General Motors LLC *and* Charles Robinson. Cases 14–CA–197985 and 14–CA–208242

September 5, 2019

NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On September 18, 2018, Administrative Law Judge Donna N. Dawson issued a decision in the above-captioned case, finding that the Respondent violated the Act by suspending employee Charles Robinson because he directed a profane outburst at supervisor Nicholas Nikolaenko during an April 11, 2017 meeting in which Robinson was engaged in union activity.[1] The judge analyzed the case under the four-factor test set forth in *Atlantic Steel*, 245 NLRB 814, 816 (1979), for determining whether misconduct in the course of otherwise protected activity lost the employee the protection of the Act.[2] The judge found that under *Atlantic Steel*'s "nature of the employee's outburst" factor, Robinson's conduct was not as egregious as the outburst at issue in *Plaza Auto Center*, 360 NLRB 972 (2014).[3] The judge also found that the remaining three *Atlantic Steel* factors favored protection, and she concluded that Robinson's outburst did not lose the protection of the Act.

The judge then found that two subsequent outbursts by Robinson, on April 25 and October 6, lost him the protection of the Act. Both incidents involved altercations between Robinson and Manager Anthony Stevens. During the April 25 incident, Robinson directed racially charged language at Stevens. During the October 6 incident, Robinson played loud music that contained profane and offensive, racially charged lyrics each time Stevens entered or exited the room.[4]

In its exceptions brief, the Respondent asks the Board to overrule *Plaza Auto*, which it describes as an "ill-advised" decision "wholly at odds with the modern workplace" that "put[s] employers at risk of losing control of their employees and their employees' safety."[5] The Respondent likewise urges the Board to overrule *Pier Sixty, LLC*, 362 NLRB 505 (2015), enfd. 855 F.3d 115 (2d Cir. 2017), in which the Board found that an employee's profanity-laced Facebook posts attacking his supervisor did not lose the Act's protection. Similarly, the Respondent argues that while the judge correctly found that Robinson's attacks on Stevens were unprotected, she should have given more weight to their racially offensive nature. In this regard, the Respondent urges the Board to overrule *Cooper Tire*, 363 NLRB No. 194 (2016), enfd. 866 F.3d 885 (8th Cir. 2017), in which the Board found that an employee did not lose the protection of the Act when he shouted racially offensive statements at employees crossing a picket line.

Plaza Auto, *Pier Sixty* and *Cooper Tire* addressed circumstances in which extremely profane or racially offensive language was judged not to lose the protection of the Act. The Board's treatment of such language (as well as sexually offensive language) has been criticized as both morally unacceptable and inconsistent with other workplace laws by Federal judges[6] as well as within the

[1] While discussing, in his role as union committeeperson, overtime support for employees engaged in cross-training, Robinson told Nikolaenko that he did not "give a fuck about [his] cross-training" and that Nikolaenko could "shove it up [his] fucking ass."

[2] The *Atlantic Steel* factors are (1) the location of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked by the employer's unfair labor practices.

[3] In *Plaza Auto*, employee Aguirre called Tony Plaza, the owner of the business, a "fucking mother fucking," a "fucking crook," and an "asshole," told Plaza that he was stupid, nobody liked him, and everyone talked about him behind his back, and warned Plaza that if Plaza fired him, Plaza would regret it. 360 NLRB at 973.

[4] According to witnesses, the songs Robinson played included lyrics that were sexually as well as racially offensive.

[5] See Respondent's brief in support of exceptions at 5 fn. 1, 14–15.

[6] Although, as our colleague observes, the courts of appeals have not repudiated the Board's tests in this area, the vehemence of judicial criticism must give us pause. See, e.g., *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d at 894, 898 (Beam, J., dissenting) ("No employer in America is or can be required to employ a racial bigot. Indeed, . . . requiring . . . the petitioner to do so here is tantamount to requiring that Cooper Tire violate federal anti-discrimination and harassment laws, including Title VII and 42 U.S.C. § 1981, as well as numerous other similar state and local laws. . . . [T]he Board repeatedly broadens the protections for such repulsive, volatile, incendiary, and heinous activity time and again in cases such as these.") (internal quotation marks omitted); *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1, 20, 24 (D.C. Cir. 2016) (Millett, J., concurring) ("I write . . . to convey my substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace. . . . After all, the Board is a component of the same United States Government that has fought for decades to root discrimination out of the workplace. Subjecting coworkers and others to abusive treatment that is targeted to their gender, race, or ethnicity is not and should not be a natural byproduct of contentious labor disputes, and it certainly should not be accepted by an arm of the federal government."); see also *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) ("According to the Board . . . , it is perfectly acceptable to use the most offensive and derogatory racial or sexual epithets, so long as those using such language are engaged in union organizing or efforts to vindicate protected labor activity. Expecting decorous behavior from employees is apparently asking too

Board.[7] Mindful of this criticism, the Board now invites the parties and interested amici to file briefs to aid the Board in reconsidering the standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the Act. The Board asks the parties and *amici* to address either some or all of the following questions, as they see fit.

1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act? In *Plaza Auto*, although the nature of Aguirre's outburst weighed against protection, the Board found that the other three *Atlantic Steel* factors favored protection, and it concluded that Aguirre retained the Act's protection. And although the *Plaza Auto* majority did not say that the nature of the outburst could never result in loss of protection where the other three factors tilt the other way, it also did not say that it ever could. Are there circumstances under which the "nature of the employee's outburst" factor should be dispositive as to loss of protection, regardless of the remaining *Atlantic Steel* factors? Why or why not?

2. The Board has held that employees must be granted some leeway when engaged in Section 7 activity because "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.,* 282 NLRB 130, 132 (1986). To what extent should this principle remain applicable with respect to profanity or language that is offensive to others on the basis of race or sex?

3. In determining whether an employee's outburst is unprotected, the Board has considered the norms of the workplace, particularly whether profanity is commonplace and tolerated. See, e.g., *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982). Should the Board continue to do so? If the norms of the workplace are relevant, should the Board consider employer work rules, such as those that prohibit profanity, bullying, or uncivil behavior?

4. Should the Board adhere to, modify, or abandon the standard the Board applied in, e.g., *Cooper Tire*, supra, *Airo Die Casting*, 347 NLRB 810 (2006), *Nickell Moulding*, 317 NLRB 826 (1995), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), and *Calliope Designs*, 297 NLRB 510 (1989), to the extent it permitted a finding in those cases that racially or sexually offensive language on a picket line did not lose the protection of the Act? To what extent, if any, should the Board continue to consider context—e.g., picket-line setting—when determining whether racially or sexually offensive language loses the Act's protection? What other factors, if any, should the Board deem relevant to that determination? Should the use of such language compel a finding of loss of protection? Why or why not?

5. What relevance should the Board accord to antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act?[8] How should the Board accommodate both

much. . . . We do not share [this] low opinion of . . . working people . . . . America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who now condescend to them."). In any event, the Board does not require appellate court approval before it invites briefing regarding how best to administer the Act.

[7] See, e.g., *Plaza Auto*, 360 NLRB at 986 (former Member Johnson, dissenting) ("[I]n the modern, extensively regulated workplace, it is essential for an employer to proscribe profane behavior that could under other employment laws be viewed as harassing, bullying, creating a hostile work environment, or a warning sign of workplace violence. The Board is not an 'überagency' authorized to ignore those laws in its efforts to protect the legitimate exercise of Section 7 rights in both unrepresented and represented workforces.").

[8] The dissent says that we are addressing issues that are not presented. However, the facts of this case involve profanity as well as racially and sexually offensive language. And while the setting involves a workplace encounter and not picket-line or online conduct, the latter contexts are "not presented" only if one assumes that different loss-of-protection standards must apply in different settings, and we think it appropriate to invite briefing regarding the extent to which, if any, the Board should continue to do so. We take no position as to how that question or any question posed in this Notice and Invitation should be answered. Thus, the dissent is simply wrong when she says that we are "forecast[ing] the desire to limit the protections of Section 7" or "suggest[ing]" "changes" in the Board's loss-of-protection standards. The dissent also says that we should use rulemaking to address these issues, but "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

The dissent broadly claims that "the Board's decisions create no conflict with employer's obligations under Title VII," citing the Eighth Circuit's decision in *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d at 891–892. However, in *Cooper Tire*, a majority merely found that the statements at issue *in that case* did not create a hostile work environment. At least one other federal court of appeals has found that a single racially-charged slur directed towards an employee could support a hostile work environment claim. See *Castleberry v. STI Group*, 863 F.3d 259, 265–266 (3d Cir. 2017); see also *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d at 27 ("We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt [civility rules]. Under both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment."). Also relevant is a 2016 EEOC report that recommended the EEOC and the NLRB "confer, consult, and attempt to jointly clarify and harmonize the interplay of the [NLRA] and federal EEO statutes."

> employers' duty to comply with such laws and its own duty to protect employees in exercising their Section 7 rights?

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before November 4, 2019. The parties may file responsive briefs on or before November 19, 2019, which shall not exceed 15 pages in length. No other responsive briefs will be accepted. The parties and amici shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and amici are reminded to serve all case participants. A list of case participants may be found at https://www.nlrb.gov/case/14-CA-197985 and https://www.nlrb.gov/case/14-CA-208242 under the heading "Participants." If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C. September 5, 2019

John F. Ring,	Chairman
Marvin E. Kaplan,	Member
William J. Emanuel	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

As the Board and courts have long recognized, "[t]he protections Section 7 [of the National Labor Relations Act] affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses."[1]

The Supreme Court has recognized as much in establishing a heightened standard for allegedly defamatory statements made in the course of labor disputes.[2] The Board recently explained that its decades-old test for examining speech in the context of protected activity

> appropriately recogniz[es] that the economic power of the employer and employee are not equal, that tempers may run high in this emotional field, that the language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behavior is required . . . and offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service.

Constellium Rolled Products Ravenswood, LLC, 366 NLRB No. 131, slip op. at 3 fn. 12 (2018) (quoting *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976)). Not a single Federal appellate court has rejected the Board's general approach or its specific tests for determining whether an employee has lost the protection of the Act in particular contexts.

Yet today the majority forecasts the desire to limit the protections of Section 7 by overhauling the Board's well-established standards for evaluating when employees lose the protection of the Act based on their conduct during workplace meetings, while on the picket line, and in online posts. While I welcome the return (at least in this case) to the Board's sound, traditional practice of seeking public participation before reconsidering significant precedent, the scope of the majority's inquiry reaches far beyond the issues presented in this case, and the majority has offered no good reason for revisiting long-settled law.

This case involves the Respondent's three suspensions of employee Charles Robinson for his conduct during meetings with management. Applying the well-established standard set forth in *Atlantic Steel*,[3] the administrative law judge found that Robinson retained the protection of the Act during the first meeting but lost the protection of the Act during subsequent meetings. Rather than simply analyze whether the judge correctly applied *Atlantic Steel* to the facts here, the majority has

Chai Feldblum and Victoria Lipnic, *Select Task Force on the Study of Harassment in the Workplace* (available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm) (last visited 14 August 2019). The dissent dismisses the possibility that current interpretations of the Act could create a conflict with Title VII obligations, or at least one that would support any reconsideration of precedent. We believe the potential conflict is self-evident. Rather than debate with her whether revisions to precedent are therefore warranted, we believe the better course is to consider that issue after we have received and considered the views of interested parties.

[1] *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

[2] See *Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974).

[3] 245 NLRB 814, 816 (1979). In evaluating whether employees lose the protection of the Act based on their conduct during workplace meetings, the Board considers: (1) the location of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked by the employer's unfair labor practice.

decided to use this case as a jumping-off point to address issues that clearly are not presented, including the different tests the Board applies in determining whether employees lose the protection of the Act based on their speech while picketing and while online.[4] There was, of course, no picket line or online conduct at issue in this case. If the majority intends to engage in such a comprehensive rework of Board precedent outside the circumstances of the case at hand, rulemaking would be the appropriate procedure.[5] At the very least, the majority should wait for cases to arise that actually present the issues of interest, in real world factual contexts. Indeed, if several cases involving similar issues were pending before the Board, the majority could easily consolidate those proceedings for a more comprehensive review of the law. But rather than pursue any of these options, the majority has instead grown impatient and continued an unfortunate trend by using this case as a vehicle to reach out to address issues that are clearly not presented.[6]

Today's notice specifically targets three Board decisions for possible reversal: *Plaza Auto*, *Pier Sixty*, and *Cooper Tire*.[7] Two of the three decisions were enforced by Federal appellate courts, and the third (decided after a court remand) apparently was not challenged at all. In support of its inquiry, the majority cites criticism from one former Board Member and separate opinions by two individual circuit court judges.[8] The majority fails to grapple with the fact that while the courts may sometimes disagree with Board decisions applying the law to the facts of particular cases, no court has rejected the Board's legal approach in any of these areas.[9] The Fed-

[4] As the Board has recognized, the *Atlantic Steel* framework is not well-suited to evaluating employee speech on the picket line or online. See, e.g., *Triple Play Sports Bar & Grill*, 361 NLRB 308, 311 (2014) (explaining that *Atlantic Steel* "is tailored to workplace confrontations with the employer"), enfd. sub nom. *Three D, LLC v. NLRB*, 629 Fed.Appx. 33 (2d Cir. 2015). Instead, the Board evaluates picket-line misconduct under the standard set forth in *Clear Pine Mouldings*, considering "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to intimidate employees in the exercise of rights protected under the Act." 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). And the Board has applied a totality-of-the circumstances test in evaluating employees' online conduct. See, e.g., *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015).

[5] See, e.g., *Boeing Co.*, 365 NLRB No. 154, slip op. at 33–34 (2017) (Member McFerran, dissenting) (criticizing the majority's decision to use a case involving a single camera rule to set forth a new standard for evaluating all facially neutral work rules).

[6] See, e.g., *Ridgewood Healthcare Center, Inc.* and *Ridgewood Health Services, Inc.*, 367 NLRB No. 110, slip op. at 15 & fn. 6 (2019) (Member McFerran, dissenting) (collecting cases demonstrating the majority's pattern of overreach).

[7] *Plaza Auto Center, Inc.*, 360 NLRB 972 (2014); *Pier Sixty, LLC*, 362 NLRB 505 (2015), enfd. 855 F.3d 115 (2d Cir. 2017); *Cooper Tire & Rubber Co.*, 363 NLRB No. 194 (2016), enfd. 866 F.3d 885 (8th Cir. 2017).

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

The majority's citation to an EEOC task force report is also inapposite. The task force "recognize[d] that broad workplace 'civility codes' which may be read to limit or restrict certain forms of speech may raise issues under the [National Labor Relations Act], which is outside the jurisdiction of the EEOC." Chai Feldblum and Victoria Lipnic, *Select Task Force on the Study of Harassment in the Workplace* at 56 (available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm). Accordingly, the task force recommended that "EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes *with regard to the permissible content of workplace 'civility codes.* '" Id. at 69 (emphasis added). Nothing in the task force report suggests that Board doctrine at issue here was in any way inconsistent with federal equal employment statutes.

[9] The courts have enforced numerous Board decisions finding that employees did not lose the protection of the Act based on their language and conduct during workplace meetings, on the picket line, and in online posts. See, e.g., *Murray American Energy, Inc. v. NLRB*, 765 Fed.Appx. 443, 447 (D.C. Cir. 2019) (loud and rude language during workplace meeting); *Meyer Tool, Inc. v. NLRB*, 763 Fed.Appx. 5, 8 (2d Cir. 2019) (heated language and defiant conduct during workplace meeting); *Novelis Corp. v. NLRB*, 885 F.3d 100, 103, 108 (2d Cir. 2018) (vulgar online posts); *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d at 890–891 (racially offensive comments while on the picket line); *NLRB v. Pier Sixty, LLC*, 855 F.3d at 122–126 (profane language in online posts); *S. Freedman & Sons, Inc. v. NLRB*, 713 Fed.Appx. 152, 160 (4th Cir. 2017) (profane language during workplace meeting); *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1, 12 (D.C. Cir. 2016) (profane language and obscene and sexually offensive conduct on the picket line) *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 547–548 (6th Cir. 2016) (profane and threatening language during workplace meeting); *Three D, LLC v. NLRB*, 629 Fed.Appx. at 36–37 (profane language in online posts); *Kiewit Power Constructors Co*, supra, 652 F.3d at 27–28 (intemperate statements during workplace meeting); *Nevada Service Employees Union, Local 1107 v. NLRB*, 358 Fed.Appx. 783, 785 (9th Cir. 2009) (critical statements on website); *Wal-Mart Stores, Inc. v. NLRB*, 137 Fed.Appx. 360, 361 (D.C. Cir. 2005) (profane language during workplace meeting); *NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 211 (4th Cir. 2005) (loud and boisterous language during workplace meeting); *NLRB v. Honda of America Mfg., Inc.*, 73 Fed.Appx. 810, 814–816 (6th Cir. 2003) (insulting language in newsletter); *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1288 (10th Cir. 1980) (vulgar language during workplace meeting); *Allied Industrial Workers v. NLRB*, 476 F.2d 868, 879 (D.C. Cir.

eral courts have uniformly accepted that "not every impropriety committed during [otherwise protected] activity places the employee beyond the protective shield of the [A]ct" and that employees must be given "some leeway for impulsive behavior."[10]

The majority emphasizes potential tension between the Board's decisions and antidiscrimination laws, but the courts have made clear that the Board's decisions create no conflict with employers' obligations under Title VII.[11] The Supreme Court has said repeatedly that Title VII is not "a general civility code for the American workplace."[12] Neither is the National Labor Relations Act. It is not the role of the Board, in interpreting the Act, to make it as easy as possible for employers to maintain workplace decorum.[13] The role of the Board is to enforce the rights that the Act provides in support of the goals that the Act clearly sets out.[14]

The framing of the majority's inquiry, meanwhile, paints a false picture of the Board's jurisprudence in this area, implying that the Board always finds employee outbursts protected. But, contrary to the majority, our cases demonstrate that the Board has routinely found that employees lost the protection of the Act based on their misconduct.[15] Indeed, the judge found that the employee

1973) (obscene, threatening, and harassing language and conduct while on the picket line).

[10] *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). As the D.C. Circuit recently explained, "[t]he question . . . is not whether the outburst was something to be encouraged—no outburst is—but whether it was so unreasonable as to warrant denying protections that the Act would otherwise afford. . . . And, as we have stated before, that only happens when the employee's actions are not simply bad, but opprobrious." *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d at 27–28 (internal quotations omitted). See also *U.S. Postal Service v. NLRB*, 652 F.2d 409, 412 (5th Cir. 1981) (endorsing the Board's "reasonable and established policy that in the context of grievance meetings the Act should be lenient with spontaneous employee insubordination").

In the picketing context, meanwhile, the courts have recognized that "not every incident occurring on the picket line, though harmful to a totally innocent employer, justifies a refusal to reemploy a picketing employee for acts that exceed the bounds of routine picketing. Impulsive behavior on the picket line is to be expected especially when directed against non-striking employees or strike breakers." *Montgomery Ward & Co. v. NLRB*, 374 F.2d 606, 608 (10th Cir. 1967). Further, the courts have found that "some types of impulsive behavior must have been within the contemplation of Congress when it provided for the right to strike." *Allied Industrial Workers v. NLRB*, 476 F.2d at 879. See also *NMC Finishing v. NLRB*, 101 F.3d 528, 531 (8th Cir. 1996) ("We assume . . . that some obscenities hurled in the rough and tumble of an economic strike may, indeed, be protected speech. By that we mean, it may be misconduct but not misconduct that is sufficient to take the acts outside the protections afforded strikers under the NLRA.")

Regarding employee speech online, the courts have emphasized that the "location" of such speech "is a key medium of communication among coworkers and a tool for organization in the modern era." *NLRB v. Pier Sixty, LLC*, 855 F.3d at 125. With this principle in mind, the courts have cautioned against applying traditional "public outburst" analysis because it "could lead to the undesirable result of chilling virtually all employee speech online." *Three D, LLC v. NLRB*, 629 Fed.Appx. at 37; see also *NLRB v. Pier Sixty, LLC*, 855 F.3d at 125. And the courts have recognized that Board decisions finding employees did not lose the protection of the Act based on their obscene online posts "accords with the reality of modern-day social media use." *Three D, LLC v. NLRB*¸ 629 Fed.Appx. at 37.

In addition, the premise of the majority's inquiry seems to disregard the important statutory concerns and policy rationales underlying the Board's decisions. For example, the third question in the notice and invitation to briefs indicates that the majority may jettison any consideration of the norms of the workplace when determining whether an employee loses the protection of the Act. It would defy both common sense and decades of Board precedent in a variety of areas to disregard evidence of whether the employer consistently sanctions the use of profanities and other offensive conduct or whether the employer has only taken adverse action because such conduct occurred in the context of otherwise protected activity. See, e.g., *Coors Container Co.*, 238 NLRB 1312, 1320 (1978), enfd. 628 F.2d 1283, 1288 (10th Cir. 1980).

[11] *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d at 891–892 (surveying precedent and rejecting employer's argument that reinstating employee who made racially offensive comments would conflict with employer's obligations under Title VII). The majority argues that a single offensive remark could potentially create a hostile work environment claim under Title VII. However, as the Supreme Court has explained, "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Further, based on the facts of an individual case, the Board could readily find that extremely serious language was unprotected under extant precedent.

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

[13] Cf. *Meyers Industries, Inc.*, 281 NLRB 882, 888 (1986) (observing that Board "was not intended to be a forum in which to rectify all the injustices of the workplace" and is "not empowered to correct all immorality or illegality arising under all Federal and state laws"), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[14] The majority's apparent desire to restrict employees' protected concerted activity in the name of civility was already reflected in its holding that employer "civility" rules are always lawful to maintain, despite their predictable chilling effect. *Boeing Co.*, 365 NLRB No. 154, slip op. at 15 & fn. 76. As I pointed out in dissent, "common forms of protected concerted activity under the National Labor Relations act may reasonably be understood as uncivil" and "[w]ith respect to uncivil language, . . . the Supreme Court has observed that '[l]abor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions.'" See id., slip op. at 39–40 (quoting *Old Dominion Branch*, supra, 418 U.S. at 272). The combined effect of *Boeing* and the changes suggested by the majority today—particularly suggesting that an employer's civility rules should be relevant in defining what loses the Act's protections—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. Empowering employers to restrict the scope of Sec. 7's protections in this manner undermines the fundamental goals of the Act. 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 (2006).

[15] See, e.g., *KHRG Employer, LLC d/b/a Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 2 (2018) (finding employee lost the

lost the protection of the Act on two occasions here. Nothing in Board precedent, then, or in the decisions of the reviewing courts, suggests that there is something inherently wrong with the Board's approach. This case certainly could readily be decided under extant precedent—and it should be.

For all these reasons, I cannot support the majority's decision to comprehensively revisit the Board's loss-of-protection standards in this case. However, given that the majority is determined to proceed, I acknowledge that seeking public input before changing precedent is better than not doing so, and I will fully consider with an open mind whatever evidence and public input might result from the majority's request for briefing. I trust that my colleagues will do the same and remain equally open to adhering to current law.

Dated, Washington, D.C. September 5, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

protection of the Act while delivering employee petition based on security breach); *Public Service Co. of New Mexico,* 364 NLRB No. 86, slip op. at 7–8 (2016) (finding employee lost the protection of the Act during workplace meeting based on disruptive behavior); *Richmond District Neighborhood Center*, 361 NLRB 833, 835 (2014) (finding employees lost the protection of the Act based on Facebook posts advocating insubordination); *Gene's Bus Co.*, 357 NLRB 1009, 1009 fn. 4 (2011) (finding employee lost the protection of the Act based on disruptive behavior during workplace meeting).