DATE: March 10, 2022

TO: Kathy Drew King, Regional Director
    Region 29

FROM: Richard A. Bock, Associate General Counsel
      Division of Advice

SUBJECT: Consolidated Edison of New York, Inc.
      Case 29-CA-278495

The Region submitted this case for advice pursuant to GC Memorandum 21-04\(^1\) on whether the Employer’s discipline of the Charging Party violated Section 8(a)(1) and (3) under the analytical framework set forth in General Motors, LLC.\(^2\) First, we conclude that, under the standard set forth in General Motors, the Employer unlawfully disciplined the Charging Party because engaged in Union activity. In finding the discipline unlawful under General Motors, the Region should urge the Board to overrule its decisions in Tschiggfrie Properties\(^3\) and Electrolux Home Products,\(^4\) both of which improperly altered the General Counsel’s burden for showing animus when conducting a Wright Line analysis.\(^5\) Further, the Region should use this case to urge the Board to overrule General Motors and reinstate the loss-of-protection standards from cases such as Atlantic Steel Co.\(^6\)

\(^{1}\) GC Memorandum 21-04, “Mandatory Submissions to Advice,” at 3 (Mar. 31, 2021).

\(^{2}\) 369 NLRB No. 127 (2020).

\(^{3}\) 368 NLRB No. 120 (2019).

\(^{4}\) 368 NLRB No. 34 (2019).


\(^{6}\) 245 NLRB 814, 816 (1979).
FACTS

Consolidated Edison of New York, Inc. ("the Employer") is a power company that provides electrical services to New York City and the Westchester County area. For decades, the Employer's employees have been represented by Utility Workers Union of America, AFL-CIO, Local 1-2 ("the Union"). In [b] 6 [b] 7 [C] the Employer hired the Charging Party as [b] 6 [b] 7 [C]. In October 2000, [b] 6 [b] 7 [C] became a member of the Union, and since [b] 6 [b] 7 [C] has been [b] 6 [b] 7 [C]. In over [b] years as [b] 6 [b] 7 [C], the Charging Party has regularly represented and advocated for employees in disputes with the Employer.

In early 2021, the Employer created a new organizational unit known as the Construction Paving Section. In [b] 6 [b] 7 [C] the Employer promoted the Charging Party to the position of [b] 6 [b] 7 [C], and [b] 6 [b] 7 [C] became part of this new department. At that time, the section held its first-ever monthly Business and Safety meeting remotely via Microsoft Teams with about 36 attendees, including the Charging Party. During the meeting, a project specialist for the Employer ("the Project Specialist") provided a training segment about the Employer's reimbursement policy for personal vehicle usage during storms. During the presentation, the Charging Party asked whether employees who were assigned to use their personal vehicles during a storm, but were not actually activated to use them (i.e. whose vehicles were placed "on call" but not utilized), were still entitled to a stipend. The Project Specialist responded that, per the policy, the stipend is paid only if an employee actually uses their personal vehicle during the weather emergency. The Charging Party objected to that interpretation of the policy, stating that the Union understood the agreed-to policy to be to the contrary. The Project Specialist responded that the collective-bargaining agreement ("CBA") with the Union included a provision stating that only those employees who actually use their automobiles would be paid, and then used the screen-sharing function to share the relevant portion of the CBA. 7 The Charging Party then began reading the relevant provision aloud, emphasizing certain words to demonstrate that the Union’s interpretation of the provision was more reasonable.

At this point, the [b] 6 [b] 7 [C] manager [b] 6 [b] 7 [C] Manager”) told the Project Specialist that it was time to move on and stop sharing the CBA on the screen. Immediately after the document was reading aloud was removed from the screen, the Charging Party stated, “this is bullshit.” At some point, either before

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7 Article III, Section 18, paragraph (c) of the CBA states, in relevant part, “[i]f the Company assigns an employee to use his or her own vehicle for business purposes during a storm or other emergency, the Company will pay the employee one hundred and forty dollars ($140) a day for the use of the vehicle, tolls, gas used, and other expenses, for each day of such use.”
or after the Charging Party's statement, the (b) (6), (b) (7)(C) Manager offered to provide a copy of the agreement via email to all participants for further review.

The next day, the Employer asked the Charging Party to meet via Microsoft Teams with the (b) (6), (b) (7)(C) Manager, the Employer's chief construction inspector, and the Charging Party's direct supervisor. The (b) (6), (b) (7)(C) Manager told the Charging Party (b) was being counseled regarding conduct during the previous day's Business and Safety meeting, and issued a “counseling memorandum,” which stated as follows:

On (b) (6), (b) (7)(C) 2021 during a Microsoft Teams Business and Safety meeting, you asked a question about a policy in a Corporate [On-the Job-Training], indicating your disagreement with the policy. The [Project Specialist] answered the question, but you repeated the question again. The [Project Specialist] provided the same answer after you continued to ask the same question. (b) (6), (b) (7)(C) Manager] therefore recommended that the policy be sent to all meeting attendants for review, and if there were still questions, a further discussion can be had at another time. You responded with an expletive, audible to many, if not all the meeting participants. Our Standards of Business Conduct admonishes against any workplace conduct made with the purpose or effect of creating an intimidating, offensive or demeaning environment for another employee. It directs all employees to treat each other with respect and consideration in the workplace and to be sure our comments and actions are appropriate and respectful. In this instance, your comments are considered offensive.

In the “disposition” section of the form, the Employer wrote, “You are therefore being counseled on this behavior. Any future violation of this infraction will result in further disciplinary action (s) up to and including termination.” Based on the records provided by the Employer it appears that counseling memos always conclude with a statement that, if the workplace rule is violated again, more severe discipline will result. Further, the Employer includes counseling memos as part of an employee’s permanent disciplinary record.

According to the Charging Party, the use of expletives is common in the workplace. The Employer's disciplinary records showed that the Employer had never issued an employee a counseling memorandum for language as mild as that used by the Charging Party. Rather, in each circumstance where the Employer had issued a counseling memorandum, the employee either used significantly more extreme language or the conduct at issue was in some way discriminatory in nature.
ACTION

We conclude that the Employer violated Section 8(a)(3) and (1) by disciplining the Charging Party because of Union activity. In particular, we conclude that a General Motors/Wright Line analysis establishes that the Employer unlawfully discriminated against the Charging Party as a result of Union conduct during the remotely held Business and Safety meeting. In applying the Wright Line analysis, the Region should urge the Board to overrule its decisions in Tschiggfrie Properties and Electrolux Home Products because those cases inappropriately altered the General Counsel’s burden for demonstrating animus. Finally, the Region should also use this case as a vehicle to urge the Board to overrule its decision in General Motors and restore the loss-of-protection standards set forth in cases such as Atlantic Steel Co. Applying Atlantic Steel here, we conclude that the Employer unlawfully disciplined the Charging Party because did not lose the Act’s protection while engaging in Union activity during the Business and Safety meeting.

I. Under General Motors and Electrolux, the Employer Violated Section 8(a)(3) and (1) By Disciplining the Charging Party for Engaging in Union Activity.

In General Motors, the Board held that “the Wright Line burden-shifting framework is the appropriate standard for cases where the General Counsel alleges that discipline was motivated by Section 7 activity, and the employer asserts that it was motivated by [the employee’s] abusive conduct.” Under that framework, to establish that an employer unlawfully disciplined an employee, the General Counsel bears the burden of showing that the employer subjected the employee to an adverse


9 General Motors, LLC, 369 NLRB No. 127, slip op. at 9. Although the Board in General Motors stated that a Wright Line analysis would apply in cases involving employees disciplined or discharged because of alleged “abusive conduct,” such as profane ad hominem attacks, racial slurs, and threats of violence, it subsequently has applied the same analysis to cases involving less severe forms of alleged misconduct. See, e.g., Wismettac Asian Foods, 371 NLRB No. 9, slip op. at 1 n.6, 6, 7 (2021) (applying General Motors where employer alleged it had discharged an employee for using angry hostile tones and making only negative comments while complaining in a safety meeting about being required to drive overweight trucks), affirmed, 2022 WL 313776 (9th Cir. Feb. 2, 2022) (unpublished decision).
employment action, and that the employer’s action was motivated by the employee’s “union or other protected activities.”10 To demonstrate the improper motivation, the General Counsel must initially show that “(1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.”11 Circumstantial factors from which an anti-Section 7 motive may be inferred include the employer’s demonstrated frustration with the employee’s protected conduct, employer assertions that the employee’s protected activities constitute misconduct, and the assertion of reasons for the adverse action that are pretextual, i.e., false or not in fact relied on.12 Evidence of pretext may support an inference of unlawful motivation, but it does not compel such a finding and may not be sufficient depending on the surrounding circumstances.13 Finally, where an employer relies on pretextual reasons for an adverse employment action, it cannot satisfy its rebuttal burden under Wright Line that it would have taken the same action even absent the employee’s protected activity.14

10 Wright Line, 251 NLRB at 1083. See also General Motors, 369 NLRB No. 127, slip op. at 8-9.

11 General Motors, 369 NLRB No. 127, slip op. at 10 (citing Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 6, 8 (2019)). The General Counsel can meet her initial burden under Wright Line as interpreted in Tschiggfrie but disagrees with the Board’s decision in Tschiggfrie. As noted below, the Region should thus urge the Board to revisit that decision.

12 See, e.g., A & W Products Co., 244 NLRB 1128, 1131 (1979) (affirming ALJ’s conclusion that employer’s expressions of “displeasure or frustration” with union conduct was evidence of animus; employer’s vice president, among other things, threatened employees with job loss if they continued to file and pursue grievances); Wismettac Asian Foods, 371 NLRB No. 9, slip op. at 7 (noting that employer disciplining employee for the protected activity he engaged in was “more than sufficient to show animus toward” that activity); Lucky Cab Co., 360 NLRB 271, 274 (2014) (noting that evidence of pretext is one of the factors from which an employer’s unlawful motive for an adverse employment action may be inferred), enforced, 621 Fed. Appx. 9 (D.C. Cir. 2015) (unpublished decision).

13 See Electrolux Home Products, 368 NLRB No. 34, slip op. at 3, 5.

14 See, e.g., Con-Way Freight, 366 NLRB No. 183, slip op. at 3-4 (2018); see also General Motors, 369 NLRB No. 127, slip op. at 10, n.26 (“if an employer is unable to prove it would have taken the same action . . . in the absence of Sec. 7 activity,
Applying these principles here results in finding that the Employer violated Section 8(a)(3) and (1) by disciplining the Charging Party. Initially, we conclude that, contrary to the Employer’s assertion, issuance of the counseling memorandum to the Charging Party constituted an adverse employment action. The counseling memorandum states that a future violation by the Charging Party of the same workplace rule will lead to more severe discipline up to and including termination. Moreover, the Employer’s practice is to retain such memoranda as part of an employee’s disciplinary record. The Board has found that such forms of discipline constitute an adverse employment action affecting an employee’s terms and conditions.15

Furthermore, the evidence supports finding that the Employer took the adverse action because of the Charging Party’s Union activity. First, the Charging Party engaged in protected activity when, as [b] (6), [b] (7)(C) attempted to clarify the reimbursement policy for use of a personal vehicle based on an honest belief that the Union viewed the policy different than how the Project Specialist had presented it. The Charging Party specifically communicated this reasonable alternative reading of the CBA to all meeting attendees with the intent of ensuring that employees would be paid any stipends they were entitled to under the contract.16 The Employer, specifically, the [b] (6), [b] (7)(C) Manager who was present and issued the counseling memorandum, obviously had knowledge of this Section 7 activity.

perhaps because of a history of tolerating such conduct, the Board would still find a violation under Wright Line”).

15 See Jennie-O-Foods, 301 NLRB 305, 316 n.18 (1991). Cf. Bon Harbor Nursing and Rehabilitation, 348 NLRB 1062, 1079 (2006) (supervisor’s statement to employee that the employee had been rude to her in front of other employees and admonishing her not to do it again was an adverse employment action even though not a part of the employer’s progressive discipline system); El Paso Electric Co., 355 NLRB 428, 445 (2010) (employer’s verbal warning to stop engaging in protected concerted activity where it came with an implied threat about further discipline should the conduct continue constituted an adverse employment action), affirmed, 681 F.3d 651 (5th Cir. 2012).

16 See, e.g., King Soopers, Inc., 364 NLRB 1153, 1154 (2016) (employee advocacy for rights “sufficiently grounded” in a CBA is protected, even when they are mistaken or their interpretation of the contract is incorrect), enforced in relevant part, 859 F.3d 23 (D.C. Cir. 2017).
The Employer’s response during the meeting and in the counseling memorandum, as well as its disparate treatment of the Charging Party, evince its anti-Union motive for the adverse action. Initially, the Charging Party had just been promoted to a position on the Construction Paving Section when that department held the Business and Safety meeting. Thus, that meeting represented the first opportunity for the Charging Party, a known [b] [6], [b] [7],[c] to publicly question work policies applicable to employees in that department. When the Charging Party respectfully challenged the Project Specialist’s explanation of the reimbursement policy for personal vehicle use, the [b] [3], [b] [7],[c] Manager cut [b] off by directing the Project Specialist to remove the CBA language from the attendees’ screens and move on to another subject. That response by the Employer indicated its frustration with the Charging Party’s Union activity and is what caused the Charging Party to then use an expletive to express [b] own frustration with not being allowed to continue [b] advocacy on behalf of [b] and [b] coworkers.[17] The Employer then seized on the response that it had evoked in an effort to legitimize disciplining the Charging Party for [b] Union activity.

Similarly, the language of the counseling memorandum supports finding an anti-Union motive for the discipline. The memorandum refers to the Charging Party’s “comments” at the meeting as being offensive, rather than solely to [b] use of an expletive. Indeed, the memorandum details that those comments included the Charging Party repeatedly challenging the Project Specialist’s interpretation of the reimbursement policy during the meeting while “indicating [b] disagreement with the policy.” Thus, although the Employer asserts that it disciplined the Charging Party because [b] used an expletive during the meeting, the counseling memorandum also targets conduct that was clearly Section 7 activity, i.e., the Charging Party’s unwillingness to accept the Project Specialist’s interpretation of the reimbursement policy. By also targeting the Charging Party’s interpretation of the parties’ CBA, the Employer revealed its anti-Union motive.[18]

In addition, the evidence establishes that the Employer’s proffered reason for disciplining the Charging Party constituted a pretext, which further supports finding an unlawful motive. The Employer asserts that it disciplined the Charging Party because [b] used an expletive after the [b] [6], [b] [7],[c] manager cut off [b] Section 7 activity at the Business and Safety meeting. However, the Charging Party maintains

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[17] See, e.g., Consumers Power Co., 282 NLRB 130, 132 & n.11 (1986) (recognizing that “disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses” and permitting employees “some leeway for impulsive behavior” when engaging in Section 7 conduct), criticized in General Motors, LLC, 369 NLRB No. 127, slip op. at 8.

[18] See, e.g., Wismettac Asian Foods, 371 NLRB No. 9, slip op. at 7.
that the use of expletives was common in the workplace. More important, the
evidence does not support the Employer’s claim that it disciplined the Charging Party
in the same manner as other employees who had used expletives at work. Rather,
each example of discipline the Employer provided to support its defense involved an
employee who used an expletive either while engaged in much more severe conduct
than the Charging Party’s isolated remark or in circumstances indicating
discriminatory conduct based on protected characteristics. As relevant here, the three
examples (out of a total of 29 provided) in which the Employer issued an employee a
counseling memorandum for using an expletive at work included: (1) an employee
who frequently loitered at a loading dock while repeatedly using inappropriate
language; (2) another employee who made an “obscene gesture” with arms during
a group goodbye photo; and, (3) a third employee who engaged in daily inappropriate
behavior and language that included racist comments investigated by the Employer’s
Office of Diversity and Inclusion. In short, the comparators the Employer supplied
make clear that it has not issued a counseling memorandum to any employee in the
last several years for the mild type of conduct the Charging Party engaged in after
was provoked by the Manager. Because this evidence of disparate
treatment shows that the Employer did not discipline the Charging Party for the
reason it proffered, it supports finding that the Employer relied on this justification to
conceal its true, discriminatory motive. Further, given the Employer relied on a
pretexual reason for disciplining the Charging Party, it also cannot satisfy its
rebuttal burden under Wright Line that it would have taken the same action even
absent Union activity. Thus, based on all the foregoing, the General Counsel can

19 The remaining examples of discipline that the Employer provided involved more
extreme employee misconduct, including verbal threats, sexist and racist comments,
and extreme vulgarity, which resulted in the employee receiving more severe
discipline than a counseling memorandum. Those examples provide no justification
for the Employer’s disciplining of the Charging Party.

20 Under Electrolux Home Products, “the Board may infer from the pretextual nature
of an employer’s proffered justification that the employer acted out of union animus,
‘at least where . . . the surrounding facts tend to reinforce that inference.’” 368 NLRB
No. 34, slip op. at 3 (citation omitted) (emphasis in original). As noted above, the
Employer’s response to the Charging Party’s Union activity during the Business and
Safety meeting and in the counseling memorandum provide those reinforcing facts
here.

21 See, e.g., Con-Way Freight, 366 NLRB No. 183, slip op. at 3-4; General Motors, LLC,
369 NLRB No. 127, slip op. at 10, n.26.
meet her burden to show that the Employer disciplined the Charging Party because of its anti-Union animus.

II. The Board Should Overrule Tschiggfrie Properties and Electrolux Home Products Because Those Cases Deny Employees the Protections of the Act.

In Tschiggfrie Properties, the Board heightened the General Counsel’s initial burden under Wright Line by holding that the evidence of animus must demonstrate a causal relationship between an employee’s protected activity and the employer’s adverse action against that employee. This holding undermines the Act’s protection by limiting the relevant analysis to a particular discriminatee’s protected activities rather than permitting the General Counsel to show that animus toward Section 7 rights generally was the cause of the adverse employment action.

In Electrolux Home Products, the Board similarly shifted the General Counsel’s burden in cases applying the Wright Line test by holding that when a respondent’s stated reasons for an adverse action are found to be pretextual, a discriminatory motive need not necessarily be presumed. However, as noted by the dissent in Electrolux, how that decision minimized the significance of pretext evidence “seems to open the door for employers to lie to the Board and get away with it.”

Thus, although as set forth above the Region can establish under current Board law that the Employer violated Section 8(a)(1) and (3) by disciplining the Charging Party, the Region should urge the Board to overrule Tschiggfrie Properties and Electrolux Home Products.

III. The Board Should Overrule General Motors and Apply Atlantic Steel Here to Find that the Employer Unlawfully Disciplined the Charging Party.

The current case provides a good example of the problems with applying the Wright Line test to situations previously analyzed under the loss-of-protection standards set out in cases such as Atlantic Steel. Because the Employer here retaliated against the Charging Party’s Union activity, there should be no need to

22 Tschiggfrie Properties, Ltd., 368 NLRB No. 120, slip op. at 1, 6, 8.

23 368 NLRB No. 34, slip op. at 3, 4.

24 Id., slip op. at 9 (Member McFerran, dissenting in part).
show external evidence of animus to establish that the discipline violated the Act. Thus, the Region should rely on the arguments set out in the General Counsel’s Statement of Position in Lion Elastomers, LLC, 369 NLRB No. 88, Cases 16-CA-190861, et al., to urge the Board to overrule its decision in General Motors and return to the loss-of-protection standards.

Applying Atlantic Steel to the current case also results in finding that the Employer violated Section 8(a)(1) and (3) by disciplining the Charging Party because conduct remained protected by the Act. Under the Atlantic Steel test, the question is “whether employee misconduct that occurs during the course of otherwise protected activity is so opprobrious as to lose the protection of the Act.” To answer that question the Board considers four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s statements; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. Here, each factor weighs in favor of finding that the Charging Party retained the Act’s protection.

In analyzing the first factor, the place of the discussion, the Board generally finds that an employee retains the Act’s protection when the employee’s outburst occurs in a location unlikely to disrupt ongoing work. Here, the Charging Party raised concerns and used an expletive during a remote Business and Safety meeting in which employees were not expected to be engaged in their regular duties of providing services to customers. As such, it is extremely unlikely that the Charging Party’s conduct disrupted the Employer’s normal business operations. Thus, this factor weighs in favor of protection.

The second factor also strongly favors protection as the subject matter being discussed in the meeting was employee compensation, specifically, when employees would receive a stipend under the personal vehicle use policy, which is a topic that is “the grist on which concerted activity feeds.” Moreover, the Employer included


26 Id., 355 NLRB at 709.

27 See Datwyler Rubber & Plastics, 350 NLRB 669, 670 (2007) (outburst during monthly employee meeting did not lose Act’s protection where meeting was held away from employees’ work area and therefore in a location that would not disrupt the Respondent's work process).
discussion of this policy as part of the meeting, so the Charging Party’s reasonable questions and comments about it fit squarely within the appropriate subject matter parameters for the meeting.

The third factor, the nature of the conduct, also weighs strongly in favor of protection because at no time did the Charging Party cross the line into abusive, ad hominem, or discriminatory attacks; indeed, expletive was in no way threatening or directed at any particular individual, nor was it vulgar. Further, the profanity used here did not exceed “that which was common and tolerated in the workplace,” and, thus, this factor favors protection.

Finally, the Charging Party’s conduct here was provoked. To start, the Charging Party uttered the challenged term based on reasonable belief that the Employer had unilaterally changed a contract term. Further, the Charging Party was attempting to obtain clarification about a policy and advocate for employees’ stipends. Instead of responding to concerns, the Employer abruptly ended sharing the relevant CBA language on the attendees’ screens and directed that the meeting move on to the next subject, which provoked the Charging Party into expressing...


29 See, e.g., Roseburg Forest Products Co., 368 NLRB No. 124, slip op. at 1 n.2, 9 (2019) (finding “mild nature” of employee’s conduct, which included speaking with an elevated voice, calling management stupid, and being told to calm down, favored finding the employee retained the Act’s protection, especially given the lack of any threats or vulgar language).

30 Aluminum Co. of America, 338 NLRB 20, 22 (2002).

31 Because the Charging Party’s reading of the CBA provision (i.e., “if the Company assigns an employee to use his or her own car . . . , the Company will pay the employee . . .”) was reasonable, belief that the Employer was committing an unfair labor practice was reasonable. In these circumstances, including that the Charging Party is, the Employer’s conduct during the meeting is reasonably viewed as provocation under the fourth prong of the Atlantic Steel test. Cf. Felix Industries, 331 NLRB 144, 145 (2000) (finding fourth factor favored protection where employee’s outburst was triggered by supervisor’s hostile responses to employee’s protected remarks, which were not alleged as unfair labor practices), enforcement denied and remanded on other grounds, 251 F.3d 1051 (D.C. Cir. 2001), supplemented by 339 NLRB 195 (2003) (reaffirming employee did not lose the Act’s protection).
frustration about the Employer’s conduct. In light of these facts, this factor also weighs in favor of a finding that the Charging Party did not lose the Act’s protection.

Accordingly, based on the analysis above, the Region should issue complaint, absent settlement, alleging the Employer violated Section 8(a)(1) and (3) by disciplining the Charging Party.

/s/
R.A.B.

32 See Overnite Transportation Co., 343 NLRB 1431, 1435, 1437-38 (2004) (fourth factor favored protection where supervisor’s refusal to discuss the circumstances of the discharges of eight employees, unalleged as an unfair labor practice, provoked the employee’s outburst, which occurred while the employee was investigating the matter as union steward).