STOKES WAGNER

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Abusive or Offensive Language is No Longer Protected Activity Says the NLRB In Its Recent Ruling

Under the National Labor Relations Act, workers engaging in a "concerted activity" with other employees, such as a union organizer or representative discussing conditions of employment with an employer, qualifies as a protected activity.

On Tuesday, the NLRB reversed an agency judge's ruling that General Motors violated the NLRA when it suspended an employee who lobbed the F–word at a supervisor. This decision replaces three context-specific rules laid out in three different cases with the well-known Wright Line test, which hinges on whether a worker would have been punished absent the protected activity. The board uses Wright Line in cases alleging an employer punished a worker for taking protected actions, such as striking or raising safety concerns. Under this test, board prosecutors bringing unfair firing cases must first prove the worker's protected activity factored into their discipline. Then, the employer gets a chance to prove it would have fired the worker absent the protected activity, such as by showing it fired other workers over similar outbursts. If the prosecutor stumbles on the first prong or the employer satisfies the second, the worker loses.

Prior to the NLRB's recent ruling, workers who cursed out their bosses or made racist comments were protected. Tuesday's decision clarifies that employers have the right to punish or terminate problematic employees who engage in workplace harassment.

Questions? Contact Stokes Wagner.