been affected by *General Motors* in the context of analyzing a single act, this looks like a complete misreading. *General Motors* was focused on disentangling protected activity from abusive conduct precisely when both constituted the same individual act. *See* Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 14–15 (July 21, 2020). Thus, if *Wright Line* does not now apply to single-act cases, it is unclear why *General Motors* would have bothered overturning the setting-specific standards at all. Moreover, every case cited by the First Circuit in support of this claim either relates to third-party communications or draws from tests that *General Motors* disavowed. *See Me. Coast Reg'l Health Facilities*, 999 F.3d at 11; Five Star Transp., Inc., 349 N.L.R.B. 42, 42–43 (2007) (concerning letters sent by workers); Am. Steel Erectors, Inc., 339 N.L.R.B. 1315, 1316 (2003) (applying *Atlantic Steel*); Phx. Transit Sys., 337 N.L.R.B. 510, 510 (2002) (concerning articles published by worker in union newsletter); Nor-Cal Beverage Co., 330 N.L.R.B. 610, 610–12 (2000) (weighing whether a worker lost Act protections by calling other employees "scabs" in the course of protected activity). Whatever the implications of the First Circuit's open-ended language, it is hard to imagine other circuits embracing its most liberal readings in any § 8(a)(3) cases that do not involve third-party communications.

208 *Me. Coast Reg'l Health Facilities*, 999 F.3d at 7.

from *General Motors* that was cited by *Maine Coast* related to third-party communications in the context of social media posts.[209] And further, *General Motors* exclusively cited decisions involving third-party communications as those which had not been affected.[210] Thus, when a worker's disloyalty in the form of third-party communications is at issue an entirely different set of precedents from *Wright Line* or the setting-specific standards governs,[211] but any misconduct that is abusive or that does not take the form of third-party communications seems that it should be governed by *General Motors* in dual motive cases. This means that *Wright Line* is the relevant standard in most dual motive cases.

B. *The Setting-Specific Standards Were Deeply Flawed*

Substituting *Wright Line* for the setting-specific standards unacceptably weakens Section 7 protections, but the *General Motors* Board made credible points regarding the standards' problems with permissiveness and consistency.[212] First, the *Clear Pine Mouldings* picket line standard protected horribly abusive conduct against coworkers, including vilely racist and sexist behavior.[213] Based on this history, there seems little reason to believe that the standard can exist in harmony with Title VII and other antidiscrimination laws, thus putting labor law at odds with other vital workplace protections and tarnishing abused workers' views of the Board and organized labor more generally.[214] There is no persuasive reason to retain any of the *Clear Pine Mouldings* standard.

As the oldest of the three tests and the one which the *General Motors* Board could not associate with protecting the most troubling

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[209] *See id.* at 7–8, 13; *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 6 n.16 (stating that "precedent on disparagement or disloyalty" was outside the scope of the decision, and that such precedents regarding third-party communications were unaffected).

[210] *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 6 n.16 (citing *Jefferson Standard*, 346 U.S. 464) (concerning discipline over published and distributed handbills); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966) (concerning discipline over published leaflets); Desert Cab, Inc., 367 N.L.R.B. No. 87 (Feb. 8, 2019) (concerning discipline over private social media posts); Triple Play Sports Bar & Grille, 361 N.L.R.B. 308 (2014) (concerning discipline over a Facebook discussion).

[211] *See, e.g.*, *Jefferson Standard*, 346 U.S. 464; *Triple Play*, 361 N.L.R.B. 308.

[212] *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 6–12.

[213] *See supra* discussion I.D.

[214] Consolidated Commc'ns., Inc. v. NLRB, 837 F.3d 1, 23 (D.C. Cir. 2016) (Millett, J., concurring) ("Holding that such toxic behavior is a routine part of strikes signals to women and minorities both in the union and out that they are still not truly equals in the workplace or union hall.").

forms of abusive conduct, the *Atlantic Steel* standard is the least objectionable.[215] Even so, *Atlantic Steel* contained significant flaws. As *General Motors* pointed out, *Atlantic Steel*'s unweighted factors gave fact finders wide discretion to place more or less emphasis on certain factors in a given decision.[216] As a result, similar behavior would be found protected in one instance and to have lost protection in another.[217] That the second factor—subject matter of the discussion—was redundant also invited ALJs to accord varying degrees of significance based on preference.[218]

There are also problems with reviving *Atlantic Steel* that extend beyond its individual flaws. Reverting to such a recently disavowed standard will raise the unwelcome prospect that Boards will continue flipping back and forth between positions based on partisan leanings,[219] a problem the Board has encountered in other areas of labor law.[220] Establishing a new standard that incorporates *General Motors*'s criticisms may prevent this from happening and from entrenching uncertainty regarding abusive conduct standards.

Further, *Pier Sixty*'s nine-factor totality of the circumstances test presents even greater concerns around consistency and predictability than *Atlantic Steel*, concerns the *General Motors* Board pointed out were shared by the Second Circuit Court of Appeals.[221] The more factors in a test, the greater the discretion allowed to fact finders, and the incredible amount of discretion provided in *Pier Sixty*[222] should again give both employer and employee advocates pause given that political

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215 "[T]he Board's Notice cites no cases applying *Atlantic Steel* to protect racist or sexist slurs . . . and the [amicus] is aware of none." Brief for National Nurses United as Amici Curiae at 3, Gen. Motors LLC, 369 N.L.R.B. No. 127 (No. 14-CA-208242).

216 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 5–6 (comparing *Atlantic Steel* decisions).

217 *Id.*

218 *Id.* at 7.

219 In at least one instance, an ALJ has refused to recognize *General Motors*'s effect and instead applied *Atlantic Steel*, citing briefing by the General Counsel in which the General Counsel said that she intended to ask the Board to reconsider *General Motors*. Am. Med. Response Mid-Atlantic, Inc., No. 05-CA-221233, at 9 (N.L.R.B. Div. of Judges Sept. 8, 2021) ("[T]he General Counsel states that it intends for the Board to revisit its *General Motors* decision. In light of that intention, I hereby reiterate my conclusion that Respondent violated the Act under the *Atlantic Steel* precedent."). As of this Note's completion, the Board had not reviewed this ALJ disposition.

220 *See, e.g.*, William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 28–31 (2006) (describing how the Board has reversed itself regarding Weingarten rights multiple times).

221 *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 9; NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123–24 (2d Cir. 2017).

222 *Pier Sixty*, 855 F.3d at 123–24 (stating that the court was "not convinced the amorphous 'totality of the circumstances' [*Pier Sixty*] test" was sufficiently balanced but avoiding ruling on the test itself since it was not challenged by the employer).

winds and Board staffing can change rather quickly.[223] Even assuming a political vacuum, the discretion afforded fact finders when a test includes so many factors means that such a test will be tremendously difficult for the Board to apply consistently and predictably.[224]

Finally, although the *General Motors* Board did not mention this specifically, there are good reasons for worker advocates to be wary when it comes to numerous setting-specific tests. It stands to reason that the more varied and complicated tests for discriminatory discipline that exist, the more difficult for relevant parties to conform their behaviors appropriately. Greater confusion and uncertainty are likely to affect the less sophisticated party more severely, which in the Board's context is typically going to be the employees.[225] Thus, reducing the number of protected activity tests need not necessarily reduce workers' statutory rights; rather, reducing the number of tests may promise robust Section 7 protections and avoid past pitfalls.

III. PROPOSAL

A. *A New Test Should Replace* Wright Line *When Analyzing Abusive Conduct in the Course of Protected Activity*

Returning to the Board's pre–*General Motors* setting-specific protected activity tests would be a mistake, even if they could be improved by taking measures like adopting EEOC standards. Certainly, the Board should incorporate EEOC standards into all its motive tests as best it can,[226] but *General Motors* struck at Section 7 protections in ways that go beyond balancing the Act with Title VII and other federal antidiscrimination laws.[227] The *General Motors* Board did not clearly define "abusive conduct," but it seems apparent from its decision that

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223 Eli Rosenberg & Reis Thebault, *Biden Fires Trump-Appointed Labor Board General Counsel and Deputy Who Refused to Resign*, WASH. POST (Jan. 21, 2021, 7:05 PM), https://www.washingtonpost.com/business/2021/01/20/biden-fires-nlrb-peter-robb [https://perma.cc/FML9-GGYH].

224 *Pier Sixty*, 855 F.3d at 123–24.

225 *See generally* Lawrence Mishel, Lynn Rhinehart & Lane Windham, *Explaining the Erosion of Private-Sector Unions*, ECON. POL'Y INST. (Nov. 18, 2020), https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion [https://perma.cc/HW49-WNC9] (claiming that, among other things, legal resources and greater legal insight often give employers a large organizing advantage).

226 For some illuminating suggestions on how this may have been accomplished under the old setting-specific standards, see O'Brien, *supra* note 189; LeRoy, *supra* note 123.

227 *See* O'Brien, *supra* note 189, at 211 ("[T]he GM decision is also an advancement for management rights to stifle objection to the status quo.").

such conduct is not limited to racist, sexist, or otherwise prejudicial behavior.[228] Thus, employees who violate workplace policies in the exercise of Section 7 rights are now easier to discipline for exercising those rights, even when their conduct does not implicate Title VII or other workplace protections. This shift means that reversing *General Motors* and returning to the setting-specific approaches would be more in keeping with Section 7 than current Board law, but even so, reverting to the old standards is not the best solution.

Rather than resuscitate the setting-specific standards, the Board should adopt a new standard that this Note will call the Res Gestae standard. This standard should apply whenever an employer's discipline was provoked by abusive conduct committed in the course of protected activity, and should apply to the workplace, the Internet, the picket line, and wherever else it is useful.

The Res Gestae standard draws directly from *Atlantic Steel* and *Pier Sixty*, but with changes that reflect the criticisms advanced in *General Motors*. It is a three-factor test that considers: (1) the place of the outburst; (2) the nature of the outburst; and (3) whether the outburst was provoked.[229] Unlike the previous tests, these factors are weighted: if two factors favor an employee, then her activity retains protection. However, there should be one exception to this general rule: if the nature of the outburst includes threats of violence or derogatory conduct that significantly implicates other workplace protections—such as Title VII or the Americans with Disabilities Act—the second factor alone can outweigh the other two.

The Res Gestae test provides advantages that are missing from *Wright Line* and the old setting-specific standards. First, the test recognizes what the Board had long understood before *General Motors*, which is that the dual motive analysis for workplace discipline should be different regarding misconduct that occurs in the course of protected activity.[230] Such an analysis should allow greater expressive freedom to workers in an effort to prevent employers from punishing Section 7 activity, which this test does by drawing from previous tests that were crafted with that express goal. Moreover, the familiar language in the test should prove easy for ALJs to apply, even if the test is in other ways new.

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228 Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 8–9, 12–14 (July 21, 2020) (disapproving of decisions in which misconduct did not implicate other antidiscrimination statutes and listing "profane ad hominem attack[s]" as an example of abusive conduct).

229 The first two factors use language that closely mirrors factors one and three from Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979), while the third factor uses language similar to factor two from Pier Sixty, LLC, 362 N.L.R.B. 505, 506 (2015).

230 *See supra* notes 59–61 and accompanying text.

Second, this test incorporates responses to the more persuasive criticisms proffered by *General Motors*. In order to allow for greater consistency, there are only three factors in the Res Gestae test, and they are weighted. Further, unlike *Atlantic Steel* and *Pier Sixty*, the Res Gestae test does not include the subject matter factor, which as the *General Motors* Board pointed out, is redundant when considering simultaneous misconduct and protected activity.[231] For those who may worry that this change makes the test less protective for workers, the third factor in the Res Gestae test considers simply whether the worker was provoked, which is a lower standard than the similar factor in *Atlantic Steel*, which asks whether the worker was provoked by a ULP.[232] Thus, workers who respond to objectionable conduct by management in kind have potentially more leeway under this factor in the Res Gestae test, same as how the worker in *Pier Sixty* was considered provoked by "disrespectful" language from his manager even though such language did not constitute a ULP.[233]

Also, placing special weight and emphasis on the nature-of-the-outburst factor should help prevent the Board from protecting the hideous, racist conduct that the previous paradigm allowed while still granting more expressive freedom than *Wright Line*. To be clear, the second factor's focus should be whether the misconduct in the course of protected activity constituted violent threats or implicated other antidiscrimination protections, not whether it violated some broad notion of workplace "civility," the latter being an approach that would necessarily undercut vital Section 7 rights without sufficient justification.[234]

Stating when precisely a worker's threatening or discriminatory conduct is so abusive that she loses all protection based on the second factor alone will need to be developed over the course of numerous decisions, but greater focus on other antidiscrimination laws is a place to start. In recognition of the incredible array of fact patterns that the Board encounters, it seems wise to avoid being more prescriptive regarding this factor's analysis.[235] However, at least two points should

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[231] *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 7.

[232] Although ALJs would at times claim that *Atlantic Steel*'s fourth factor did not require a ULP finding, the Res Gestae test makes this explicit. *See* Pier Sixty, LLC, 362 N.L.R.B. 505, 507 n.4 (2015) (collecting decisions showing that provocation may exist absent ULPs).

[233] *Id.* at 506–07.

[234] *See generally* Corbett, *supra* note 220 (arguing that decisions prizing "civility" often come at the expense of Section 7 protections).

[235] One pre–*General Motors* proposal called for the Board to develop speech standards for determining when the *Atlantic Steel* nature-of-the-outburst factor should presumptively weigh against the worker. These standards were modeled on the Supreme Court's First Amendment

impart confidence that under Res Gestae the Board will not return to protecting hateful conduct: first, proposals exist for incorporating Title VII into § 8(a)(3) analyses, and there is no clear reason why those could not be adapted to the Res Gestae standard;[236] and second, the Res Gestae standard does not draw whatsoever from *Clear Pine Mouldings*, the setting-specific standard that had shielded the most despicable behavior.[237]

Third, reducing the number of tests would provide greater clarity for employees, unions, and employers.[238] The Res Gestae standard can accommodate the picket line, social media, and any other currently imaginable work-related setting while still safeguarding Section 7 and other workplace rights. Thus, the Res Gestae standard can improve clarity without sacrificing necessary protections.

B. *Applying the Res Gestae Standard to the Workplace*

Since the Res Gestae test's factors are largely modified versions of the *Atlantic Steel* factors, applying this test to the workplace should be relatively straightforward. Two examples from the ALJ's *General Motors* decision show when it may lead to similar or different outcomes from *Atlantic Steel*.[239] Like under *Atlantic Steel*, the Res Gestae test

jurisprudence, but with hate speech treated as an unprotected category for Act purposes. *See* Thelen, *supra* note 123, at 1007–08. While such an approach could certainly also be incorporated into the Res Gestae framework, this Note is wary about creating nesting dolls of tests within tests since the Board should be doing its best to limit the number of dual motive factors. *See supra* Section II.B.

236 *See supra* note 226 and accompanying text.

237 *See supra* notes 121–22 and accompanying text.

238 One interesting proposal calls for reinstating *Atlantic Steel* as the only setting-specific standard to apply when misconduct in the course of protected activity does not qualify as sufficiently "abusive," but applying *Wright Line* when such misconduct in the course of protected activity is "abusive" according to *General Motors*. *See* Thibodeaux, *supra* note 32, at 231. While this offers possible improvements over the current situation, this Note maintains that all misconduct in the course of protected activity should be held to a different standard from *Wright Line*. Deciding whether misconduct occurred in the course of protected activity is a more objective determination than whether the misconduct was severe enough to be "abusive," which will make it clearer to fact finders and parties which test is relevant in a given instance. In addition, the approach advocated here ensures that a more forgiving test will always apply to misconduct in the course of protected activity, which should be the case because as a rule, such instances demand greater Act protection. *See supra* Section II.A. Further, *Atlantic Steel*'s unweighted factors grant too much discretion to fact finders, *see supra* Section II.B, and creating a new test that addresses the problems raised by *General Motors* may present a less partisan looking outcome than simply reviving a standard that the *General Motors* Board disavowed.

239 While comparing possibly different results from applying the Res Gestae standard against a new *Wright Line* application would also be helpful, the number of relevant published decisions

would have found that Robinson's conduct during the first encounter was protected, and thus his discipline would still constitute a ULP according to the Res Gestae standard. However, the third incident's analysis may have yielded a different result from *Atlantic Steel* depending on some unclear details.

In the first incident, Robinson's abusive conduct occurred in the course of protected activity—discussing a possible CBA violation—and so the Res Gestae test would clearly apply.[240] In that incident, Robinson was speaking with a coworker in a place with few witnesses and he did not disrupt workplace operations, putting factor one, location, in his favor.[241] Second, Robinson never used language that implicated other workplace antidiscrimination protections or that constituted a violent threat, meaning that the nature-of-the-outburst factor would have been in his favor.[242] Telling a coworker to "shove the fuckin' cross-training up [his] ass"[243] may not have been the friendliest phrasing, but was not enough to weigh the second factor against him. Thus, unlike the *Atlantic Steel* analysis which always applied all four factors, at this point the Res Gestae analysis would result in a finding that Robinson retained protection because two factors favored protection, including factor two, which is the only individual factor that can outweigh the two others in the Res Gestae test.

However, the third incident's analysis may have turned out differently than it did under *Atlantic Steel*, depending on some unclear facts that a record developed with Res Gestae in mind could clarify. The third incident's location factor would again have favored Robinson because his misconduct occurred during a closed-door meeting.[244] Regarding the second factor, the influence of the Res Gestae test's modified nature-of-the-outburst factor would be unclear. The ALJ determined that the nature of the outburst weighed "heavily" against Robinson under *Atlantic Steel* because he told a coworker that he would

since *General Motors* was rather limited before this Note was published. A search on Westlaw for citations to *General Motors* in Board decisions found thirty ALJ or Board adjudications that cited it. But of those thirty, many did not actually apply *Wright Line* in place of the setting-specific standards and thus are not relevant here. *See, e.g.*, FDRLST Media, LLC, 370 N.L.R.B. No. 49, slip op. at 1 n.4 (Nov. 24, 2020) (refusing to apply *Wright Line* because employer motive was not at issue); Wendt Corp., 369 N.L.R.B. No. 135, slip op. at 3 n.10 (July 29, 2020) (citing *General Motors* for proposition that discriminatory behavior should be taken seriously in a case in which setting-specific standards would not have applied); Absolute Healthcare, No. 28-CA-267540, at 10 (N.L.R.B. Div. of Judges Feb. 8, 2022) (citing *General Motors* as a restatement of *Wright Line* but applying the latter in an instance in which setting-specific standards would not have applied).

240 Gen. Motors LLC, No. 14-CA-208242, at 18 (N.L.R.B. Div. of Judges Sept. 18, 2018).

241 *Id.*

242 *Id.* at 5, 20.

243 *Id.* at 15.

244 *Id.* at 24.

"mess" him up, played music with profane lyrics, and used profanity when he left the meeting.[245]

Under the Res Gestae test, the threatening language and the music may have set the nature-of-the-outburst factor against Robinson, but likely would not have weighed so heavily that the factor would be dispositive. The ALJ found that the threat was not credible, and there were conflicting accounts regarding what music was played and what its lyrics were.[246] Assuming a new record could not clarify what was played and to what extent the music may have implicated other antidiscrimination laws, the test would come down to whether Robinson's misconduct was provoked.[247] Using *Atlantic Steel*, the ALJ looked to whether Robinson was provoked by a ULP and found he had not been.[248] Under the Res Gestae standard, an ALJ would look to whether managers had themselves acted in a manner that may be seen as abusive or disrespectful, even if not in a manner that constituted a ULP.[249] Robinson may have been protesting what he believed was racist treatment by a manager, and a new record with the Res Gestae test in mind would perhaps shed light on this, potentially placing the final factor in Robinson's favor.[250] In fact, Robinson later claimed as much about his behavior.[251]

C. *Applying the Res Gestae Standard to the Picket Line*

The Res Gestae standard can also apply to the picket line.[252] The rebuttable presumption when analyzing abusive picket-line conduct

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245 *Id.* at 24–25.

246 *Id.* at 12–14.

247 The EEOC noted the music in its amicus brief but did not expressly argue that playing it may have violated Title VII. *See generally* Brief for Equal Employment Opportunity Commission as Amicus Curiae, *supra* note 144.

248 *Gen. Motors*, No. 14-CA-208242, at 25.

249 The ALJ did look to provocation more generally but did so as one component of the nature-of-the-outburst factor, not as a separate factor. *Id.* It is not clear if the analysis may have come out differently if the ALJ was focusing on non-ULP provocation as a distinct factor.

250 *See* Brief for National Nurses United as Amici Curiae, *supra* note 215, at 3 (suggesting that, "however ungracefully," Robinson was protesting perceived racist behavior).

251 Josh Eidelson & Hassan Kanu, *It's Now Even Easier to Fire U.S. Workers for What They Say*, BLOOMBERG L. (July 30, 2020, 6:14 AM), https://www.bloomberg.com/news/articles/2020-07-30/it-s-now-even-easier-to-fire-u-s-workers-for-what-they-say [https://perma.cc/Y2JV-85NB] (quoting Robinson as saying that "[t]he way [the GM colleagues] were talking to me was racist," and that "[t]hey always made me out like I was threatening and intimidating them in meetings because I'm Black, and because of my size").

252 For a proposal regarding how the *Atlantic Steel* four-factor test could apply to the picket line, see Thibodeaux, *supra* note 32, at 264–66.

should be that factor one—place—is in the worker's favor. This presumption recognizes that the picket line is a crucial site in labor struggles that is expressly protected by the Act, and one in which tempers run high.[253] Further, workplaces and picket lines are rather different settings, the latter being a site where an employer's policies should have less effect.[254] However, this factor-one presumption could be overcome by presenting evidence regarding where the disputed conduct occurred: a worker chanting with striking coworkers in the office parking lot is picketing, and thus would receive the presumption; a worker who breaks into the employer's building and smashes desktop computers while picketing happens to be occurring outside would not.

Although the Res Gestae factor-one presumption protects workers on the picket line more strongly than it does workers in the workplace, when picket line speech crosses into racist or sexist abuse or violently threatening behavior, ALJs can dispositively weigh the nature-of-the-outburst factor against the worker. None of the worst incidents involving racist and sexist picket line behavior that were protected by *Clear Pine Mouldings*—such as in *Cooper Tire*—would be shielded from employer discipline under the Res Gestae standard,[255] and the second factor's emphasis on attention to other antidiscrimination laws should make such outcomes clear to ALJs. Thus, the Res Gestae standard would forcefully strengthen picket line protections from where they stand post–*General Motors* without providing the leeway for abusive behavior that existed under *Clear Pine Mouldings*'s coercion standard.[256]

D. *Applying the Res Gestae Standard to the Internet*

Finally, the Res Gestae standard can apply to abusive conduct in the course of protected activity on the Internet. Although the *General Motors* Board referred to *Pier Sixty* as a social media standard[257] and scholarly attention has often focused on social media specifically in

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[253] *See* 29 U.S.C. § 158(b)(7); *Right to Strike and Picket*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/right-to-strike-and-picket [https://perma.cc/8XXC-FHZG] ("Under federal law, you cannot be fired for participating in a protected strike or picketing against your employer.").

[254] *See* Thibodeaux, *supra* note 32, at 265 ("Since striking employees are not in the working area or on company time, the employer does not have as strong of an interest in maintaining order.").

[255] *See, e.g.*, Board decisions cited *supra* note 122.

[256] *See* discussion *supra* Section I.D.

[257] Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 9 (July 21, 2020).

relation to online Section 7 activity,[258] there seems no reason to design a standard that only applies to social media instead of the Internet more generally.

The Res Gestae standard's online application presents a few distinctions from the workplace or the picket line, the most important of which relates to the first factor, place. Online protected activity always implicates at least two places: the physical place where the worker was when accessing the Internet, and the "place" on the Internet where the protected activity occurred. Reasonable minds can differ about which place should receive more focus in a protected activity analysis, and indeed, they have.[259] Since there may plausibly be any number of factual scenarios in which the worker's physical location at the time of her online protected activity may carry greater or lesser significance to an abusive conduct analysis, this Note does not maintain that fact finders should accord a certain amount of weight to either. Rather, the most important point is that by analyzing location in both physical and online platform terms, the Res Gestae standard can apply to protected activity on the Internet.

There are two more relevant distinctions regarding the Res Gestae online activity analysis. One is that unlike the picket line, the Internet is not a site with express Act protections.[260] As such, the rebuttable Res Gestae presumption in favor of workers regarding the place factor in a picketing analysis should not apply to online activity. Second, the limits to *General Motors* are most salient in connection with protected activity on the Internet.[261] As stated in *General Motors* and recognized by the First Circuit in *Maine Coast*, disparaging or disloyal conduct that takes the form of third-party communications is governed by a different set of precedents.[262] Thus, the Res Gestae standard would not apply to online conduct that was disloyal rather than abusive.

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258 *See, e.g.*, Elizabeth Allen, Note, *You Can't Say That on Facebook: The NLRA's Opprobriousness Standard and Social Media*, 45 WASH. UNIV. J.L. & POL'Y 195 (2014); Natalie J. Ferrall, Comment, *Concerted Activity and Social Media: Why Facebook Is Nothing like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1033 (2013).

259 *Compare* Nicholas H. Meza, Comment, *A New Approach for Clarity in the Determination of Protected Concerted Activity Online*, 45 ARIZ. STATE L.J. 329, 364 (2013) (arguing that *Atlantic Steel* should apply to online protected activity, but that "place"—when and from where the employee engaged in the online conduct—should have dispositive weight in some circumstances), *with* Thibodeaux, *supra* note 32, at 263 (arguing that "[t]he impact of a social media post depends more on what platform it was shared on" than where the worker physically was when making the post).

260 *See* 29 U.S.C. § 158(b)(7).

261 *See supra* notes 207–10 and accompanying text.

262 Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 9 n.16 (July 21, 2020); NLRB v. Me. Coast Reg'l Health Facilities, 999 F.3d 1, 12 (1st Cir. 2021).

CONCLUSION

The *General Motors* decision mischaracterized how important it is for a standard that is not *Wright Line* to govern misconduct in the course of protected activity, a standard that grants sufficient room for workers to exercise their Section 7 rights. But reviving the setting-specific standards would resurrect the complications of having different tests and the defects within each of those individual tests. By instead applying the Res Gestae standard to all instances in which the previous setting-specific standards would have governed, the Board's Section 7 protections will meet the Act's goals without replicating such issues.[263] Although this proposal cannot possibly remove all partisan influences from the Board, adopting a new test that responds to *General Motors*'s criticisms may prevent a cycle of setting-specific standard reversals and reaffirmations that leaves parties perpetually uncertain. The end result would be adopting a framework for judging abusive conduct upon which all interested parties should agree.

263 *See* discussion *supra* Part III.