UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC.

and **Cases 14-CA-197985**
14-CA-208242

CHARLES ROBINSON.

GENERAL COUNSEL'S BRIEF

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On September 5, 2019, the Board invited all interested parties to file briefs in the above-captioned case to determine whether individuals who engage in profane outbursts or offensive statements or conduct of a racial, sexual, or otherwise discriminatory or potentially discriminatory nature in the context of otherwise protected activity under the National Labor Relations Act ("NLRA" or the "Act") lose the protection of the Act, and whether the Board should overrule the standards it has applied to analyze these questions as articulated in *Plaza Auto Center, Inc.* (*Plaza Auto*), 360 NLRB 972 (2014), *Pier Sixty, LLC* (*Pier Sixty*), 362 NLRB 505 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017), and *Cooper Tire & Rubber Co.* (*Cooper Tire*), 363 NLRB No. 194 (May 17, 2016), *enforced*, 866 F.3d 885 (8th Cir. 2017). The Board further invited the parties to address the following five questions: (1) under what circumstances should profane or sexually or racially offensive speech lose the protection of the NLRA; (2) to what extent should employees be granted "leeway" when engaged in Section 7 activity with respect to the use of profanity or language that is racist, sexist or may otherwise tend to create an unlawful hostile environment; (3) should workplace norms and employer work rules be considered when determining if a profane or other offensive outburst is unprotected; (4) to what

extent should racially or sexually offensive speech lose the protection of the Act during picketing; and (5) should the Board consider and accommodate other federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1963, as amended ("Title VII"), in determining whether an employee's statements are protected by the Act. *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2019).

Summary of the General Counsel's Position

For the reasons discussed below, the Board should reexamine its standards and overrule its holdings in *Plaza Auto, Pier Sixty,* and *Cooper Tire* to the extent that they protect outbursts and statements that in and of themselves create or have the potential to create violence or a hostile work environment on the basis of a protected status such as race or gender. Employers have the authority and legal responsibility to insure employees' rights to a workplace that is safe and free of discrimination, harassment, or violence. It is thus axiomatic that employers must be able, through discipline, to deter employees who engage in conduct that may lead to violence or is unlawful or potentially unlawful under other federal laws without being penalized by the Board for doing so.

The NLRA should therefore be interpreted in harmony with other federal laws as part of a comprehensive federal scheme to protect employee rights in the workplace. This means that certain employee rights and protections, such as those under the NLRA, should not be interpreted to override other employee rights and protections pursuant to other laws. Although the NLRA preceded the enactment of other federal anti-discrimination laws, the protections it affords were never meant to supersede and trump the protections provided by all future anti-discrimination laws or protect employees who engage in conduct prohibited by other federal laws. Indeed, there

is no language in the Act that suggests that NLRA protections preempt or override all other employee workplace protections.

Unfortunately, current Board law, as articulated in the *Plaza Auto*, *Pier Sixty*, and *Cooper Tire* decisions, effectively gives primacy to NLRA protections and overrides employee protections under other federal laws, including discrimination laws. This is contrary to U.S. Supreme Court precedent, which requires that federal laws be read in harmony so as to effectuate the purposes of each statute. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (May 21, 2018) (citing *Morton v. Mancari*, 417 U.S. 535 (1974)) (holding that the Federal Arbitration Act and NLRA should be interpreted to effectuate the purposes of both statutes). *See also United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible."). The NLRA should be interpreted to permit, and not negate, the efforts of employers to comply with the federal discrimination laws, such as Title VII. Thus, consistent with Supreme Court precepts, employers should be allowed to take corrective action concerning harassing conduct in the workplace, even if it occurs in the context of otherwise-NLRA-protected activity, to prevent the occurrence of actionable discrimination under other discrimination laws. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (holding that employer must take steps to prevent discriminatory or harassing conduct because the "primary objective" of Title VII is "to avoid harm"). *See also* Brief of the Equal Employment Opportunity Commission ("EEOC") as Amicus Curiae at 18–20 (Nov. 4, 2019).

To ensure that the Act does not conflict with an employee's right to a safe and discrimination-free workplace, the Board should overrule the *Plaza Auto*, *Pier Sixty*, and *Cooper Tire* decisions and develop a new standard to apply to all conduct that is racist, sexist, or could reasonably lead to violence, ensuring that it never enjoys the protection of the NLRA.

Specifically, conduct or speech that an affected employee would reasonably find contributes to a hostile work environment or creates a situation that could reasonably lead to violence must never be protected by the Act. As for profanity not involving potential discrimination, the Board should analyze such behavior with respect to the degree to which the outburst is insubordinate, focusing on the effect of the behavior on the actual workplace, rather than some hypothetical "typical" workplace norm.

With respect to the five specific questions posed by the Board, the General Counsel recommends that the Board reexamine its current standards and apply the following principles to discriminatory speech and profanity not involving potential discrimination.

First, the *Atlantic Steel* factors should not apply where the conduct or "outburst" in itself constitutes unlawful discrimination or could lead to an unlawful hostile work environment or potential violence. Thus, where inflammatory offensive language that could lead to a hostile environment is used during the course of otherwise protected activity, the *Atlantic Steel* factors concerning the location of the conduct, the subject matter of the discussion, and whether an unfair labor practice "provoked" the "outburst" are irrelevant and should not be considered. Use of the *Atlantic Steel* factors analysis should be limited to the use of profanity unrelated to discriminatory or violent speech or conduct and such behavior should be assessed as a form of insubordination.

Second, there should be no "leeway" for racist or sexist or otherwise discriminatory comments, even if engaged in as an "outburst" in "reaction" to another person's conduct. Recognizing that labor disputes may provoke strong feelings and language, there is simply no reason or excuse for them to engender the eruption of discriminatory invective or conduct or for

the Act to protect such conduct. The Act should neither provide a platform for racist and sexist speech nor a refuge for those who engage in it.

Third, the Board should give effect to work rules that prohibit profanity, bullying, and uncivil behavior in determining whether an employee's outburst is unprotected. Such rules are in place to prevent such behavior and to protect employees from such conduct. The Board should not therefore consider whether profanity is nevertheless commonplace in the workplace but should focus on the extent to which the employer has enforced its work rules.

Finally, as extensively discussed above and below, the other federal anti-discrimination laws are extremely relevant in determining whether an employee's statements lose the protection of the NLRA. The NLRA and the panoply of other federal discrimination laws not only should be read in harmony with each other, but they also must be considered as a comprehensive scheme of employee protections that work together to create a safer and discrimination-free workplace for all employees in the private sector. The NLRA should not and cannot be applied in a vacuum; nor should the Board presumptuously read the Act as primary and preemptive of all other federal workplace statutes.

Rather, the Board should recognize that employers, in regulating their workplaces, have a duty to comply with a multitude of anti-discrimination laws and should not require them to engage in a Hobson's Choice of having to decide with which federal labor laws to comply. By finding unprotected under the NLRA offensive, racist, and sexist conduct, the Board will not only permit employers to comply with their Title VII obligations, but will further effectuate the purposes of the NLRA in protecting employees' rights to a safe workplace free of violence and harassment on any unlawful basis.

I. Statement of the Case

On October 31, 2017, the Regional Director for Region 14 issued a consolidated complaint alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending an African-American shop steward three times for his conduct in the course of his meetings with management, once for telling a manager to shove a specific program "up his f***in' a**" during a contract dispute, once for speaking in a "mock servile" or "slave voice" during an argument with management, and once for telling a manager he would "mess him up" and playing loud music with offensive lyrics during a union-management meeting. The case was heard on November 14, 2017 before Administrative Law Judge ("ALJ") Donna N. Dawson, who issued her decision on September 18, 2018 finding that the loud offensive music and the servile voice lost him the protection of the Act, while the profanity during the contract dispute did not. Both the Region and the Respondent filed exceptions to the ALJ's decision on October 31, 2018.

II. Argument

A. The Current Board Law

As noted in the invitation to file briefs, the current Board law's protection of profane and bigoted outbursts in the course of otherwise-protected concerted activity has sparked derision, ridicule, and outrage from courts of appeal, academia, the bar, and dissenting Board members, coming from a wide range of the political spectrum. These critics have called attention to the fact that the Board's holdings not only conflict with Title VII and the state anti-discrimination laws in finding protected under the NLRA racist and sexist conduct that is unlawful under Title VII but also in harboring to the point of condoning otherwise opprobrious conduct. *See* Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017

U. Chi. Legal F. 235, 262 (2017). Indeed, the courts of appeal have expressed "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 . . . ." *Consol. Commc'ns v. NLRB*, 837 F.3d 1, 20 (D.C. Cir. 2016) (Millett, J., concurring in decision which she also authored). They have criticized the Board for decisions that "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." *Consol. Commc'ns*, 837 F.3d at 21 (Millett, J., concurring).

To the extent that the current legal analysis and standards used by the Board in reviewing such conduct yields these disparate results between the Act and other federal discrimination laws, the Board's standards should be changed. The Board must no longer allow the Act to become a shield for racists and bigots. Michael H. LeRoy, *Slurred Speech: How the NLRB Tolerates Racism*, 8 Colum. J. Race & L. 209, 212–13 (2018) (noting reemergence of white supremacy and how current Board doctrine can be exploited). Employers must be allowed to protect their employees by "nipping in the bud" the kinds of employee conduct that could lead to a "hostile workplace," rather than waiting until an actionable hostile workplace has been created before acting.

Although the Board is legally required to balance the Section 7 rights of employees against the right of those employees to a safe workplace free of racial and sexual discrimination, the Board has utterly failed to so. *See* Ryan H. Vann & Melissa A. Logan, *The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Management Perspective*, 33 ABA J. Lab. & Emp. L. 291 (2018). As a result, the Board's current standards for addressing racist and sexist conduct *infringe* on employee rights and put employers "on the horns of a federal agency dilemma—investigate and punish harassment to avoid the wrath of the

EEOC or let harassers off without discipline to avoid NLRB sanctions." Vann & Logan, 33 ABA J. Lab. & Emp. L. at 292.

The Board has repeatedly ignored the rights guaranteed to employees by Title VII and other anti-discrimination statutes and has "impermissibly fetter[ed] the ability of employers to comply with the requirements of other labor laws." *Fresenius USA Mfg.*, 358 NLRB 1261, 1269 (2012) (Member Hayes, dissenting), *vacated*, 362 NLRB 1065 (2015). The Board's more recent picket line misconduct cases demonstrate the woeful inadequacy of its efforts to seriously consider competing legal requirements in the workplace. *See, e.g.*, *Airo Die Casting*, 347 NLRB 810, 811 (2016) (affording protection to picketing employee who approached a car carrying African American security guard with raised middle fingers yelling "f** you [n-word]"); *Detroit Newspapers*, 342 NLRB 223, 268–69 (2004) (affording protection to picketer who was fired after blocking a coworker's exit, repeatedly using the "n-word" and other profanities, referring to a coworker as a "whore," and telling her he hoped her children died). For instance, in *Cooper Tire*, 363 NLRB No. 194, slip op. at 4, 7–10, the Board absurdly found statements by white picketers to black employees of "did you bring enough KFC for everyone," "go back to Africa, you bunch of f***ing losers," and "I smell fried chicken and watermelon" protected. As Judge Beam noted in his dissent to the enforcement decision, the Board's reinstatement order there "is tantamount to requiring that Cooper Tire violate federal anti-discrimination and harassment laws, including Title VII." *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885, 894 (8th Cir. 2017). More importantly, in its single-minded focus on Section 7 rights, the Board myopically ignored equally important employee rights to work free of racial harassment. Amazingly, the Board at no point in its decision even mentioned Title VII or anti-discrimination law.

There are a few instances in which the Board has recognized that it "must take into account an employer's legitimate interest (and perhaps legal obligation) to refrain from having an offensive working environment." *Honda of America Mfg.*, 334 NLRB 746, 748 (2001). Indeed, where the Board has given real consideration to these negative effects, it has found the conduct unprotected by the Act. In *Avondale Industries*, 333 NLRB 622, 637–38 (2001), the Board held that the employer lawfully discharged a union activist for insubordination based on her unfounded assertion that her foreman was a Klansman, because the employer was justifiably concerned about the disruption her remark would cause in the workplace among her fellow African-American employees. And, in *Honda of America Mfg.*, the employer lawfully disciplined an employee for distributing a newsletter in which he directed one named employee to "come out of the closet" and used the phrase "bone us" to critique the employer's bonus program. 334 NLRB at 747.

The Board concluded that such language was unprotected because of its negative impact on the workplace and quoted approvingly an earlier decision:

> In view of the controversial nature of the language used and its admitted susceptibility to derisive and profane construction, [the employer] could legitimately ban the use of the provocative [language] as a reasonable precaution against discord and bitterness between employees and management, as well as to assure decorum and discipline in the plant.

Id. at 749 (quoting *Southwestern Bell Telephone Co.*, 200 NLRB 667, 670 (1972)). *See also Veterans Admin.*, 26 FLRA 114, 116 (1987) (finding racial stereotyping unprotected and upholding employer's discipline of union president for calling a manager the "spook who sat by the door" and an "Uncle Tom" in union newsletter advocating his removal), *aff'd per curiam sub nom. AFGE v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989). Similarly, recently the Board has held that it considers workplace civility rules to be presumptively lawful because such rules further an

"employer's legal responsibility to maintain a work environment free of unlawful harassment based on sex, race or other protected characteristics" and the rules would not, when reasonably interpreted, "prohibit or interfere with the exercise of NLRA rights." *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15 (Dec. 14, 2017).

Nevertheless, the current Board standards for reviewing conduct that is discriminatory or has the potential to create a hostile work environment are an incoherent hodgepodge that yield dubious results. Currently, the Board treats racist and sexist speech the same way it treats other opprobrious language, using different standards depending on the situation. For instance, at the workplace, bigoted language in the course of otherwise protected concerted activity is gauged to determine whether the negative effect on discipline and respect outweighs the leeway for impulsive employee behavior. *See Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). For offensive speech in public and on social media, the Board applies a "totality of the circumstances" test that adds several factors to the original *Atlantic Steel* test*Pier Sixty*, 362 NLRB at 506. And racist and sexist language on the picket line is evaluated to determine if it is coercive or threatening. *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985). Yet, by treating hate speech the same as insubordinate outbursts or schoolyard insults on the picket line, the Board ignores the power of those words and the effect they have on workers and employers, regardless of the location at which they are uttered or medium through which they are delivered.

As for judging potentially violent conduct, the Board currently applies an objective standard as to whether an employee's statement is a physical threat, ignoring the subjective interpretation of the involved parties. *See Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 28–29 & n.2 (D.C. Cir. 2011) (agreeing with Board that statement that supervisor better bring his boxing gloves was not meant literally and was not reasonably threatening). This rule completely

ignores when an employee's conduct creates a situation that could reasonably lead to violence, endangering all employees, even if they do not make a specific threat. In fact, none of these tests give adequate consideration to employees' right to be free of harassment and violence.

These disparate, inconsistent, and incoherent standards, which yield dubious conclusions that protect violent, offensive, and discriminatory speech and conduct, require review and overhaul to create standards that better conform to existing federal and state law as well as current workplace norms and work rules.

B. The Act Does Not Supersede Other Federal Employment Laws.

The Board is not an "ϋberagency" authorized to ignore federal employment laws in its efforts to protect the legitimate exercise of Section 7 rights. *Plaza Auto*, 360 NLRB at 986 (Member Johnson, dissenting). Supreme Court precedent directs that the Board must consider the objectives of other federal statutes when remedying unfair labor practices. *See, e.g., Southern Steamship v. NLRB*, 316 U.S. 31 (1942) (denying enforcement of Board order of reinstatement of thirteen seamen who had engaged in a peaceful strike and had refused their supervisors' orders to prepare their ship to leave the dock, but which constituted an unlawful mutiny under 18 U.S.C., §§483 & 484). The Court noted that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives" and that "it is not too much to demand of an administrative body that it undertake this accommodation [of equally important Congressional objectives] without excessive emphasis upon its immediate task." *Id.* at 47. *See also Hoffman Plastic Compounds*, 535 U.S. 137, 143–44 (2002) (refusing to enforce a Board order awarding backpay to an undocumented immigrant who had been fired for engaging in protected activity on

the grounds that such an award would run counter to the Immigration Reform and Control Act of 1986 (IRCA)).

Under Title VII an employer is required to take steps to prevent unlawful discrimination or harassment from occurring. Thus, the Board's "actions should not easily supersede an employer's efforts to prevent a hostile environment from arising" in the first place. Green, 2017 U. Chi. Legal F. at 262. Nipping a hostile work environment in the bud is best achieved by taking immediate and appropriate action *whenever* harassment occurs, a policy that the Board currently forbids. *See* EEOC, *Best Practices for Employers and Human Resources/EEO Professionals: How to Prevent Race and Color Discrimination*, https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm (last visited Oct. 23, 2019).[1]

Similarly, employees have a right to a workplace free from violence. According to the Occupational Safety and Health Administration ("OSHA"), "[o]ne of the best protections employers can offer their workers is to establish a zero-tolerance policy toward workplace violence." OSHA, *Workplace Violence*, https://osha.gov/SLTC/workplaceviolence/ (last visited Oct. 17, 2019). However, the Board regularly minimizes threats of violence in the workplace, and protects objectively threatening conduct that should be nipped in the bud to prevent actual violence. In *Plaza Auto Center*, 360 NLRB at 976, after spewing a torrent of obscenities at his

[1] The Board's current treatment of racist and sexist language is also in tension with many state and municipal anti-discrimination laws. Many such entities have strengthened their own equal employment and harassment laws and ordinances to impose even greater obligations on employers than Title VII. Vann & Logan, 33 ABA J. Lab. & Emp. L. at 301. For instance, the California Fair Employment and Housing Act makes it unlawful for a company to "fail[] to take immediate and appropriate corrective action" when it knows or should have known of sexual harassment, imposing personal liability. Cal. Govt. Code § 12940(j)(1) (West 2019). In Colorado, an employer will be held liable anytime a harassment complaint is filed and the employer does not initiate an investigation and "take prompt remedial action if appropriate." Colo. Rev. Stat. § 24-34-402(1)(a) (West 2017).

bosses, an employee stood up while knocking his chair over in such a manner that caused the managers to spring from their chairs in anticipation of violence. The Board found that the employee had not been objectively menacing, physically aggressive, or belligerent despite the fact the employee took actions that, in the confines of a small office, could have easily led to violence. *Id. See also Postal Service*, 364 NLRB No. 62 (July 29, 2016) (finding a steward's conduct protected when, during a grievance meeting she began cursing the manager and then virtually chased her from the room); *Greyhound Lines, Inc.*, 367 NLRB No. 123 (May 6, 2019) (finding protected steward's actions in cursing out a supervisor, shaking his finger in the supervisor's face, and swinging his hand across his body in a manner that caused the supervisor to ask if he was about to be hit). To prevent violence in the workplace, employers should not have to wait until employees are injured or killed before acting to prevent actions that may reasonably lead to violence.

The unfortunate result of the Board's standards of review in this area is that the Act has become a shield for unlawful discrimination and a refuge for inappropriate language, threats of violence, and racist speech. Michael H. LeRoy, *Slurred Speech: How the NLRB Tolerates Racism*, 8 Colum. J. Race & L. 209, 224 (2018) (citing *Bethlehem-Alameda Shipyard, Inc.*, 53 NLRB 999 (1943) (approving representation petition from segregated union); *Larus & Brother Co.*, 62 NLRB 1075, 1082 (1945) (finding lack of authority to pass upon racial eligibility requirements for membership in a labor organization)); *See Airo Die Casting*, 347 NLRB at 810 n.3 (finding use of the n-word protected). Consequently, the Board has protected employees who have targeted coworkers based on their race or gender, or with potential violence, ignoring the harm inflicted on the rights of the affected employees.

The Board must recognize that racist, sexist, and potentially violent conduct is deeply harmful to employees' right to a safe and discrimination-free workplace. As Judge Millett observed in *Consolidated Communications*, targeted racial or sexual degradation of others is "categorically different" than other "rough words." 837 F.3d at 21 (Millett, J., concurring). Racist and sexist speech wreaks extensive damage on employees and business. "It will often be quite hard for a woman or minority who has been on the receiving end of a spew of gender or racial epithets—who has seen the darkest thoughts of a co-worker revealed in a deliberately humiliating tirade—to feel truly equal or safe working alongside that employee again." *Id*. at 23 (Millett, J., concurring). Such language also incurs tremendous costs to an employer's efficient operation by having incivility and bullying permeate the workplace through the use of racial epithets or sexist statements. Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017 U. Chi. Legal F. 235, 262 (2017).

Moreover, this harm to employee rights occurs whenever an employee makes a bigoted comment to another, even on the picket line. Picketing does not "insulate the volatility and heinous nature of racist, or sexist remarks." *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d at 897–98 (Beam, J., dissenting). As Judge Millett stated, the assumption that such language is somehow different when it takes place on the picket line as opposed to the shop floor "blinks reality." *Consol. Commc'ns*, 837 F.3d at 23 (Millett, J., concurring). The Board ought to consider the future suitability of an employee who is "now well-established as a racial bigot" as a continuing member of the workforce. *Cooper Tire*, 866 F.3d at 896 (Beam, J., dissenting). Even worse, the Board has condoned and privileged the bigoted misconduct.

In addition to these harms, by protecting racist and sexist speech in the course of union conduct, the Board allows bigotry to pervade both the workplace and the unions which represent

units of employees. "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." *Consol. Commc'ns*, 837 F.3d at 23 (Millett, J, concurring). Indeed, unions have been held liable in federal court for creating hostile work environments on the picket line. *See Dowd v. United Steelworkers, Local No. 286*, 253 F.3d 1093, 1101–02 (8th Cir. 2001).

Like bigotry and sexism, violence both in the workplace and in everyday life has also had an increasingly detrimental effect on employees. Workplace violence is an epidemic in the United States. Robert J. Dignam, *There is More to Fear than Fear Itself: The National Labor Relations Board's Attack on Purposeful and Necessary Workplace Conduct Rules*, 52 Val. U. L. Rev. 395, 445 (2018). *See also* National Safety Council, *Assault at Work*, https://injuryfacts.nsc.org/work/safety-topics/assault/data-details (last visited Oct. 15, 2019) (showing a rise in assaults at work from 11,690 in 2011 to 18,400 in 2017).

Aside from negative effects on employee rights, employers, and unions, bigoted language and potentially violent conduct serve no purpose under the Act. Hate speech does not convey any message about workplace injustice or terms and conditions of employment, nor are racist and sexist remarks related to persuasion for an employee's cause. *Consol. Commc'ns*, 837 F.3d at 21 (Millett, J., concurring). "Such language and behavior have nothing to do with attempted persuasion about the striker's cause. Nor do they convey any message about workplace injustices suffered, wrongs inflicted, employer mistreatment, managerial indifference, the causes of employee frustration and anger, or anything at all of relevance about working conditions or worker complaints." *Consol. Commc'ns*, 837 F.3d at 22 (Millett, J. concurring). Discriminatory and degrading stereotypes are not legitimate weapons in disputes carried out on the picket line. *Cooper Tire*, 866 F.3d at 896 (Beam, J., dissenting). "It is both 'preposterous' and insulting to

ensconce into labor law the assumption that 'employees are incapable of organizing a union or exercising their other statutory rights under the National Labor Relations Act without resort to abusive or threatening language' targeted at a person's gender or race." *Consol. Commc'ns*, 837 F.3d at 22 (Millett, J. concurring) (quoting *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001)). Indeed, the Board has in other contexts identified the fact that racist conduct has no place in labor relations. In *Sewell Mfg. Co.*, 138 NLRB 66, 71 (1962), the Board recognized that, in the context of representation elections, appeals to racial prejudice, even in the absence of threats of physical violence, can be an especially powerful emotional force which "is not intended or calculated to encourage the reasoning faculty."[2]

C. Conduct That Can Reasonably Lead to A Hostile Environment Is Unprotected.

With no redeeming value and inevitable harm, potentially violent conduct and racist and sexist speech are fundamentally unprotected by the Act, and the Board must always treat them as such.[3] Specifically, when in the course of otherwise-protected concerted or union activity, an employee engages in conduct that an affected employee would reasonably view as contributing to a hostile work environment under Title VII or as creating a situation that could reasonably lead to violence, that conduct must not receive the Act's protection. As noted above, while under current law, no one epithet will generally *create* an unlawful hostile work environment, any

[2] In *Sewell* the Board established that a "deliberate, sustained appeal to racial prejudice" could create conditions that "made impossible a reasoned choice of a bargaining representative." *Case Farms of N.C. v. NLRB*, 128 F.3d 841, 845 (4th Cir. 1997) (quoting *Sewell*, 138 NLRB at 70) (finding flier that stated employer had replaced Amish workers with Latinos because it could pay them less was not racially inflammatory).

[3] Note that even where charging parties used racist or sexist language, discipline against them may still be unlawful where they can show that similarly situated employees not engaged in protected concerted activity were not disciplined.

racial or sexual epithet can *contribute* to one if it is repeated enough times. Generally, a hostile work environment will only result after an accumulation of discrete instances of harassment. *Boyer-Liberto v. Fontainbleau Corp.*, 786 F.3d 264, 273 (4th Cir. 2015) (en banc) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)). Any given racial epithet "is the stuff of which a racially hostile work environment is made." *Id*. (referring to a co-worker's comment about "black monkeys" to African-American employee). Thus, if an employee affected by racist or sexist conduct would reasonably view it as contributing to a hostile work environment, finding that conduct protected by Section 7 would create an immediate conflict between the Act and other equally important laws governing employee rights. But, as discussed above, there is no reason for such conduct to be protected by Section 7, and thus no call for the Board to ever cause such a conflict. The Board must focus on the effect of the conduct on employee rights; therefore, this standard is easily applicable in any situation, whether on the shop floor, online, or on the picket line.

Similarly, finding unprotected any conduct that the recipient would reasonably believe creates a situation that could lead to violence better protects employees' right to a safe workspace. As noted above, the Board's current standard of determining whether conduct is objectively coercive or threatening ignores situations where employee conduct may precipitate immediate violence. Aggressive lunges and knocking over furniture, for instance, even in the rare situation it would not objectively threaten someone, would certainly create reasonable fear that violence may be imminent. *Cf. Plaza Auto Center*, 360 NLRB at 976 (finding such conduct not objectively threatening); *Postal Service*, 364 NLRB No. 62, slip op. at 4 (same). Tailgating strikebreakers or supervisors can also precipitate violence, *see, e.g. Universal Truss, Inc.*, 348 NLRB 733, 733–34 (2006) (explaining tailgating incident that resulted in assault and

hospitalization), but the Board has found that such activity is not objectively coercive. *See Altorfer Machinery Co.*, 332 NLRB 130, 141 (2000) (citing *NLRB v. Otsego Ski Club*, 542 F.2d 18 (6th Cir. 1976) (per curiam)). Employees fearing for their safety may react violently. Moreover, even if there is no overt reaction, the victim may fear future encounters. To prevent such situations, the Board must adopt a standard under which conduct that could lead any employee to fear violence may ensue is not protected, rather than merely gauging if the employee has made an actual threat. In so doing, the Board will better enable employees to be free from potentially violent activity in the modern workplace.

In addition to harmonizing the Act with other employee rights and better addressing potential violence, basing the new standard on how affected employees would reasonably interpret the conduct at issue will enable the Board's rulings to evolve as societal norms regarding bigotry, sexism, and potentially violent situations evolve.

D. Profanity Should Be Analyzed under Certain *Atlantic Steel* Factors.

Addressing the other part of the Board's query, while the factors enunciated in *Atlantic Steel Co.*, 245 NLRB 814 (1979), should be among all the circumstances considered in assessing profane workplace outbursts that do not involve discriminatory or violent speech. the Board must revise the weight given to each factor, especially the third factor—the nature of the employee's outburst.[4] While under *Atlantic Steel* employees are "permitted some leeway for impulsive behavior when engaged in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty Co.*, 313 NLRB 1289, 1290 n.3 (1994) (citing *NLRB*

[4] Note that *Atlantic Steel* is not the same standard as the "unfit for further service" standard Member McFerran mentions in her dissent to *General Motors LLC*, 368 NLRB No. 68, slip op. at 3. The Board has distinguished that standard as not applicable to outbursts in the workplace. *Meyer Tool, Inc.*, 366 NLRB No. 32, slip op. at 1 n.2 (Mar. 9, 2018), *enforced mem.*, 763 F. App'x 5 (2d Cir. 2019).

v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965)). As Member Johnson noted in his dissent in *Plaza Auto*, the *Atlantic Steel* standard is designed to give employees "some leeway," not "substantial leeway, not maximum leeway, and certainly not unrestrained freedom," to engage in impulsive behavior. 360 NLRB 972, 985 (2014). When an outburst is sufficiently insubordinate, the employer's right to curtail that outburst will control.

However, the Board has in recent years apparently forgotten this underlying balancing test in *Atlantic Steel*, instead rotely counting factors and arbitrarily finding an outburst protected if enough *Atlantic Steel* factors favor protection, regardless of the overall effect on order and respect. In *Plaza Auto*, for instance, the Board found protected an employee who during a meeting with managers raised his voice at them; called a manager a "f*cking mother f*cking," a "f*cking crook," and an "a**hole"; and said that the manager was stupid, nobody liked him, and everyone talked about him behind his back. As mentioned above, the employee also sprang out of his chair, knocking it over, and told the manager that if he fired him, the manager would regret it. 360 NLRB at 973. While the Board held that this outburst weighed against protection, the Board found that it retained the Act's protection because the other three *Atlantic Steel* factors—the place of the discussion, the subject matter of the discussion, and whether the outburst was, in any way, provoked by an employer's unfair labor practice—weighed in favor of protection. *Id.* at 977–78. Inexplicably, nowhere in its decision did the Board discuss what effect such insubordination would have on order and respect in the workplace, except to note that the effect was less disruptive because it was not witnessed by fellow employees. *Id.*

Yet the other three factors are not nearly as important as the nature-of-the-outburst factor in revealing the effect an outburst had on order and respect. Under the first factor of the test, for instance, while the place of the discussion can exacerbate an outburst if done in front of other

employees, customers, patients, or the public, a one-on-one discussion is not a license for offensive or insubordinate behavior. And while the subject matter of a discussion may speak to the likelihood that the offensive behavior will be repeated, the mere fact that a subject relates to terms and conditions of employment is no excuse for offensive language. And the issue of whether the outburst was, in any way, provoked by an employer's unfair labor practice must only be considered when the outburst is simultaneous with the ULP and if the ULP directly affected the employee's protected rights. The nature of the employee's outburst—what the employee actually said and did—is by far the most important factor in determining the level of insubordination.

The Board in *Plaza Auto* ignored that an outburst that is sufficiently insubordinate and violates enough workplace norms may seriously undermine order and respect regardless of where it took place, who saw it, and whether it was provoked. Otherwise, employees would be permitted to curse, denigrate, and defy their managers with impunity so long as they did so "in front of a relatively small audience, can point to some provocation, and do not make an overt physical threat." *Plaza Auto,* 360 NLRB at 983 (Member Johnson, dissenting). A one-on-one profane tirade may not directly disrupt other coworkers, but depending on the norms of the workplace, it can be extremely disrespectful and distressing to the manager and disruptive to that manager's ability to maintain order and discipline.

Furthermore, the Board's evaluation of the third *Atlantic Steel* factor is badly antiquated. The Board decisions imply that "profanity in the course of labor relations is the presumptive and permissible norm in *any* workplace." *Fresenius USA Mfg.*, 358 NLRB at 1269 (Member Hayes, dissenting). But much has changed about "industrial life" since the Act was passed, and the Board developed its doctrine allowing employees moments of "animal exuberance" in the course

of protected conduct. *See Bettcher Mfg. Corp.*, 76 NLRB 526, 527 (1948) (quoting *Milk Wagon Drivers Union v. Meadowmore Dairies, Inc.*, 312 U.S. 287, 293 (1941)). For one, to the extent the idea that "the use of vulgarities and obscenities is a reality of industrial life" ever existed, it must never be considered an acceptable part of workplace interactions in the modern workplace. *Cf. Coors Container Co.*, 238 NLRB 1312, 1320 (1978), *enforced*, 628 F.2d 1283 (10th Cir. 1980). As Member Johnson argued in his dissent to *Plaza Auto*, 360 NLRB at 985, "[t]he reality of the modern workplace is that employees do not typically curse each other and their superiors like characters in a Scorsese film." Indeed, as the workforce has changed, the need for greater civility has become more apparent. "The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances." *Pier Sixty*, 362 NLRB at 510 (Member Johnson, dissenting). In the modern extensively regulated workplace, it is essential for an employer to proscribe profane behavior that could be viewed as harassing, bullying, creating a hostile work environment, or a situation that could reasonably lead to workplace violence. *Plaza Auto*, 360 NLRB at 985 (Member Johnson, dissenting).

Due to these changes in the "realities of industrial life," a "one-size-fits-all" standard of determining if a profane outburst is so opprobrious as to lose the Act's protection is no longer appropriate.[5] To truly understand the disruptive effect profanity has on order and respect in a workplace, the Board must "give meaningful consideration to the context of this particular

[5] Illustrating the current problem, in many cases involving an offensive outburst, ALJs will compare it to past offensive outbursts in other cases that the Board has found protected without considering differences between the workplaces. *See, e.g.*, *Greyhound Lines, Inc.*, 367 NLRB No. 123, slip op. at 20 (May 6, 2019); *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 36 (Mar. 11, 2016); *Pier Sixty, LLC*, 362 NLRB at 509 n.5 (Member Johnson, dissenting).

workplace," in order to determine if an employee's profane outburst is sufficiently egregious or opprobrious to remove it from the Act's protection. *Plaza Auto*, 360 NLRB at 986 (2014) (Member Johnson, dissenting). Member McFerran's assumption that "the language of the shop is not the language of 'polite society,'" is no longer necessarily true. *Cf. General Motors LLC*, 368 NLRB No. 68, slip op. at 3 (Member McFerran, dissenting) (quoting *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131, slip op. at 3 n.12 (July 24, 2018)). Many workplaces now insist that employees engage each other with civility even on matters where opinions differ sharply and emotions flare. As Member Johnson observed in his dissent in *Plaza Auto*, "a small family business managed accordingly with 'small town values,' should not be required by the Act to have the same workplace culture as a dockyard or movie set." 360 NLRB at 986. *See also Laborers Local 872*, 359 NLRB 1076, 1077–78 (2013) (distinguishing screaming and profane conduct in an office setting from same conduct in dockside setting). At other workplaces, however, strong language is still common, and those workers should not be held to the "Emily Post standards of etiquette customary in more genteel surroundings." *Longshoremen Local 333*, 267 NLRB 1320, 1320 (1983).

Only by assessing workplace norms will the Board maintain the flexibility to apply the Act to a changing workforce. To objectively determine the behavioral norms of a given workplace, the Board must take several factors into account. As the Board suggested in its invitation to file briefs, the written rules of a workplace are an important data point. Another is the extent to which those rules are enforced by discipline. Whether supervisors use similar profanity is also important, especially if they cursed at the alleged discriminatee first. *See Nexteer Automotive Corp.*, 368 NLRB No. 47, slip op. at 1 n.2 (Aug. 27, 2019). However, not all cursing is equal, and some kinds of profanity are more opprobrious than others. For instance, in

Aluminum Co., 338 NLRB 20 (2002), the Board held that even in a workplace where "profanity is common," an employee's profanity can weigh against protection due to its extreme degree and *ad hominem* manner. *Id.* at 21–22. Thus, if profanity is common but profanity directed at supervisors is not, then one brief outburst where the profanity *is* directed at an individual supervisor might not be so far out of line as to cause a breakdown in discipline, depending on the circumstances. On the other hand, at a worksite where profanity is strictly prohibited, a profane and personal tirade directed at a supervisor will usually be so shocking and disrespectful as to seriously undermine respect and that supervisor's authority, losing the protection of the Act regardless of whether it was provoked and private.

By performing such an analysis on profane outbursts, the Board will be able to individually assess how far outside of the norm an outburst went, and thus how much the nature-of-the-outburst factor weighs against protection. Where the outburst far exceeded workplace norms, the nature of the outburst will necessarily outweigh all other factors. Employees are entitled to some leeway above the norm so long as their profanity does not cross the line to rank insubordination. To the extent *Atlantic Steel* is inconsistent with evaluating all factors with primary emphasis on the nature of the outburst, it and its progeny should be overruled.

III. Conclusion

We respectfully urge the Board to modify its approach to offensive conduct. The Board must finally make clear that racist, sexist, and potentially violent conduct or conduct that potentially creates a hostile work environment is unprotected no matter where it occurs. The Board must also recognize that profane outbursts can, depending on workplace norms, do serious damage to order and respect in the workplace, and may not be protected by the Act regardless of other *Atlantic Steel* factors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of GENERAL COUNSEL'S BRIEF in Cases 14-CA-197985 and 14-CA-208242 was served electronically and/or by regular mail upon the parties listed below on this 12th day of November 2019.

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