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ARTICLE

Worker Outbursts, Workplace Rules and a Resurgence of Worker Voice

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Abstract

What started as the "Summer of Strikes," as unions across different industries flexed their muscles and rode a wave of revived pro-labor sentiment, has turned into a year marked by some of the largest labor disputes in more than two decades. In total, 2023 saw 451 labor strikes, some of which have resulted in historic victories and pay increases. Despite these victories, for many workers the prospect of going on strike or even participating in any kind of worker speech is still daunting. That might be because of how difficult it is to navigate what is or is not protected speech in the workplace. Between employers citing tension between compliance with the National Labor Relations Act and anti-discrimination statutes and enacting overbroad workplace rules, it is hard to know what to do. In addition, there is added complexity surrounding worker invocation of the Black Lives Matter Movement. This Article seeks to discuss the history and development of case law on protected concerted activity, consider how to reconcile the National Labor Relations Act with employer obligations to curtail discrimination, and introduce workplace rules as a mode favored by employers. Furthermore, this Article will deliberate on how recent decisions signal the National Labor Relations Board's impending treatment of worker speech against racism, namely worker invocation of Black Lives Matter in the workplace.

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INTRODUCTION

Organized labor made 2023 the year of the strike.[1] What started as the "Summer of Strikes," as unions across different industries flexed their muscles and rode a wave of revived pro-labor sentiment,[2] turned into a year marked by some of the largest labor disputes in more than two decades.[3] In total, 2023 saw 451 labor strikes.[4] For many of these workers, such as those from Writers Guild of America (WGA), Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), and United Auto Workers (UAW), going on strike, though a major gamble, paid off in the form of historic victories and pay increases.[5]

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1. Ian Kullgren, *Diverse Workforce Reaps Benefits of Strikes as Contracts Kick In*, BLOOMBERG L. (Dec. 13, 2023), https://news.bloomberglaw.com/daily-labor-report/diverse-workforce-reaps-benefits-of-strikes-as-contracts-kick-in; Kate Bronfenbrenner, *For Labor Unions, 2023 Was the Year of the Strike–and Big Victories*, WALL ST. J. (Dec. 4, 2023), https://www.wsj.com/business/unions-workers-2023-strikes-companies-da09de12; Drew DeSilver, *2023 Saw Some of the Biggest, Hardest-Fought Labor Disputes in Recent Decades*, PEW RSCH. CTR. (Jan. 4, 2024), https://www.pewresearch.org/short-reads/2024/01/04/2023-saw-some-of-the-biggest-hardest-fought-labor-disputes-in-recent-decades/; Max Zahn, *Unions Made 2023 the Year of the Strike. What Will Happen Next?*, ABC NEWS (Dec. 26, 2023), https://abcnews.go.com/Business/unions-made-2023-year-strike-happen/story?id=105556127.

2. Steven Greenhouse*, 'It feels like it's strike summer': US unions flex muscles across industries*, THE GUARDIAN (July 26, 2023), https://www.theguardian.com/us-news/2023/jul/26/strike-summer-us-unions-flex-muscles.

3. DeSilver, *supra* note 1.

4. *Labor Action Tracker*, CORNELL U. INDUS. LAB. REL. SCH., https://striketracker.ilr.cornell.edu/ (last visited Apr. 5, 2024) (choose "Strike" from the "Type" options, then enter "01/01/2023" and "12/31/2023" for the "Start Date Range" and click "Filter").

5. The summer started with over 150 Starbucks stores striking in late June over banned Pride Month decorations. Deborah M. Sophia, *Starbucks workers at over 150 stores to go on strike over Pride decor dispute*, REUTERS (June 23, 2023), https://www.reuters.com/business/retail-consumer/starbucks-workers-over-150-stores-strike-over-pride-decor-row-2023-06-23/. This was quickly followed by thousands of hotel workers in southern California striking over the July 4th weekend for better wages. Maanvi Singh, *'More work in fewer hours': LA's hotel workers detail backbreaking conditions*, THE GUARDIAN (July 4, 2023), https://www.theguardian.com/us-news/2023/jul/04/los-angeles-hotel-workers-strike; Suhauna Hussain, *Union calls for a boycott of Southern California hotels without contracts*, LA TIMES (Aug. 24, 2023), https://www.latimes.com/business/story/2023-08-24/l-a-hotel-strike-union-says-boycott-hotels-without-contracts. Less than two weeks later, over 160,000 television and movie actors joined the 11,500 Hollywood writers who had already been on strike since May protesting low wages. Greenhouse, *supra* note 2. The end of July saw last-minute contract negotiations that narrowly avoided 340,000 UPS workers going on strike. Haleluya Hadero, *UPS reaches tentative contract with 340,000 unionized*

For many other workers, however, the prospect of going on strike or even participating in any kind of worker speech is daunting.[6]

It does not take much imagination to come up with a list of reasons why a worker would be hesitant to speak or act out against their employer.[7] While going on strike could end with gains for the employee, they have to contend with loss of wages for the duration of the strike, suspension of benefits like health insurance, emotional and physical taxation, the worry of being replaced, the fear of retaliation from their employers, and so on.[8] As such, interviews of workers who striked in 2023 revealed several commonalities when asked why they voted to strike. Many of the actors who participated in the SAG-AFTRA strike cited their laughably low residual pay despite record streaming and viewership numbers and what they found to be a broken system.[9] Members of the UAW strike cited similar frustrations with "years of stagnant wages and painful concessions following the

workers, potentially dodging calamitous strike, AP NEWS (July 25, 2023), https://apnews.com/article/ups-teamsters-strike-labor-logistics-delivery-a94482dbff7bfb67ad82f607ab127672. On September 15th, after several weeks of waiting, approximately 13,000 auto workers went on strike simultaneously against the Big Three American automakers, General Motors, Ford, and Stellantis. Nora Naughton, *Workers at Ford, GM, and Jeep-maker Stellantis just got one step closer to striking as automaker union negotiations heat up*, BUS. INSIDER (Aug. 25, 2023), https://www.businessinsider.com/uaw-auto-workers-union-negotiations-contract-strike-ford-gm-stellantis-2023-7; Chris Isidore & Vanessa Yurkevich, *UAW workers launch unprecedented strike against all Big Three automakers*, CNN (Sept. 15, 2023), https://www.cnn.com/2023/09/15/business/auto-workers-strike/index.html. The autoworkers' strike ended after six weeks with massive wins for the union, including a 25% hourly wage increase over four-and-a-half years and an 11% increase in the first year. Josh Eidelson, Laura B. Jensen & Jo Constantz, *Unions Are Winning Big for the First Time in Decades*, BLOOMBERG (Oct. 31, 2023), https://www.bloomberg.com/news/articles/2023-10-31/uaw-strike-ups-drivers-writers-union-mark-record-wins-for-us-labor-movement?embedded-checkout=true; Vanessa Yurkevich & Chris Isidore, *GM and the UAW Come to Tentative Agreement*, CNN (Oct. 30, 2023), https://www.cnn.com/2023/10/30/business/gm-uaw-tentative-agreement/index.html; David Shepardson & Joseph White, *UAW Reaches Deal with GM, Ending Strike Against Detroit Automakers*, REUTERS (Oct. 30, 2023), https://www.reuters.com/business/autos-transportation/gm-reaches-tentative-deal-with-uaw-source-says-2023-10-30. Although 2023's number is not much higher than 2022's total of 414 strikes, 2023 received significantly more media attention and coverage —perhaps partially because of the sheer size and magnitude of each strike and their respective victories. *Labor Action Tracker*, *supra* note 4 (follow the same instructions, except enter "01/01/2022" and "12/31/2022" for the "Start Date Range"). The most notable ones were the WGA/SAG-AFTRA Strike, UPS Teamsters Strike, and UAW Strike. *See* Kullgren, *supra* note 1.

6. *See generally* GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE BARGAINING, (2020) [hereinafter FEAR AT WORK], https://files.epi.org/pdf/202305.pdf.

7. Much less go on strike.

8. Emily Stewart, *Going on Strike is a Risk*, VOX (Oct. 18, 2023), https://www.vox.com/2023/10/18/23919926/2023-strike-uaw-actors-picket-lines-wga-summer; Annie Nova, *Termination Risks, Collecting Unemployment: A Look at Workers Rights Amid a 'Summer of Strikes,'* CNBC (Aug. 6, 2023), https://www.cnbc.com/2023/08/06/whats-at-stake-for-workers-and-their-rights-amid-summer-of-strikes.html; *see* FEAR AT WORK, *supra* note 6, at 1–2.

9. *See* Greenhouse, *supra* note 2; Stewart, *supra* note 8; Gene Maddaus, *SAG-AFTRA Approves Deal to End Historic Strike*, VARIETY (Nov. 8, 2023), https://variety.com/2023/biz/news/sag-aftra-tentative-deal-historic-strike-1235771894/.

2008 financial crisis."[10] Long-term wage stagnation and an inability to keep up with inflation is a serious problem across all industries.[11] As such, workers not only feel obligated to strike, but to exercise other forms of protected worker speech.

The National Labor Relations Act ("NLRA" or "the Act") was passed by Congress in 1938 to "encourage collective bargaining by protecting workers' full freedom of association" by ensuring that employees have the "fundamental right to seek better working conditions."[12] The NLRA also created the National Labor Relations Board ("NLRB" or "the Board") to enforce the Act.[13] Section 7 of the NLRA explicitly provides employees[14] with "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[15] Meanwhile, Section 8 explicitly prohibits employers from committing unfair labor practices ("ULP"), which are any actions that interfere with or retaliate against workers who exercise their Section 7 rights.[16] A robust body of case law has formed around defining what this 'protected concerted activity' ("PCA") does or does not entail.[17] An equally robust body of case law has also formed around revoking protections from speech previously determined to be PCA.[18]

In order for an employee's actions to be deemed PCA and get Section 7 protection, the actions must be (1) protected, i.e., lawful and not disloyal or otherwise against public policy; (2) concerted, i.e., acting as a group or on behalf of one; and (3) for mutual aid or protection of worker matters.[19] Generally, the worker may lose PCA status, and the protection that comes with it, if their conduct is "egregiously offensive."[20] Unfortunately, the test to determine whether the worker

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10. Shepardson & White, *supra* note 5; *see also* Jeanne Whalen, *UAW Members Ratify Record Contracts with Big 3 Automakers*, WASH. POST (Nov. 20, 2023), https://www.washingtonpost.com/business/2023/11/20/uaw-contract-ford-general-motors-stellantis/.

11. Whalen, *supra* note 10; Bronfenbrenner, *supra* note 1; Zahn, *supra* note 1.

12. *Guidance: National Labor Relations Act*, NAT'L LAB. REL. BD., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Apr. 5, 2024).

13. National Labor Relations Act § 3, 29 U.S.C. § 153.

14. Although the authors tend to use "worker" and "employee" interchangeably, there are statutory differences between the two. Although all employees are workers, only those who meet the statutory definition of "employee" are called as such and benefit from the rights conferred.

15. National Labor Relations Act § 7, 29 U.S.C. § 157.

16. National Labor Relations Act § 8, 29 U.S.C. § 158.

17. *See, e.g.*, NLRB v. Wash. Aluminum Co., 370 U.S. 9 (1962); NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984); Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Alstate Maint., LLC, 367 N.L.R.B. No. 68 (Jan. 11, 2019), *overruled by* Miller Plastic Prods., Inc., 372 N.L.R.B. No. 134 (Aug. 25, 2023).

18. *See generally* Plaza Auto Ctr., Inc., 360 N.L.R.B. 972 (2014); NLRB v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017); Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885 (8th Cir. 2017); Consol. Commc'ns, Inc. v. NLRB, 837 F.3d 1 (D.C. Cir. 2016).

19. Fresh & Easy Neighborhood Market, Inc., 361 N.L.R.B. 151, 152–53 (2014). *See also* 29 U.S.C. § 153.

20. *What's the Law?*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/whats-law (last visited Apr. 5, 2024).

actually loses PCA status has been the subject of much scrutiny in recent years. Originally, the Board used three separate setting-specific tests to determine when workers lose PCA status, two of which were established more than 40 years ago. At the picket line, workers lost PCA status according to the *Clear Pine Mouldings*[21] test: "a firing for picket-line misconduct is an unfair labor practice [ULP] unless the alleged misconduct 'may reasonably tend to coerce or intimidate workers in the exercise of rights protected under the Act.'"[22] In face-to-face interactions with management, workers lost PCA according to the *Atlantic Steel* four-factor balancing test, which looks at the place of discussion, the subject matter of the discussion, nature of the outburst, and whether it was provoked by the employer's ULP. [23] And finally, in online interactions, or other non-picket line interactions outside of the workplace, workers lost PCA status according to a nine-factor "totality of the circumstances" test adopted by the Board in 2015.[24]

However, an interesting trend became apparent under these setting-specific standards: the Board held in multiple cases that workers who were terminated for allegations of egregiously offensive racist or sexist conduct still retained PCA status.[25] This trend led to accusations that the Board was unduly protecting racists and sexists and interfering with employers' prerogative to follow federal anti-discrimination statutes like Title VII.[26] Most famously, Judge Millett of the D.C. Circuit expressed in her concurrence for *Consolidated Communications, Inc. v. NLRB* a "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 workers during strikes."[27]

Both workers who make racially and sexually derogatory comments and workers who are victimized by such comments can be victims of poverty. Workers who cross a picket line, often as strike replacements, do so for a variety of reasons. Commonly, ethnic immigrants or other unskilled workers of color choose to cross picket lines because they are desperate for work due to their economic status and historic denial of union membership.[28] In response, the economically threatened picketing workers often verbally abuse and demean these strike replacements by targeting their race, gender, or both.

21. Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984).

22. Cooper Tire, 866 F.3d at 889 (citing Clear Pine Mouldings, 268 N.L.R.B. at 1046).

23. Atlantic Steel Co., 245 N.L.R.B. 814, 817 (1979).

24. NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123 n. 38 (2d Cir. 2017).

25. *See* Consol. Commc'ns, Inc. v. NLRB, 837 F.3d 1 (D.C. Cir. 2016) (Millett, J., concurring); *see, e.g.*, Airo Die Casting, Inc., 347 N.L.R.B. 810, 811–12 (2006) (protecting a striker who raised both middle fingers and shouted "fuck you [n-word]" at an African-American security guard).

26. *See, e.g.*, Michael H. LeRoy, *Slurred Speech: How the NLRB Tolerates Racism*, 82 COLUM. J. RACE & L. 209 (2018); Michael Z. Green, *The Audacity of Protecting Racist Speech under the National Labor Relations Act*, 2017 U. CHI. LEGAL F. 235 (2017).

27. *Consol. Commc'ns*, 837 F.3d at 20 (Millett, J., concurring).

28. *See* Eric Arnesen, *Specter of the Black Strikebreaker: Race, Employment, and Labor Activism in the Industrial Era*, 44 LAB. HIST. 319, 323–24 (2003); *see also* Lucy A. Williams, *Cross-Border Reflections on Poverty: Lessons From the United States and Mexico*, 5 U. PA. J.L. & SOC. CHANGE 33, 34–35 (2000).

In *General Motors* (2020), the Trump-appointed Board controversially overruled the three setting-specific standards and replaced them with a standard introduced in a case introduced just one year after *Atlantic Steel* was decided, the *Wright Line* test.[29] This test was applied in *General Motors* purportedly to address the concerns expressed by Judge Millett and "harmonizing" the NLRA with federal anti-discrimination statutes.[30] Under the *Wright Line* test, the General Counsel must first make a prima facie case that the employee was engaged in protected activity and that this activity was a "substantial factor" or "motivating factor" in the employer's decision to terminate their employment. Once this has been established, the burden shifts to the employer to prove, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected activity. This is often referred to as a "but for" test. Some labor activists disagreed with the decision to replace the setting-specific standards with the *Wright Line* test, alleging that the Board was just motivated to make it easier for employers to terminate workers.[31] This concern is supported by the fact that the *Atlantic Steel* and *Wright Line* tests co-existed virtually for the same period of time yet, until the *General Motors* decision, no Board or court took the opportunity to replace one test with the other. Three years later, the Biden-appointed Board decided *Lion Elastomers II*, which overruled *General Motors*, and reinstated the setting-specific standards as the proper test to determine whether a worker maintains protection under the NLRA.[32] While activists rejoice with the overruling of *General Motors*, this return to setting-specific standards leaves one important question still unanswered. What are workers, unions, employers, and the NLRB supposed to do when faced with allegations of racist and sexist speech?

While labor law scholars have many suggestions for how to address Judge Millet's concerns, for some workplaces, the immediate answer seems simple: utilize workplace rules or employee handbooks to uniformly communicate the boundaries of allowable behavior.[33] However, due to another recent Board decision, employers are going to have to rethink their approach to this strategy.[34]

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

30. Casey Thibodeaux, *It's What You Said and How You Said It: The NLRB's Attempt to Separate Employee Misconduct from Protected Activity in General Motors LLC*, 82 La. L. Rev. 227, 249–50 (2021).

31. *See, e.g.*, Marcus Reed, *The NLRB Champions "Civility" in the Workplace in General Motors: Altruism or Duplicity? – The Union Perspective*, 53 U. Tol. L. Rev. 179, 183 (2021). *See contra* Thibodeaux, *supra* note 30, at 257.

32. Lion Elastomers LLC (*Lion Elastomers II*), 372 N.L.R.B. No. 83, slip op. at 2 (May 1, 2023).

33. Rebecca L. Marks and Heather G. Ptasznik, *Employee Handbooks: Can There Be a Uniform Approach for Multistate and International Employers?*, Soc'y for Hum. Res. Mgmt. (Oct. 14, 2022), https://www.shrm.org/in/topics-tools/employment-law-compliance/employee-handbooks-can-uniform-approach-multistate-international-employers.

34. Stericycle, Inc., 371 N.L.R.B. No. 113, slip op. at 1 (Aug. 2, 2023).

In 2017, the same Board that went on to decide *General Motors* also decided *Boeing*[35] and overruled the long-standing *Lutheran Heritage*[36] standard governing whether facially neutral workplace rules, policies, and employee handbook provisions violate Section 8 of the NLRA.[37] On top of overruling *Lutheran Heritage* without being prompted to do so,[38] the *Boeing* Board also announced a bright-line, categorical approach to workplace rules, claiming to "provide greater clarity and certainty to employees, employers, and unions" on the lawfulness of a workplace rule.[39] However, in *Stericycle* (2023), the Biden-appointed Board overruled *Boeing* and *LA Specialty Produce* in an effort to end overbroad workplace rules that chilled workers' exercise of PCA.[40] In doing so, the Board also put an end to categorical presumptions of lawfulness for workplace rules of a certain type and returned to the setting-specific particularized approach of *Lutheran Heritage*.[41] Accordingly, at least while there is a Democratic majority on the NLRB, employers will have to tread lightly if they are to utilize workplace rules to address worker speech.

Additionally, in thinking about the exercise of and restrictions placed on worker speech, we should keep in mind the unseen animus behind why workers speak. Complaining about one's wages is considered by the current General Counsel of the NLRB to be inherently concerted.[42] The vociferousness of a person's reaction to a workplace injustice such as denial of overtime, a shortage on a paycheck, or wage bias may well directly correlate to the severity of their economic plight. Sanctions for expressions of frustration and anger not only chills the right—it exacerbates the problem.

On the flip side, if we are interested in addressing Judge Millet's concerns and harmonizing the aims of the NLRA with anti-discrimination statutes, then should we not encourage and protect the kind of worker speech that calls discrimination out? As will be discussed below, workers have been attempting to bring workplace racism and injustice to light via invocations of the Black Lives Matter movement, but they have been punished for it. In the last few years, employers have controversially mounted a growing campaign of barring Black Lives Matter from the workplace. The legality of such actions is still pending before the Board.

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35. Boeing Co., 365 N.L.R.B. No. 154 (Dec. 14, 2017) (refined by LA Specialty Produce, Co., 368 N.L.R.B. No. 93 (Oct. 10, 2019)).

36. Martin Luther Mem'l Home, Inc. (*Lutheran Heritage Village*), 343 N.L.R.B. 646 (2004).

37. *Boeing*, 365 N.L.R.B. No. 154, slip op. at 2.

38. *Id.* at 24 (Pearce, Member, dissenting) (noting that prior to the majority's decision to overrule *Lutheran Heritage*, not only had the standard been upheld by every court asked to consider it, but neither party asked for the Board to overrule *Lutheran Heritage*).

39. *NLRB Establishes New Standard Governing Workplace Policies, and Upholds No-Camera Policy in Boeing*, NATIONAL LABOR RELATIONS BOARD (Dec. 14, 2017), https://www.nlrb.gov/news-outreach/news-story/nlrb-establishes-new-standard-governing-workplace-policies-and-upholds-no.

40. *Stericycle*, 371 N.L.R.B. No. 113, slip op. at 2.

41. *Id.*

42. Jennifer A. Abruzzo, *Memorandum GC 23-04*, Office of the General Counsel, 3 (March 20, 2023).

Part I of this Article will discuss the history and development of NLRB case law leading up to *Lion Elastomers II* overruling *General Motors*. Part II will discuss the different proposals on how to reconcile the NLRA with employer obligations to curtail discrimination and introduce workplace rules as a mode favored by employers. Part III will detail the development of NLRB case law surrounding workplace rules. Finally, Part VI will deliberate on how these decisions signal the Board's impending treatment of worker speech against racism, namely worker invocation of Black Lives Matter ("BLM") in the workplace.

I. The NLRA and Worker Outbursts of the Abusive and Egregious Variety

The tension between the NLRA and federal anti-discrimination statutes is not a new observation. Legal scholars have anticipated a showdown of some type between the NLRA and Title VII since at least the 1970s.[43] However, as the Board in *Lion Elastomers II* pointed out, there are no cases where "an employer was required to tolerate employee conduct that reasonably could be characterized as creating a hostile work environment for other employees."[44] Then how did this become such a hot topic issue? A review of *Consolidated Communications* and Judge Millett's concurrence to that case, *General Motors*, and *Lion Elastomers II* will help explain.

A. Judge Millet's Concurrence in Consolidated Communications Brings to Attention Valid Concerns Regarding Obscenity and Discrimination

1. Facts of the Case

In 2012, following failed contract negotiations, Consolidated Communications ("Consolidated") workers went on strike.[45] Consolidated was able to continue operations by employing out-of-state workers, managers, and replacement workers.[46] Several strikers were reported to have less-than-peaceful encounters with non-strikers.[47] After negotiations resumed and concluded, ending the strike, Consolidated disciplined several strikers for their actions on the picket line.[48] One of them was Eric Williamson, a striker who made an obscene gesture at a female non-striker by grabbing his crotch in her direction.[49]

The union filed a ULP charge against Consolidated on Williamson's behalf.[50] The case was litigated before an ALJ who found the Consolidated violated the

43. *See generally* Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. Pa. L. Rev. 158 (1974); Mark D. Roth, *The Relationship between Title VII and the NLRA: Getting Our Acts Together in Race Discrimination Cases*, 23 Vill. L. Rev. 68 (1977); Mich. L. Rev., *Title VII and NLRA: Protection of Extra-Union Opposition to Employment Discrimination*, 72 Mich. L. Rev. 313 (1973).

44. Lion Elastomers LLC, 372 N.L.R.B. No. 83, slip op. at 9 (May 1, 2023).

45. Consol. Commc'ns Inc. v. NLRB, 837 F.3d 1, 5 (D.C. Cir. 2016).

46. *Id.* at 6.

47. *Id.*

48. *Id.*

49. *Id.* at 11.

50. *Id.* at 6.

NLRA when it terminated the employment of Williamson. The finding was appealed to the Board. The Board applied the *Clear Pine Mouldings* standard and affirmed the ALJ's order requiring Consolidated to reinstate those terminated, including Williamson.[51] In 2016, Consolidated petitioned the U.S. Court of Appeals for the D.C. Circuit for review of the Board's decision and the Board cross-petitioned for enforcement.[52] The D.C. Circuit, also applying the *Clear Pine Mouldings* standard, granted in part and denied in part the Board's petition for enforcement and remanded some matters back to the Board for further proceedings.[53] More important than the decision, however, is a separate concurrence authored by the same judge who wrote the majority opinion. Specifically, Judge Patricia Millett wrote separately to chastise the Board for its apparent pattern of unduly protecting racist and sexist workers.[54]

2. NLRB's History of "Winking" Away Sexually and Racially Disparaging Conduct

Although the D.C. Circuit, including Judge Millett who wrote the majority opinion, found Williamson's obscene gesture as falling just short of sufficiently egregious as to lose PCA under the *Clear Pine Mouldings* standard, Judge Millett's concurrence pointed out the Board's problematic history of "wink[ing] away" racially and sexually disparate conduct.[55]

To illustrate her point, Judge Millett cited numerous cases wherein the Board found the worker at issue to maintain PCA and the employer's disciplinary actions as violating Section 8, even when the worker is acting in an overtly racist or sexist way.[56] Her examples included using the n-word to address a Black coworker,[57] invoking negative stereotypes against Black coworkers,[58] calling a female non-striker a "whore" and a "prostitute",[59] and exposing genitals to female non-strikers.[60] Judge Millett conceded that established case law holds that because tensions can run high in the exercise of PCA, outbursts can be a normal outgrowth of these emotions and should be expected to some degree.[61] However, she questioned whether calling someone an n-word or a "whore" ought to be viewed in the same light.[62] As Judge Millett pointed out, racial and sexist epithets do not "convey any message about workplace injustices suffered, wrongs inflicted, employer mistreatment, managerial indifference, the causes of worker frustration and anger, or

51. *Id.*
52. *Id.*
53. *Id.* at 7.
54. *Id.* at 20 (Millett, J., concurring).
55. *Id.* at 21.
56. *Id.* at 21–22.
57. *Id.* at 21 (citing Airo Die Casting, Inc., 347 N.L.R.B. 810, 812 (2006)).
58. *Id.* (citing Cooper Tire & Rubber Co., 363 N.L.R.B. 194 (2016)).
59. *Id.* (citing Calliope Designs, 297 N.L.R.B. 510 (1989)).
60. *Id.* (citing Gloversville Embossing Corp., 297 N.L.R.B. 182 (1989)).
61. *See id.* at 22.
62. *Id.*

anything at all of relevance about working conditions or worker complaints."[63] Therefore, she believed that they are categorically different from normal strike-related outbursts and should be treated insomuch.[64]

Additionally, Judge Millett chastised the Board as naïve to discount how being subjected to such a racially or sexually disparate conduct can affect other workers, let alone how these other workers may feel when the perpetrator is reinstated.[65] Finally, she concluded by cautioning the Board to "think long and hard about measuring the 'threats' associated with such sexually or racially degrading behavior from the perspective of a reasonable person in the target's position, and how nigh impossible it is to cabin racism's and sexism's pernicious effects."[66] As she pointed out, the Board should be committed to the federal government's overarching goal of rooting out discrimination in the workplace. Therefore, the Board should not tolerate nor allow "subjecting co-workers and others to abusive treatment that is targeted to their gender, race, or ethnicity [as they are] not and should not be a natural byproduct of contentious labor disputes, and . . . certainly should not be accepted by an arm of the federal government."[67]

B. General Motors

1. Facts of the Case

In *General Motors*, a worker who served as the bargaining unit members' union delegate in meetings with management was disciplined for what the employer characterized as increasingly offensive conduct.[68] Over the course of three instances, the worker was alleged to have directed profane outbursts at management, behaved in an intimidating and unprofessional manner, and played music with profane and offensive language.[69] Applying the *Atlantic Steel* four-factor balancing test, the ALJ found for the worker on one instance and the employer on the other two instances, thereby ordering that the employer cease and desist in its unfair labor practices and compensate the worker for the one instance.[70] General Motors, the employer, appealed the findings of the ALJ to the Board.[71] In their filings, General Motors asked the Board to overrule the three aforementioned tests.[72] The Trump-appointed Board obliged.[73]

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63. *Id.*
64. *Id.*
65. *Id.* at 23.
66. *Id.*
67. *Id.* at 24.
68. Gen. Motors, LLC, 369 N.L.R.B. No. 127, slip op. (July 21, 2020).
69. *Id.* at 2–3.
70. *Id.*
71. *Id.* at 2.
72. *Id.* at 4.
73. *Id.* at 2. The Board then remanded the case for further proceedings and analysis under *Wright Line*. *Id.* at 17.

2. Overruling the Setting-Specific Standards

The Board, which at that point consisted of only the three Republican members,[74] analyzed the facts under *Atlantic Steel* and concluded the test "has produced inconsistent outcomes."[75] The Board maintained that in some cases, employees who engaged in "abusive conduct"[76] retained protection because the Boards increasingly rebalanced the four *Atlantic Steel* factors in employees' favor.[77] The Board further contended that employees with more seriously abusive conduct were found by past Boards to retain the Act's protection with "little, if any, consideration to employers' right to maintain order and respect."[78] The Board also took particular issue with the second *Atlantic Steel* factor, claiming that it "always tilts the scale in favor of employees," which hardly makes it a meaningful or fair test.[79] As to the totality of circumstances test for online and social media conduct, the Board similarly said that the test's flexibility and unmoored factors "promises to create the same, if not more, inconsistency and unpredictability."[80] Although *General Motors* was not a picket line case, this Board took the opportunity to decry the *Clear Pine Moulding* test and found that the test has allowed "appallingly abusive picket-line misconduct to retain protection."[81]

The *General Motors* Board then explained that these three setting-specific tests should be overruled because not only have they become effectively useless, but they are also incongruent with anti-discrimination statutes since they are "wholly indifferent to employers' legal obligations to prevent hostile work environments on the basis of protected traits."[82] Instead, the Board posited that the *Wright Line* test[83] is the proper standard for analyzing whether or not offensive conduct loses protection as it would harmonize the NLRA with anti-discrimination statutes, regardless of the setting.[84]

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74. Member McFerran's term had expired and she was awaiting confirmation. Christine Neylon O'Brien, *Twenty-First Century Labor Law: Striking the Right Balance Between Workplace Civility Rules that Accommodate Equal Employment Opportunity Obligations and the Loss of Protection for Concerted Activities Under the National Labor Relations Act*, 12 Wm. & Mary Bus. L. Rev. 167, 206-07 n. 280 (2020); *see also Lauren McFerren*, NLRB, https://www.nlrb.gov/bio/lauren-mcferran (last visited Apr. 5, 2024).

75. *Gen. Motors*, 369 N.L.R.B. No. 127, slip op. at 4.

76. Although "abusive conduct" has never been properly defined, the term has come to be understood as racially and sexually derogatory conduct. *See, e.g.*, Gen. Motors, slip op. at 1.

77. *Id.* at 5 (citing Tampa Tribune, 351 N.L.R.B. 1324 (2007) and Plaza Auto Ctr., Inc., 360 N.L.R.B. 972 (2014)).

78. *Id.* at 5–9.

79. *Id.* at 5.

80. *Id.* at 6.

81. *Id.* at 6.

82. *Id.* at 7.

83. Wright Line, 251 N.L.R.B. 1083 (1980) (creating a burden-shifting framework normally invoked for cases where the General Counsel alleges that discipline or discharge was motivated by the employer's animus toward Section 7 activity, while the employer contends that it was motivated by a legitimate business reason).

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

3. "Harmonizing" with Title VII

The *General Motors* Board claimed that *Wright Line* would better harmonize the NLRA to Title VII and other federal anti-discrimination statutes.[85] Under *Wright Line*, the burden first rests on the General Counsel ("GC") to "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" and that there is sufficiently causal relationship between the discipline and the Section 7 activity.[86] Once the GC has made this case, the burden then shifts to the employer to show that it "would have taken the same action even in the absence of Section 7 activity."[87]

The Board claimed that the *Wright Line* test would lead to consistent decisions that harmonize the NLRA with anti-discrimination statutes and allow employees to safeguard their workplaces from egregiously offensive such as the racial epithets seen in *Cooper Tire*.[88] The Board explained that under *Wright Line*, while it is unlawful for employers to target employees who engage in PCA and subject them to discipline for said PCA, employees who engage in offensive conduct will be afforded no greater protection from discipline simply because it comes with PCA.[89]

In reality, the *Wright Line* test changes nothing and is vulnerable to the same weaknesses that the *General Motors* Board accused the three setting-specific tests of. These vulnerabilities were illustrated in several cases following *General Motors*,[90] leading to it eventually being overruled.

C. Lion Elastomers

1. Facts of the Case

The Board first heard this case as *Lion Elastomers I*, 369 N.L.R.B. No. 88 (2020), where a worker was discharged for raising concerns about working conditions to a safety manager during a safety meeting and things got heated.[91] The Board found for the employee after applying the *Atlantic Steel* four-factor test.[92] The employer, Lion Elastomers, appealed to the Fifth Circuit and the Board filed a cross-application for enforcement, during which time *General Motors* was

85. *See id.* at 10.
86. *Id*.
87. *Id.*
88. *See id.*
89. *Id.*
90. *See, e.g.*, Constellium Rolled Products Ravenswood, LLC, 371 N.L.R.B. No. 16, slip op. (Aug. 25, 2021); Casey Thibodeaux*, It's What You Said and How You Said It: The NLRB's Attempt to Separate Employee Misconduct from Protected Activity in General Motors LLC*, 82 La. L. Rev. 227 (2021); O'Brien, *supra* note 75; Kurt Stumpo, *Driving the National Labor Relations Act Forward: Analyzing Abusive Conduct that Occurs in the Course of Protected Activity After General Motors LLC*, 43 Cardozo L. R. 1999 (2022).
91. Lion Elastomers LLC (*Lion Elastomers II*), 372 N.L.R.B. No. 83, slip op. at 1 (May 1, 2023).
92. *Id.*

decided and applied retroactively to all pending cases.[93] The Board then successfully filed a motion for remand from the Fifth Circuit back to the Board and invited Parties to provide statements of position.[94] While the General Counsel argued to reverse *General Motors*, the Respondent argued for further remand to an ALJ and application of *General Motors*.[95] Ultimately, in a four-to-one opinion, the Board ruled to overturn *General Motors* and return to the setting-specific standards.[96]

2. Overruling General Motors

Much of the analysis in *Lion Elastomers II* is dedicated to overruling *General Motors* as opposed to discussing the specific facts of the case. In large part, the majority argued that *General Motors* is an aberration from over four decades of unbroken precedent dating back to the *Atlantic Steel* decision in 1979 and *Clear Pine Moulding* decision in 1984.[97] The majority also pointed out that in addition to the four decades of unbroken precedent, there are over 70 years of key guiding principles along the same sentiment that "conduct occurring during the course of protected activity must be evaluated as part of that activity," which suggests that there is something intrinsically different about Section 7 activity that must be delineated and protected.[98]

In addition to the setting-specific standards' long-standing history prior to *General Motors*, the majority noted that these guidelines have also never been successfully challenged by federal appellate courts.[99] No federal appellate courts have ever prohibited the Board from using setting-specific standards. Moreover, these courts never required the application of the *Wright Line* test.[100] To support their argument, the majority cited *Linn*, 383 U.S. 53 (1966) and *Burnup & Sims*, 379 U.S. 21 (1964), where SCOTUS acknowledged that labor disputes naturally are heated.[101]

The *Lion Elastomers II* Board then went on to argue that *General Motors* was wrong to attack setting-specific standards and replace it with *Wright Line* because it incorrectly interpreted the Board's duties and Sections 7 and 8.[102] The majority proceeded to explain that Board precedent has held that employer motive is not the issue nor required for a Section 8(a)(3) violation, and that causation is established once it is determined that the worker's disciplined-for conduct is still protected under the NLRA.[103] *General Motors* essentially took away the Board's

93. *Id.*
94. *Id.* at 2.
95. *Id.*
96. *Id.* at 1.
97. *Id.* at 2.
98. *Id.* at 3.
99. *Id.* at 3.
100. *Id.* at 4.
101. *Id.*
102. *Id.* at 5–6.
103. *Id.*

statutory function to discern the scope of Sections 7 and 8, giving employers the practically unfettered right to police worker statements.[104] The Board further explained that this was incorrect because it was inconsistent with decades of understanding, affirmed by and federal appellate courts, that Congress intended to give the Board responsibility for maintaining the balance between workers and employers.[105] *General Motors* failed to realize that meaningful collective bargaining cannot occur if workers are so easily unilaterally disciplined for exercising their rights when there is no parallel ability for workers to similarly affect their employers.[106]

The majority also argued that *General Motors'* decision to apply *Wright Line* as the standard was incorrect because it allowed employers too much latitude.[107] By not defining nor restraining abusive conduct, *General Motors* allowed employers wide discretion to discipline workers for "incivility" regardless of setting, significantly chilling worker speech.[108] On the other hand, the *Lion Elastomers II* board noted that *General Motors*' application of the *Wright Line* test would allow the reinstatement of workers who actually committed gross misconduct where the employer was found to have unlawful motives to discipline.[109]

3. Deferring the Question of Tension with Federal Anti-Discrimination Statutes

The Board majority found it unnecessary to address the tension between the NLRA and federal anti-discrimination statutes that the *General Motors* majority had purported to exist in order to overturn *General Motors*.[110] However, the majority did address where it found *General Motors*' arguments to be unconvincing and inadequate.[111]

The majority in *Lion Elastomer II* found that *General Motors* cherry-picked cases in order to support the argument that setting-specific standards led to tension between the NLRA and federal anti-discrimination statutes.[112] For example, although *General Motors* cited *Cooper Tire*, it ignored the Eighth Circuit's decision siding with the Board to apply *Clear Pine Mouldings* rather than *Wright Line*, which is directly contrary to *General Motors*.[113] Moreover, the majority pointed out that *General Motors* did not actually cite any cases where this tension was actually in play because there have been no cases where employers were alleged to violate federal anti-discrimination cases in favor of the NLRA.[114] Therefore, the *General Motors* Board's claim that it was harmonizing the NLRA

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104. *Id.*
105. *Id.* at 6.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 13.
110. *Id.* at 9.
111. *Id.* at 8.
112. *Id.* at 7–8.
113. *Id.* at 8.
114. *Id.*

with Title VII was without substance and unsupported by history.[115] Additionally, the majority pointed out that per *Epic Systems*, the Supreme Court has held that the reconciliation of statutory regimes is for the courts to decide, not agencies such as the Board.[116]

Furthermore, the *Lion Elastomer II* majority found that *General Motors* misunderstood the D.C. Circuit's holding on *Constellium* as an endorsement for *Wright Line* and a condemnation of *Atlantic Steel*.[117] Per the majority, when the D.C. Circuit remanded *Constellium* to address the anti-discrimination argument, it was not endorsing *Wright Line*, but merely saying that the *Wright Line* standard was sufficient to address the issue in this particular matter, i.e., the disparate application of a work rule.[118] The majority also pointed out that the *General Motors* Board did not have any judicial support for their claim "that employers have a legal duty under antidiscrimination law to discipline or discharge employees in *every* instance" of offhand comments, even those which are non-egregious and normally retain protection under the NLRA if they happened in conjunction with Section 7 activity.[119]

The majority rounded its discussion of anti-discrimination statutes by saying that the alleged tension between the NLRA and any other federal statute as just another factor that the Board is *free* to consider when determining if employee misconduct in the exercise of Section 7 rights loses protection if the misconduct would otherwise retain protection.[120] However, this freedom to consider a violation of another federal statute in determining whether an employee has lost protection fails to adequately address the concerns raised by Judge Millet. Courts and the Board generally acknowledge that without such offensive conduct being deemed *severe and pervasive*, it will not be found to violate federal anti-discrimination law[121] and, in many instances is not likely to impact the NLRB's setting-specific standards. Therefore, such freedom would be cold comfort to historically marginalized workers victimized by racially and sexually abusive commentary by fellow employees during the course of PCA. While the standards were restored with the overruling of *General Motors*, the metrics used in determining its elements could stand revisiting. For example, the definition of what constitutes a threat of violence by an employee engaged in PCA to a person of color or a woman might have been examined more closely by this post-*George Floyd* and *#MeToo* Board majority.

In summary, the *Lion Elastomers II* Board overruled *General Motors* and returned to the setting-specific standards to determine when workers lose PCA status. However, this return to the prior standard brings with it the concerns that

115. *See id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* (emphasis added).
120. *Id.* at 9.
121. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

General Motors was ill-equipped to address, which was Judge Millett's concerns from *Consolidated Communications*. How are we supposed to treat racist and sexist conduct occurring in conjunction with PCA?

II. How to Proceed Despite Lack of Guidance

Although the Board and GC have signaled their intent to address any tensions between the NLRA and Title VII of the Civil Rights Act of 1964 as brought up by Judge Millett and subsequent critics,[122] to date, no substantial guidance has been issued.[123] It has been reported that employers, in the wake of the *Lions Elastomers* decision, remain frustrated, as the decision fails to address what should be done with disruptive, profane, racist sexist and homophobic behavior in the workplace. They feel that the Board needs "to give employers some rules of the road."[124] So, how can we address workers who make racially and sexually derogatory statements while engaged in PCA? There are a variety of approaches that Congress, the NLRB, and employers could take to help resolve this issue.

A. *Various Ideas on How to Reconcile the NLRA and Title VII*

Even before Judge Millet's *Consolidated Communications* concurrence, labor law scholars have suggested many proposals they believe will reconcile the NLRA and Title VII obligations. The following is a brief discussion of some of these suggestions.

1. Enact New Legislation

The argument for new federal legislation is based on observations about the NLRA's limitations on protecting employee speech.[125] The United States Constitution may endow an individual with a First Amendment right to free speech. However, there is no constitutional, or for that matter, statutory right to free speech in the private sector workplace. [126] As such, some scholars posit that new federal legislation may be required to protect individual worker's speech

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122. *See* Kate Tornone, *Guidance on Stopping Harassment Without Violating the NLRA Is on the Way*, HR DIVE (Nov. 13, 2017), https://www.hrdive.com/news/guidance-on-stopping-harassment-without-violating-the-nlra-is-on-the-way/510645/; Office of Public Affairs, *The National Labor Relations Board, US Department of Labor, US Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers' Rights*, NAT'L LAB. RELS. BD. (Nov. 10, 2021), https://www.nlrb.gov/news-outreach/news-story/the-national-labor-relations-board-us-department-of-labor-us-equal.

123. A quick look at either the EEOC or NLRB's interagency guidance pages show no such joint memorandum of understanding. *See Interagency Memoranda of Understanding,* NAT'L LAB. RELS. BD., https://www.nlrb.gov/guidance/key-reference-materials/interagency-international-collaboration/interagency-MOUs (last visited Apr. 5, 2024).

124. *See* Anne Cullen, *Examples Seen as Crucial To Useful EEOC, NLRB Guidance*, LAW360 (Mar. 26, 2024).

125. *See* Ann C. McGinley, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L. J. 75 (2012). Note that this article and its suggestions are primarily about worker speech and social media; I have pulled recommendations from this article for use for more general suggestions on worker speech.

126. *Id.* at 114–15.

rights.[127] Recommendations regarding worker speech suggest generally limiting employers' ability to discipline workers for speech "unless the speech (i) constitutes illegal harassment under federal anti-discrimination law; (ii) reveals trade secrets or proprietary information; or (iii) disparages the employer's products or services."[128] By specifically carving out an exception to employee speech protections when the employee violated anti-discrimination law, new legislation could firmly set the boundaries of the NLRB's jurisdiction to exclude such matters and prevent the Board from protecting racist and sexist speech.

While the idea of new federal legislation explicitly outlining the boundaries of employer interference on worker speech would be an interesting solution to Judge Millet's concerns, it has significant barriers to success. First, the notion of codifying protected employee speech would not only be an arduous task, but it is also likely to be attacked as unconstitutionally compelled speech, because the legislation is forcing the employer to permit speech that it might not agree with. Second, with Congress's increasingly polarizing positions on workers' rights, there is not enough political will to make such legislation even close to a reality. Furthermore, passing new legislation, even if feasible, does nothing for workers nor employers in the immediate time.

2. Issue Interagency Guidance

Some legal scholars believe that joint guidance from agencies like the NLRB, EEOC and other relevant agencies, on impermissible workplace speech would remedy the frustration and confusion felt after *Lions Elastomers*.

Advocates of this proposal point out that interagency-issued guidance, or joint memorandum of understanding ("MOU"), are not new.[129] For example, in 1993, the EEOC issued an MOU regarding how to handle Title VII cases that also violated the Americans with Disabilities Act and the NLRA.[130] The NLRB is no exception: it maintains a list of interagency MOUs that includes one as recent as March 2023 with the Consumer Financial Protection Bureau.[131] Furthermore, agencies seem to be amenable to the suggestion.[132] In 2017, NLRB General Counsel Abruzzo announced that the NLRB and EEOC would "work together to

127. *Id.* at 116.

128. *Id.* at 118. Note that these limitations would be in line with current Board case law to disqualify PCA anyway. The idea is that they would be codified into law, taking away any confusion.

129. 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. OF LAB. & EMP. L. 291, 298 (2018).

130. Manuel Quinto-Pozos, *The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Union Perspective*, 33 ABA J. LAB. & EMPL. L. 277, 285 (2018).

131. CONSUMER FIN. PROT. BUREAU & NAT'L LAB. RELS. BD., MEMORANDUM OF UNDERSTANDING BETWEEN THE CONSUMER FINANCIAL PROTECTION BUREAU AND THE NATIONAL LABOR RELATIONS BOARD 1 (Mar. 7, 2023), https://www.nlrb.gov/sites/default/files/attachments/pages/node-7857/cfpb-nlrb-mou.pdf.

132. Tornone, *supra* note 122.

publish guidance on the intersection between the two laws."[133] And, in 2021, the NLRB, EEOC, and Department of Labor announced a joint initiative to "raise awareness about retaliation issues when workers exercise their protected labor rights."[134]

While this proposal could help settle Judge Millett's concerns in *Consolidated Communications*, this is currently speculation at best. As other scholars have pointed out, while well-intentioned, MOUs rarely offer sufficient guidance, even for the agencies, "on how to resolve conflicts between the laws."[135] Furthermore, in the six years since GC Abruzzo announced a plan for a joint MOU, no such document has been issued yet.[136]

Fortunately, such guidance from the EEOC and the NLRB may well be on the way. In March of 2024, it was reported that Charlotte Burrows, Chair of the EEOC stated that her agency and the NLRB are planning to issue joint guidance to help employers navigate controversial speech that might run afoul of anti-discrimination statutes, but is protected under federal labor law.[137] While there was no date announced for such guidance, Burrows, through a recent public statement, has indicated commitment to this endeavor. "Obviously we are very concerned about hostile work environment and racial slurs, so we want to help get it right."[138]

3. Automatically Revoke Protection

Other legal scholars argue that the Board should not protect those who violate another federal statutory scheme and should, therefore, automatically revoke any Section 7 protection for acts that violate anti-discrimination statutes. These scholars argue, as Judge Millett did, that the NLRB should not shelter hostile speech in violation of Title VII.[139]

Many of these proposals call for the Board to adopt a per se rule or a clear definition of "abusive conduct" that "cover[s] offensive language on the basis of a statutorily protected characteristic, or other conduct that directly creates liability for the employer under applicable law."[140] For example, if the speech "meets the standard for hostile work environment under Title VII,"[141] it should be considered "abusive conduct." As the Supreme Court and other federal courts have repeatedly ruled that Title VII was not intended to create a workplace

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133. Vann & Logan, *supra* note 129.

134. Office of Public Affairs, *supra* note 122.

135. Quinto-Pozos, *supra* note 130.

136. Vann & Logan, *supra* note 129; Quinto-Pozos, *supra* note 130, at 285.

137. Khorri Atkinson, *EEOC, NLRB Promise Guidance on Profanity During Union Activity*, BLOOMBERG LAW (Mar. 21, 2024), https://news.bloomberglaw.com/daily-labor-report/eeoc-nlrb-promise-guidance-on-profanity-during-union-activity.

138. *Id.*

139. *See, e.g.*, Thibodeaux, *supra* note 30.

140. Thibodeaux, *supra* note 30, at 268; Taylor Arluck, *How the National Labor Relations Board Is Still Failing Marginalized Employees*, 87 BROOKLYN L. REV. 1007, 1028–29 (2022).

141. LeRoy, *supra* note 26, at 270.

civility code,[142] some scholars argue it should not encompass "merely profane or insulting language."[143] According to these scholars, no matter how "abusive conduct" is ultimately defined, once the boundaries of what is or is not abusive conduct or hate speech is determined, actions that meet the definition should automatically lose legal protection.[144]

This appears to be a workable proposal that the Board could easily adopt when presented with the right case. However, adopting such a new standard for defining "abusive conduct" puts the Board in the position of interpreting Title VII when assessing the applicability of the NLRA to a case scenario. Some courts might view such actions to be outside the realm of that agency's authority.

4. Narrow NLRA Jurisdiction in Favor of Title VII

When the NLRA was first passed in 1935, legal protections against workplace discrimination were not on anyone's radar.[145] Federal employment anti-discrimination law did not come into play until 1964 as part of the Civil Rights Act of 1964.[146] Thus some scholars, such as Professor Cynthia Estlund, argue that as the newer statutory scheme, Title VII should get deference.[147] These scholars explain that while nothing suggests that Title VII restricts the Board, the overlap leads to much confusion and separating the two statutory schemes would ease any tensions.[148] Given the many exceptions to Section 7 of the NLRA, "it is hardly remarkable to conclude that Title VII [was intended to] add a ban on discriminatory harassment to the list."[149] Additionally, "given the employer's recognized power under the NLRA to limit workplace discourse where necessary. . . it requires no great departure to allow the employer to restrict workplace discourse—even that which would otherwise qualify for Section 7 protection—in order to maintain an atmosphere of tolerance and equality."[150] However, in spite of the contours of the NLRA, much confusion still exists as to what the Board should actually do. Accordingly, these scholars argue that it would be simpler if all matters that meet

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142. L. C. Herbert, *Is Title VII a "Civility Code" Only for Union Activities*, 45 U. ARK. LITTLE ROCK L. REV. 1 (2022); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

143. Thibodeaux, *supra* note 30, at 231.

144. *See* LeRoy, *supra* note 26, at 270; Green, *supra* note 26, at 235; Arluck, *supra* note 144, at 1028–29.

145. *See* National Labor Relations Act § #, 29 U.S.C. §§ 151–169 (1935).

146. Other employment anti-discrimination statutes include the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, the Rehabilitation Act of 1973, and the Lily Ledbetter Fair Pay Act of 2009. *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 (last visited Apr. 5, 2024).

147. Kerry L. Stone, *Symposium: Bullying: Redefining Boundaries, Responsibility, and Harm: Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers who Wish to Ban Bullying*, 22 TEMP. POL. & CIV. RTS. L. REV. 355, 381 (2013) (citing Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 737 (1997)).

148. Roth, *supra* note 44, at 98–99.

149. Estlund, *supra* note 143, at 738.

150. *Id.* at 738–39.

the Title VII standard were taken from the jurisdiction of the Board.[151] As some explain it, the Supreme Court has long held that the Board cannot be so single-minded in its enforcement of the NLRA that it forgets or even interferes with other statutory schemes.[152]

This suggestion is a plausible answer to Judge Millett's concerns, as it could definitively set the boundaries of NLRB jurisdiction and tell the Board what to do when faced with racist and sexist actions taken under the cover of Section 7 activity. However, this suggestion is also difficult in that it would require the Board to take a categorical approach to these actions, which it has largely resisted.[153]

B. Employers Turn to Workplace Rules and Employee Handbooks

While the suggestions discussed in the previous subsection offer much valuable insight as to how the NLRB and Congress may address expressions of PCA that are deemed abusive for being racist or sexist, there is little immediate guidance for employers and workers presently dealing with such scenarios. And as explained in Part II, while workers have a right to exercise PCA,[154] employers also have an obligation to maintain their workplaces and curtail harassment and discrimination.[155] Thus, even though they are not required to, many employers resort to written workplace rules, policies, and employee handbooks to set expectations and communicate to workers what is and is not allowed.[156]

According to a vast majority of human resources experts, employers should maintain a centralized written repository of workplace rules such as an employee handbook.[157] In doing so, employers may effectively, efficiently, and consistently communicate all of their policies and procedures to workers in a uniform manner. By clearly laying out their policies and procedures, employers can meet their federal and state obligations under statutes like Title VII and accordingly shield themselves from liability.[158] For example, an employer that works in sensitive information may communicate a no-camera policy in the interests of protecting its

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151. Molly Gibbons, Comment, *License to Offend: How the NLRA Shields Perpetrators of Discrimination in the Workplace*, 95 WASH. L. REV. 1493 (2020).

152. *Id.* at 1532.

153. *Lion Elastomers II* is a good representation of that hesitance.

154. National Labor Relations Act § 7, 29 U.S.C. § 157.

155. Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-2a.

156. Marks, *supra* note 33.

157. *See, e.g.*, *id.*; Keith Mishler, *Why Are Employee Handbooks Important? Here's 7 Reasons*, INSPERITY, https://www.insperity.com/blog/why-are-employee-handbooks-important/; *8 Reasons You Should Have a Company Employee Handbook* (last visited Apr. 5, 2024); PAYCOR (Dec. 14, 2021), https://www.paycor.com/resource-center/articles/8-reasons-you-should-have-a-company-employee-handbook/#:~:text=In%20a%20nutshell%2C%20it%20sets,wrongful%20termination%2C%20harassment%20and%20discrimination; *Employee Handbook*, Bamboo HR, https://www.bamboohr.com/resources/hr-glossary/employee-handbook (last visited Apr. 5, 2024); Patty Hilger, *12 Experts Weigh In On Why You Need An Employee Handbook*, GENESIS HR SOLUTIONS (May 10, 2023), https://genesishrsolutions.com/peo-blog/importance-of-employee-handbook/.

158. *Supra*, note 133.

trade secrets as well as a no-harassment or discrimination policy that prohibits and lays out the punishment for racially or sexually derogatory conduct.[159]

However, recent Board decisions show that some employers have difficulty figuring out how to do this properly.

III. Employers May No Longer Maintain Overbroad Workplace Rules

The Supreme Court has long held that it is the NLRB's duty to determine how to protect employees' right "to organize for mutual aid without employer interference" under the NLRA "in light of the infinite combinations of events which might be charged as violative of its terms."[160] And the Court has granted the NLRB a significant amount of flexibility to do so.[161] As a result, both the NLRB and the appellate courts have long acknowledged that part of this duty includes regulating employers' workplace rules.[162] In doing so, the Board performs an "important prophylactic function" by "block[ing] rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than forcing the Board to 'wait until that chill is manifest,' and then trying to 'undertake the difficult task of dispelling it.'"[163]

However, similarly to what happened with its treatment of worker outbursts, the Trump-appointed Board[164] believed that the long-standing setting-specific and particularized standards governing employers' workplace rules were too inconsistently applied. Therefore, the Board overruled the setting-specific standard in *Boeing* and replaced it with a standard aimed at simpler and more unified decisions. This standard was later refined in *LA Specialty Produce*.[165] When this new standard also proved to weigh too heavily on employer interests to the detriment of workers' explicitly enumerated rights, the Biden-appointed Board overruled it in *Stericycle* and reestablished the old standard.[166]

A. Cases Leading Up to Stericycle

1. Lutheran Heritage

In *Lutheran Heritage*, the Board was faced with a case where the employer, an extended healthcare provider, was alleged to have maintained impermissibly overbroad workplace rules that had a tendency to chill employees in the exercise

159. *See, e.g.,* Boeing Co., 365 N.L.R.B. No. 154, 17–18 (Dec. 14, 2017) (finding that employer's no-camera policy was lawful mostly because of its clearly defined purpose in protecting employer's trade secrets).

160. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

161. *Id.*

162. *See generally id.*; Quicken Loans, Inc. v. NLRB, 830 F.3d 542 (D.C. Cir. 2016); Cintas Corp. v. NLRB, 482 F.3d 463 (D.C. Cir. 2007); Lafayette Park Hotel, 326 N.L.R.B. 824 (1998).

163. *Quicken Loans*, 830 F.3d at 549 (quoting Flex Frac Logistics, 358 N.L.R.B. 1131, 1132 (2012)).

164. The same Board which went on to decide *General Motors* two years later.

165. Boeing Co., 365 N.L.R.B. No. 154, slip op. at 1 (Dec. 14, 2017).

166. Stericycle, Inc., 371 N.L.R.B. No. 113 (Aug. 2, 2023).

of their Section 7 rights.[167] *Lutheran Heritage* refined the standard set by *Lafayette Park*, an earlier case that was affirmed by the D.C. Circuit. [168] This standard identified the proper inquiry for facial challenges to the workplace to be "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."[169] The *Lutheran Heritage* standard first determines whether a workplace rule "explicitly restricts activities protected by Section 7" and then, if the rule is not explicit, finds that facially neutral workplace rules were still in violation of Section 8 upon a showing where "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[170] The Board explained that a workplace rule does not violate Section 8(a)(1) just because it "could conceivably be read to cover Section 7 activity," instead, the analysis must be based on how a reasonable employee would read the rule.[171] Applying this new standard to the facts of the case, the Board found that the employer did not violate Section 8(a)(1) with a rule prohibiting abusive or threatening language, and that a workplace rule preventing harassment was lawful. The Board explained that "use of abusive or profane language may be sufficiently egregious to deprive an employee of the protection of the [NLRA] even if used during the course of Section 7 activity."[172]

2. Boeing

Post-*Lutheran Heritage*, despite some degree of confusion and disagreement as to its proper application, the Board and reviewing courts had consistently applied and upheld the standard.[173] Furthermore, no court of appeal had rejected the *Lutheran Heritage* standard for 13 years.[174]

However, in 2017, without being asked to and without soliciting public input,[175] a Trump-appointed majority[176] decided to overrule the *Lutheran Heritage* standard. In *Boeing*, the majority held that the lawfulness of a facially

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167. Martin Luther Mem'l Home, Inc. (*Lutheran Heritage*), 343 N.L.R.B. 646, 652 (2004).

168. Lafayette Park Hotel, 326 N.L.R.B. 824 (1998). Referring to the Supreme Court's decision in *Republic Aviation*, the Board identified the proper inquiry for facial challenges to workplace rules to be "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights", and also found that mere maintenance of such a rule that has a chilling effect violates Section 8(a)(1) even if there is no evidence of enforcement. *Id.* at 824–25. Lafayette Park Hotel v. NLRB, 203 F.3d 52 (D.C. Cir. 1999).

169. Lafayette Park Hotel, 326 N.L.R.B. 824, 824–25 (1998).

170. *Lutheran Heritage*, 343 N.L.R.B. at 646–47.

171. *Id.* at 647.

172. *Id.* at 648.

173. Stericycle, Inc., 371 N.L.R.B. No. 113, slip op. at 5 (Aug. 2, 2023).

174. *Id.* (citing William Beaumont Hospital, 363 N.L.R.B. 1543, 1545 & n.11 (2016)).

175. As would normally be the case when the Board is reconsidering the validity of a standard. *See, e.g.*, *Archived Notices for Briefs and Invitations*, NATIONAL LABOR RELATIONS BOARD, https://www.nlrb.gov/cases-decisions/filing/invitations-file-briefs/archived-notices-briefs-and-invitations (last visited Apr. 5, 2024).

176. Which went on to decide *General Motors* two years later.

neutral workplace rule will be based on (1) the nature and extent of the potential impact on NLRA rights, and (2) legitimate justifications associated with the rule.[177] The *Boeing* Board also established a categorical approach to workplace rules, policies, and employee handbook provisions.[178] "Category 1" rules are always lawful to maintain because they are rules that, when reasonably interpreted, do not prohibit or interfere with the exercise of Section 7 PCA, or rules that, even with potentially adverse impacts on Section 7 PCA, are outweighed by justifications associated with the rule.[179] "Category 2" rules are sometimes lawful to maintain, pending some scrutiny as to whether they would prohibit or interfere with Section 7 PCA and their justifications.[180] Finally, "Category 3" rules are always unlawful because they would prohibit or limit Section 7 PCA and are not sufficiently justified.[181]

The Board applied this new standard to the facts of the case, where a military and commercial aircraft manufacturer maintained a no-camera in the workplace rule.[182] The Board found that any adverse impact on Section 7 PCA was comparatively slight compared to the important justifications of trade secrets and the like.[183] Therefore, the rule was deemed lawful as a Category 1 rule.[184] Additionally, the Board "deemed all rules of that type always lawful for employers to maintain no matter the circumstances."[185]

3. LA Specialty Produce

Less than two years after *Boeing*, another Trump-appointed majority[186] realized that the *Boeing* standard needed clarification because it was not instructive as to how to interpret the standard.[187] Therefore, the Board provided clarification of the *Boeing* standard in *LA Specialty Produce*. First, the Board clarified that the initial burden is on the GC to prove that a reasonable employee interpreting the facially neutral rule would potentially interfere with the exercise of Section 7 PCA.[188] Second, once the GC meets that initial burden, *Boeing* analysis requires the potential interference to be balanced against the employers' legitimate justifications

177. Boeing Co., 365 N.L.R.B. No. 154, slip op. at 3 (Dec. 14, 2017).
178. *Id.* at 3–4.
179. *Id.* at 3.
180. *Id.* at 4.
181. *Id.*
182. *Id.* at 17.
183. *Id*.
184. *Id.*
185. Stericycle, Inc., 371 N.L.R.B. No. 113, slip op. at 6 (Aug. 2, 2023) (citing *Boeing*, 365 N.L.R.B. No. 154, slip op. at 17). Interestingly, as *Stericycle* notes, *Boeing* also includes a sort of throwaway reference to workplace rules regarding outbursts and the like by also designating all rules "requiring employees to abide by basic standards of civility" as Category 1. *Id.* (citing *Boeing*, 365 N.L.R.B. No. 154, slip op. at 17).
186. Two of the three-person majority that decided *Boeing* and *General Motors*.
187. *See* LA Specialty Produce Co., 368 N.L.R.B. No. 93, slip op. at 2 (Oct. 10, 2019).
188. *Id.*

associated with that rule.[189] And third, the Board admitted that there will be cases in which it is "not possible to draw any broad conclusions about the legality of the a particular [workplace] rule because the context of the rule and the competing [Section 7] rights and interests involved are specific to that rule and that employer;" these sorts of rules are *Boeing* Category 2.[190] Additionally, *LA Specialty Produce* explained that the three categories enumerated in *Boeing* were not themselves a test nor party of any tests, but rather the natural products from the application of the *Boeing* standard.[191]

B. Stericycle

Despite the *LA Specialty Produce* majority's efforts, the Biden-appointed Board in *Stericycle* found that the *Boeing* standard could not stay and overruled it.[192] Chief among the reasons given was that, like *General Motors* did regarding worker speech and outbursts, *Boeing* gave too much consideration to employers to the detriment of workers.[193]

1. Facts of the Case

Stericycle involves a dispute between Stericycle, a medical waste disposal company, and employees at two of its facilities located in Southampton and Morganton, Pennsylvania.[194] Though employees had alleged multiple violations of Section 8(a)(5) for refusing to bargain collectively, the case arrived before the Board primarily due to the allegation that the employer violated Section 8(a)(1) by maintaining several workplace rules in the employee handbook that interfered with workers' Section 7 rights.[195] Policies at issue included (1) restricting the "use of personal mobile phones or other electronic devices to break time" and prohibiting such devices "from entering work areas with their cell phones and other electronic devices;"[196] (2) prohibiting "employee conduct that 'maliciously harms or intends to harm the business reputation' of the Company;"[197] (3) prohibiting "employee activity that "constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management;"[198] (4) prohibiting employees from discussing or disclosing complaints and their resolution as a part of the company's retaliation policy;[199] (5) prohibiting the use of phone and data lines for nonbusiness usage;[200] and (6) prohibiting "employees from taking

189. *Id.* at 3.
190. *Id.*
191. *Id.* at 2.
192. Stericycle, Inc., 371 N.L.R.B. No. 113, slip op. at 1 (Aug. 2, 2023).
193. *Id.* at 8.
194. *Id.* at 33.
195. *Id.*
196. *Id.* at 43.
197. *Id.*
198. *Id.* at 44.
199. *Id.*
200. *Id.* at 45.

pictures, or video or audio recordings with personal or company-issued mobile phones, cameras, camcorders or other devices . . . without the permission of their supervisor/manager."[201] Applying *Lutheran Heritage*, the ALJ found most of these policies to be impermissibly overbroad and, therefore, in violation of Section 8(a)(1).[202] Claims for policies which were not found in violation of Section 8(a)(1) were dismissed.[203] The parties appealed the decision to the Board.[204]

2. Overruling Boeing and LA Specialty Produce

Upon being given the opportunity to reconsider *Boeing*, the *Stericycle* Board found that the standard impermissibly allowed "employers to adopt overbroad work rules that chill employees' exercise of their rights under Section 7 of the Act." Accordingly, the Board overruled it.[205]

The Board rooted its accusations against *Boeing* in] n analysis of *Republic Aviation* and *Gissel Packing Co*.[206] In *Republic Aviation*, the Board explained, the Supreme Court charged the NLRB with "protecting 'the right of employees to organize for mutual aid without employer interference.'"[207] Equally important, however, is "the 'right of employers to maintain discipline in their establishments' and otherwise protect their legitimate and substantial business interests by regulating employees' workplace conduct."[208] Altogether, *Republic Aviation* charged the Board to, as with other Section 8(a)(1) subjects, balance both employer interests and worker rights.[209] However, the Board pointed out that the Supreme Court has also indicated that this balance requires some discussion of the "economic dependence of the employees on their employers, and the necessary tendency of the form, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."[210] In short, balancing employer interests and worker rights requires an understanding that they are not equal. But, as the Board noted, *Boeing* failed to do this balancing.

The *Stericycle* Board reasoned that by not factoring economic dependency, the *Boeing* Board gave too little weight to workers' rights and too much weight to employers' interests.[211] That, in conjunction with *Boeing* not requiring employers to "narrowly tailor [workplace] rules to only promote its legitimate and substantial business interests,"[212] seriously overburdened workers' rights.[213] Under

201. *Id.* at 43–45.
202. Note that the ALJ's decision dates back to 2016, well before *Boeing*.
203. *Stericycle*, 371 N.L.R.B. No. 113, slip op. at 43–45.
204. *Id*. at 1.
205. *Id.*
206. *Id.* at 8.
207. *Id.* (citing Republic Aviation v. NLRB, 324 U.S. 793, 798 (1945)).
208. *Id.*
209. *See id.*
210. *Id.* (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)).
211. *Id.* at 1.
212. *Id.*
213. *See id.*

Boeing, it did not matter that for the vast majority of workers, wages only grew 12% over the course of four decades even when their employers reported increasing profits and CEO compensation grew 940% in the same time period.[214]

Having overruled *Boeing* and its progeny, the *Stericycle* Board necessarily also overruled the three-category approach that *Boeing* introduced.[215]

3. Returning to and Refining Lutheran Heritage

Upon overruling *Boeing*, the *Stericycle* Board reinstated a modified *Lutheran Heritage* standard.[216] This standard, according to the Board, is more in line with *Republic Aviation* and *Gissel*, because it recognizes the chilling effect overbroad workplace rules can have on workers, and requires employers to constrain their rules as much as possible while still keeping employer interests and justifications for the rules in mind.[217] *Lutheran Heritage* is a particularized standard that is setting- and fact-specific, "[making] explicit that an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule."[218] As such, it balances interests more carefully than *Boeing* did. As the Board noted, narrow tailoring is "exactly the sort of reasonable 'adjustment'" between employees' and employer interests that the Supreme Court tasked the NLRB with in *Republic Aviation*.[219] Since the circuit courts had consistently applied and upheld the *Lutheran Heritage* standard prior to *Boeing*, they clearly had no issue with narrow tailoring.[220]

The *Stericycle* board also noted that in addition to being narrowly tailored and accommodating for economic dependency, the new *Lutheran Heritage* standard will also interpret the contested workplace rule from the perspective of a reasonable employee who is subjected to the rule and economically dependent on the employer and is contemplating engaging in Section 7 PCA.[221] As such, once the GC proves that a challenged workplace rule has a reasonable tendency to chill employees from exercise of their Section 7 rights, it is on the employer to rebut the presumption of unlawfulness by proving that the rule advances a legitimate and substantial business interest that it cannot do otherwise with a more narrowly tailored rule.[222] The standard will also no longer account for employers' supposed intentions for maintaining the rule.[223]

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214. *See* FEAR AT WORK, *supra* note 6, at 2.
215. *Stericycle*, 371 N.L.R.B. No. 113, slip op. at 11.
216. *Id.* at 1–2.
217. *See id.* at 7-8.
218. *Id.* at 2.
219. *Id.* at 11 (citing Republic Aviation v. NLRB, 324 U.S. 793, 797–98 (1945)).
220. *Id.* at n.21.
221. *Id.* at 2.
222. *Id.* at 10. Placing the burden of rebuttal on the employer is also more consistent with the Supreme Court's other decisions than *Boeing* and *LA Specialty Produce* was. *See id.* at 11.
223. *Id.* at 2.

The *Stericycle* Board further demonstrated *Lutheran Heritage*'s legitimacy as a standard by explaining how it would have supported the specific decisions of both *Boeing* and *LA Specialty Produce* without applying the *Boeing* standard nor creating unnecessary categorical rules.[224]

As such, while workplace rules, policies, and employee handbook provisions may be one method employers may utilize to meet their Title VII obligations and curtail abusive and egregious worker speech, they will have to carefully consider what they write. Employers looking to limit their liability under Title VII may instead find themselves charged with violations of Section 8(a)(1) for chilling the exercise of Section 7 PCA. This is because while it may have been permissible under *Boeing*, it may no longer be lawful to simply have a policy prohibiting abusive speech in the workplace.[225]

IV. BLM Complicates the Question of What is Protected Concerted Activity [226]

With *Lion Elastomers II* and *Stericycle* on the books, the Board has set forth its intention to continue expanding protections for worker rights.[227] Although these two new decisions have caused quite a commotion for the field of labor and employment law, the fact that both cases merely overturned relatively new standards in favor of longer held precedent makes them easier to navigate—which makes the question of where we go from here a little less interesting. Instead, where we go post-*Lion Elastomers II* and *Stericycle* is *Home Depot*,[228] *Whole Foods*,[229] and *Fred Meyers*.[230] Each of these cases addressed the issue of whether Black Lives Matter and other discussions on workplace racism are protected under the Act. If we are to harmonize the NLRA with anti-discrimination statutes

224. *See id.* at 11–12.

225. Considering that the Supreme Court has repeatedly explained that Title VII is not meant to be a civility code, it is unlikely that blanket civility codes or prohibitions will be allowed. *See* Part II.a.iii.

226. It is important to note that there were technically four cases pending review before the Board on the issue of BLM. The fourth case is *SFR, Inc.*, which is about employees who argued that they were constructively discharged following increasingly hostile interactions with their employer following their attendance at BLM protests. In this case, the ALJ found that while attending the protests was concerted, it was too attenuated to be for mutual aid or protection and therefore did not qualify as PCA. However, more importantly, the ALJ found that regardless of whether or not going to BLM protests was PCA, the employees were not constructively discharged because they quit and were not made to choose between continued employment or continued support for the BLM movement. SFR, Inc., 10-CA-268413, JD-16-22 (N.L.R.B. Div. of Judges March 21, 2022).

227. *See, e.g.*, Brian Balonick & Raeann Burgo, *Labor Board Signals Continued Expansion of Employee Rights: Your Questions Answered*, FISHER PHILLIPS (Aug. 18, 2023), https://www.fisherphillips.com/en/news-insights/labor-board-signals-continued-expansion-employee-rights.html; Braden Campbell, *Biden NLRB Retakes Ground on Scope of Workers' Rights*, LAW360 (Sept. 5, 2023), https://www.law360.com/employment-authority/articles/1717990/biden-nlrb-retakes-ground-on-scope-of-workers-rights.

228. Home Depot, Inc., 18-CA-273796, JD-34-22 (N.L.R.B. Div. of Judges June 10, 2022).

229. Whole Foods Markets, Inc., 01-CA-263079, JD-34-22, (N.L.R.B. Div. of Judges Dec. 20, 2023).

230. Fred Meyers Stores, Inc., 19-CA-272795, JD(SF)-12-23, (N.L.R.B. Div. of Judges May 3, 2023).

on the issue of what worker speech qualifies as protected concerted activity, and do so without overbroad workplace rules, then we also need to look at how the BLM cases fit into the equation.

In all three BLM cases, workers filed ULPs against their employers alleging that they were retaliated against for invoking BLM messaging on their work attire as an exercise of worker speech on the topic of workplace racism and social justice. In each case, the employer's response was that such messaging violated its dress code and workplace rules.

Central to each case is the understanding of what BLM stands for. The Black Lives Matter movement first began in 2013, following the acquittal of Trayvon Martin's killer.[231] The movement grew to astronomical heights in 2020 following the murder of George Floyd in Minneapolis while he was in police custody.[232] As an organization and movement, BLM's mission is "to eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes."[233] Additionally, the organization aims to win immediate improvements "[b]y combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy."[234] However, as each of the three BLM cases demonstrate, popular understanding of BLM is wide and varied, with some understanding that the movement is covering the advancement of Black people in all fields including employment, and others understanding it to be primarily about combating police brutality and racial violence.

A. Home Depot

1. Facts of the Case

Home Depot asked whether an employee who wrote "BLM" on their work apron engaged in PCA. Home Depot required employees to "wear orange Home Depot aprons while working in its retail stores."[235] It also maintained a written dress code policy that laid out requirements and prohibitions for work attire, in relevant part that employees are required to wear the company apron and may not place or promote "religious beliefs, causes or political messages unrelated to workplace matters."[236] Other drawings or messages on the apron such as cartoons were not in violation of the dress code; employees were even "encouraged to personalize their aprons by adding written messages and other elements."[237]

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231. *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Apr. 5, 2024).

232. Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS News (June 4, 2021, 7:39 PM), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/.

233. BLACK LIVES MATTER, *supra* note 231.

234. *Id.*

235. Home Depot, Inc., 18-CA-273796, JD-34-22, slip op. at 3 (N.L.R.B. Div. of Judges June 10, 2022).

236. *Id.*

237. *Id.*

The charging party, employee Antonio Morales, wrote "BLM" on their apron shortly after joining.[238] They also drew a number of cartoons on their apron.[239] In their first month of employment, Morales noticed and promptly discussed with several coworkers[240] what they saw as racist behavior towards customers of color by another coworker, Allison Gumm.[241] Despite several complaints to management, the situation escalated instead of improving.[242] This prompted several conversations between Morales and management about the issue of workplace racism.[243] Several months later, management asked Morales to assist with Black History Month displays in the employee break room.[244] Another employee, who Morales previously observed engaging in racist behavior, tore down and vandalized the displays, prompting yet more interface between management and Morales.[245]

Approximately six months after Morales initially put "BLM" on their apron, management noticed and warned Morales that it was against the company dress code policy.[246] Over the course of several exchanges over several days, Morales was asked to remove the BLM messaging, and each time they declined.[247] Management eventually told Morales that they cannot work with the BLM message displayed, and despite initiating back-and-forth communication on alternative messaging to BLM and how to make Home Depot a more equitable workplace, Morales ultimately resigned, citing "injustice, micro-aggressions and blatant racism."[248]

2. ALJ Found Writing BLM on Work Apron Is Not PCA

Morales and the GC asserted that Morales' display of BLM on their apron was PCA and that Home Depot violated Section 8(a)(1) by conditioning their return to work on removing a Black Lives Matter ("BLM") message on their work apron.[249] The ALJ stated that in order for there to have been a Section 8(a)(1) violation, the GC would have to show that the BLM message was PCA: that is, both concerted and for mutual aid or protection of employment-related matters.[250] However, the ALJ framed BLM as a political movement only about police brutality and reform.[251] What's more, the ALJ focused on circumstances leading

238. *Id.* at 6.
239. *Id.*
240. Particularly Nebiy Tesfaldet and Jamesha Kimmons. *Id.* at 7.
241. *Id.*
242. *Id.* at 7.
243. *Id.*
244. *Id.*
245. *Id.* at 8.
246. *Id.* at 9.
247. *Id.* at 10–11.
248. *Id.* at 11–13.
249. *Id.* at 1–2.
250. *Id.* at 15.
251. Which was contrary to the general consensus of employee testimony included in the decision. *Id.*

to the employee's initial addition of BLM to their apron instead of taking a holistic look at the events leading up to their constructive discharge. Accordingly, the ALJ found that BLM did not afford Section 7 PCA status and, therefore, there was no violation of Section 8(a)(1).[252] The ALJ reasoned that because Morales wrote BLM on their apron soon after being hired, without discussing with other workers, and before any group concerns arose with the racist coworker or vandalism of the Black History Month display, it was not a logical outgrowth of group concerns and was therefore not concerted.[253] Furthermore, the ALJ reasoned that even if the BLM display were concerted, it "would still fail because the BLM message had, at best, an extremely attenuated and indirect relationship to any workplace issue at the . . . store . . .[because] BLM messaging originated, and is primarily used, to address the unjustified killings of Black individuals by law enforcement and vigilantes."[254]

B. Fred Meyers

1. Facts of the Case

In *Fred Meyers*, several employees at different stores owned and operated by Kroger were punished for wearing pins and buttons with BLM messaging on them.[255] Some of these buttons only had BLM messaging on them, while others also included union messaging.[256] Initially, Kroger embraced and supported the BLM movement, going to great lengths to demonstrate support both to the public online and to its employees.[257] However, Kroger's support for BLM gradually waned due to customer complaints, culminating in attempts to enforce a previous loosely followed written dress code policy that prohibited "unauthorized buttons, badges, or patches" save for certain approved exceptions such as Pride Month or football game days.[258] Kroger tried to distance itself from the BLM movement and suggested an alternative pin. However, this suggestion was met with resistance by the employees, and some of the unionized workers proposed a joint union and BLM button instead.[259] Kroger banned the buttons[260] as "unauthorized" to varying success, ordering employees to remove them and sending some employees home.[261]

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252. *Id.* at 23.
253. *See id.* at 21–22.
254. *Id.* at 22.
255. *See* Fred Meyers Stores, Inc., 19-CA-272795, JD(SF)-12-23, slip op. at 2 (NLRB Div. of Judges May 3, 2023).
256. *See id.* at 18.
257. *See id.* at 10–13.
258. *Id.* at 7–10.
259. *See id.* at 17–18.
260. Both BLM and BLM/union buttons. *See id.* at 19–20.
261. *See id.* at 20–24.

2. ALJ Found A BLM Button, Even if Political Speech, Is PCA

The ALJ in *Fred Meyers* held that sending employees home early without pay for the rest of the day for refusing to remove BLM buttons from their uniforms violated Section 8(a)(1).[262] The ALJ reasoned that based on the facts,[263] invoking BLM was PCA because it is both concerted and for mutual aid and protection.[264] First, the ALJ found concertedness because the employees had engaged in group action in displaying the BLM message and collectively resisting the employers' efforts to ban it.[265] Then, the ALJ found mutual aid and protection because the employees' invocation of BLM was an attempt to address racial discrimination in the workplace.[266] Specifically, the ALJ explained that employees "who collectively don apparel forbidden by their employer's dress code do so for their mutual aid and protection, in that the wearing of uniforms is a condition of employment and a mandatory subject of collective bargaining."[267] The ALJ also noted that employees who "question the sincerity of their employer's publicly professed 'values' may also be engaged in protected conduct."[268]

The ALJ also pointed out that under *Eastex*,[269] BLM messaging is still protected as political speech because the workers had legitimate concerns about workplace racism from customers, coworkers, and management and were questioning the corporation's public pronouncements of support for BLM and subsequent diversity, equity, and inclusion policies.[270] Therefore, the ALJ found that even if BLM is political speech, the employee activity was sufficiently related to working conditions to maintain protection.[271]

C. Whole Foods

1. Facts of the Case

Similar to the prior two cases, *Whole Foods* saw employees at several stores across the country place BLM messaging on face masks, buttons or pins, t-shirts, or jewelry, during working hours.[272] While some messaging said "BLM," others said "No Justice No Peace" or "I Can't Breathe," referring to slogans adopted by the BLM movement following the Floyd murder.[273] Some employees began wearing BLM messaging in support of the movement and following the murder of

262. *See id.* at 39–40.
263. And without intentionally reframing BLM as merely about police brutality and reform. *See id.* at 39–40.
264. *See id.* at 27–31.
265. *See id.* at 27–28.
266. *See id.* at 28.
267. *Id.* at 28–29.
268. *Id.*
269. Eastex, Inc. v. NLRB, 437 U.S. 556 (1978).
270. *See Fred Meyers,* 19-CA-272795, slip op. at 29–30.
271. *See id.* at 30–31.
272. *See* Whole Foods Markets, Inc., 01-CA-263079, JD(SF)-39-23, slip op. at 2 (NLRB Div. of Judges Dec. 20, 2023).
273. *Id.* at 48.

George Floyd, many others began doing so later in solidarity with other workers who had been ordered to remove their BLM messaging and punished for non-compliance.[274] Whole Foods maintained a written dress code policy as a part of its employee handbook requiring that employees wear their Whole Foods shirts and hats and prohibited "any visible slogan, message, logo or advertising" on them.[275] Whole Foods later updated the written dress code policy to define "anything worn by or decorating Team Members" as apparel, expanding the scope of the policy beyond just clothes.[276] The employees alleged that Whole Foods violated Section 8 (a)(1) by forcing employees to remove their BLM messaging and maintaining overbroad workplace rules in the employee handbook.[277]

2. ALJ Found Wearing BLM Pins or Masks May Be Concerted, But Still Not Protected

Like the *Home Depot* ALJ, the *Whole Foods* ALJ stated that for the employer to be on the hook for Section 8(a)(1), donning BLM messaging at work must be an exercise of Section 7 PCA.[278] Looking at the two-prong test of PCA, the ALJ found that the employees were generally acting in concert because most either acted with others at a particular store or started to do so in solidarity after hearing about others who were told to stop.[279] Therefore, the concerted action prong was met.[280]

However, analyzing the other prong of the test, the ALJ held that the BLM messaging was not sufficiently for mutual aid or protection because BLM is about systemic racism in all contexts, not only racism in the workplace.[281] The ALJ posited that *Eastex* stands for political speech as protected *only* if it sufficiently has a "reasonable and direct nexus to the advancement of mutual aid and protection in the workplace."[282]The ALJ found that this case did not have such a nexus because the BLM cases lacked a "readily discernible" distinction between the goals of the employee conduct and the subjective motives behind that conduct.[283] This made the BLM cases fundamentally different from *Fresh & Easy Neighborhood Market, Inc.*[284] In *Fresh & Easy*, the Board found that "the

274. *See id.* at 22, 25–26.

275. *Id.* at 46.

276. *Id.*

277. *See id.* at 2. It is important to note that the ALJ did find that the employer was guilty of violating Section 8(a)(1) on the grounds of overbroad workplace rules. The written dress code policy initially prohibited "any visible slogan, message, logo or advertising printed on them." *Id*. at 63–64. However, in a later version of the written dress code policy, the word 'printed' was removed. *Id.* The GC argued that this was an impermissible broadening of the rules contrary to the Board's recent ruling in *Stericycle*. *See id.* at 62–63. The ALJ agreed. *Id.*

278. *See id.* at 52.

279. *See id.*

280. *Id.*

281. *See id.* at 53.

282. *Id.*

283. *See id.* at 54–55.

284. *Id.*; *see* Fresh & Easy Neighborhood Market, Inc., 361 N.L.R.B. 151, 153 (2014).

subjective motive for the conduct is not relevant in determining whether such conduct is for 'mutual aid and protection' and thus protected; what matters is what the goal or purpose of such conduct is, as examined through an objective lens."[285] Therefore, the *Fresh & Easy* employee's complaint about sexual harassment aligned with her goal of preventing future harassment, thereby meeting the mutual aid or protection prong despite the fact that her subjective motivations behind the complaint were her disgust and offense toward the harassment.[286] Unlike *Fresh & Easy*, the *Whole Foods* ALJ found that an utterance of "BLM" or "I can't Breathe" would not happen if not for the death of George Floyd.[287] In other words, because there was "no reason to believe" that the employees would have donned BLM messaging "in the absence of Floyd's killing," the ALJ found that there was genuine ambiguity as to whether there was enough of a link between the employees' activity and a goal or purpose of advancing employee interests.[288] Since the two-prong analysis is objective and not subjective, the employees' subjective motivations did not matter. Instead, what mattered was whether the employees' goal was mutual aid or protection—which, according to the ALJ, was not discernible based on the facts in the record.[289]

D. The Board Takes on Home Depot and Found PCA

With three appeals pending, the Board was faced with the decision to find whether invocation of BLM was PCA. Approximately three years after the events in question took place, the Board issued its long-awaited decision on *Home Depot* and found PCA.[290]

1. Board Reverses Home Depot and Found PCA

In February 2024, the Board issued its decision on *Home Depot*, finding that Morale's refusal to remove BLM from their work apron was PCA.[291] Looking at the evidence on record, with particular emphasis on the events surrounding and stemming from Allison Gumm's racist conduct and alleged vandalism,[292] the Board found that Morales' insistence to keep BLM on their work apron was both concerted and for mutual aid or protection.[293]

Looking at the concertedness prong, the Board cited its recent decision in *Miller Plastics*, which emphasized that concertedness calls for a thorough case-by-case analysis of the record to see when employees are acting with or on the

285. *Whole Foods*, 01-CA-263079, slip op. at 56.
286. *Id.* at 55.
287. *See id.*
288. *Id.*
289. *See id.* at 56.
290. Home Depot, Inc., 373 N.L.R.B. No. 25, slip op. at 1 (Feb. 21, 2024).
291. *Id.* at 5.
292. *Id.* at 2, 6–7.
293. *Id.* at 5.

authority of others and not just for themselves.[294] The Board looked to the facts of *Home Depot* and found all of Morales' actions leading to the meeting with management regarding the racist conduct of a coworker, were concerted. This concerted activity included Morales' prior discussions with coworkers regarding Gumm's conduct, as well as the eventual meeting with management over Gumm's conduct—the meeting where management chose to confront Morales regarding their work apron.[295] Additionally, the Board found Morales' mid-February insistence on continuing to don the BLM messaging to be concerted, as they were not the only employee with BLM on their apron. Two other employees also displayed BLM on their aprons, when they voiced concerns about Gumm's racism to each other and to management.[296] The Board disagreed with the ALJ's conclusion that BLM on the apron was not a logical outgrowth of their group activity regarding Gumm,[297] but that Morales' February conduct and subsequent constructive discharge *was* a logical outgrowth from their BLM invocation.[298] As such, the Board found that Morales' continued display of BLM on their apron was concerted.[299]

As for the mutual aid or protection prong, the Board cited *Fresh & Easy* and emphasized that the test relies heavily on the *goal* of the concerted activity in question.[300] Accordingly, the Board started by analyzing Morales' actions regarding Gumm and explained that it was clearly for mutual aid and protection to protest "racially discriminatory working conditions."[301] Then, the Board turned to Morales' testimony where they explain why they first put BLM on their work apron and subsequently refused to remove it.[302] Because Morales' goal in prominently displaying BLM on their work apron was to signal to coworkers and customers alike of their support following Gumm's racist conduct, the invocation was for mutual aid or protection in the workplace.[303] Additionally, the Board rejected the ALJ's finding that BLM was too attenuated from the workplace because it was a political movement based on police brutality and reform.[304] The Board explained that a movement's origins do not "dictate how [it] may be used or understood in a particular workplace context."[305] As such, invoking BLM can be considered conduct carried out for the purpose of mutual aid or protection.[306]

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294. *Id.* at 6 (citing Miller Plastic Products, Inc., 372 N.L.R.B. No. 134, slip op. at 3, 5 (Aug. 25, 2023)).

295. *Id.* at 6–7.

296. *Id.* at 7–8.

297. The ALJ claimed that because Morales' initial decision to put BLM on their apron predated any group activity, it was not a logical outgrowth from any concerted activity and therefore not itself concerted. *Id.*

298. *Id.* at 8–9.

299. *Id.* at 9.

300. *Id.* at 6 (citing Fresh & Easy Neighborhood Market, Inc., 361 N.L.R.B. 151, 153 (2014)).

301. *Id.* at 9.

302. *Id.* at 10.

303. *Id.*

304. *See id.*

305. *Id.*

306. *See id.*

2. Board Does Not Address Question of Inherently Concerted

Despite GC Abruzzo's arguments that invocation of BLM or discussions of workplace racial discrimination are inherently concerted,[307] the Board declined to take up the issue in *Home Depot*.[308] The Board found that Morales' refusal to remove BLM from their apron was sufficiently "concerted under well-established precedent," and therefore did not require them to address the issue of whether protesting workplace racism would categorically be considered concerted activity.[309] However, the Board did explain that they are not opposed to taking up the issue of inherently concerted in future cases.[310] With two more BLM cases still pending,[311] the future is probably sooner than otherwise expected.

E. Where Do We Go From Here?

What does all this mean for to the scope of protected activity? If the Board found that discussions and displays regarding workplace racism are "inherently concerted" activity, workers would have gotten more protection which would allow them to safely take a stance on Black Lives Matter and draw connections between systemic racism and the challenges they face in the workplace. However, when considering this expansion of protection, new issues present themselves. How might the lines be drawn? Would every instance of a worker talking about race in the workplace be protected, or does there need to be an active concern about racism in that particular workplace?

It was predictable that the Board did not take on the question of whether BLM messaging in the workplace is inherently concerted, because the facts of *Home Depot* provided a means to sidestep the issue. Some observers might view this declination by the Board as a regretful missed opportunity.

History tells us that "Black Lives Matter" is obviously related to workplace issues. Black lives built America. Slaves and some freed Blacks built the White House, the Capitol, major historic churches, and most antebellum buildings in the South. African American slaves were the labor of early America, so much so that the scholar W.E.B Du Bois called the "general strike" of four million slaves that took place during the U.S. Civil War, America's first major labor strike.[312] It goes without saying that so much of the injustice that Black people have endured was

307. *Id.* at 9 n.23; NAT'L LAB. REL. BD., OFF. OF THE GEN. COUNS., *Advice Memorandum*, *The Home Depot Case 18-CA-273796*, 3 (Sept. 9, 2021) (released in 2023 by current GC Abruzzo); *Memorandum GC 23-04*, *supra* note 43 at 346.

308. *Home Depot*, 373 N.L.R.B. No. 25, slip op. at 9 n. 23.

309. *Id.*

310. *Id.*

311. Order Transferring Procs. to the N.L.R.B., Fred Meyers Stores, Inc., 19-CA-272795 (May 3, 2023); Order Transferring Procs. to the N.L.R.B., Whole Foods Markets, Inc. No. 01-CA-263079) (Dec. 20, 2023).

312. *See* Press Release, National Archives, Slaves Built the White House and Capital – See the Records (Dec. 10, 2008) https://www.archives.gov/press/press-releases/2009/nr09-28-images.html; Asha Banerjee & Cameron Johnson, *African American Workers Built America*, CTR. FOR L. & SOC. (Feb. 26, 2020), https://www.clasp.org/blog/african-american-workers-built-america/; Nelson Lichtenstein,

manifested in the workplace. To say that "Black Lives Matter" is not a workplace issue is to ignore the historic concerns of Black employees as employees.

Although workers should be encouraged by the Boards disagreement with one of these ALJ on this point, the questions of what is considered a workplace issue and whose workplace issues will be prioritized remain. The Supreme Court in *Eastex* held that it is enough for workers to be advocating for the "concerns of employees as employees," even if these concerns are "political" issues.[313] While BLM may have come about from terrible tragedy and murder, it is more than that. It is as much about a denial of freedom, equality, and security.

If we are to take seriously the mandate of the Supreme Court in *Eastex*, then the Board must be ready to embrace doctrine that recognizes the intersections between systemic racism and the shop floor. The Board's recent decision in *Home Depot,* albeit limited in scope, presents a path to meaningful acknowledgment of that intersection.

V. Conclusion

Although *Lion Elastomers II* has overturned *General Motors*, thus putting an end to the *Wright Line* test and reinstating the setting-specific standards, much remains unanswered as to how the Board, employers, and workers are supposed to treat racist and sexist actions done in conjunction with protected concerted activity. Workers victimized by these actions have one thing in common with the perpetrators of this abuse: economic deprivation. Accordingly, it is not uncommon for ethnic immigrants or other unskilled workers of color to choose to cross picket lines because of economic needs and their historic exclusion from union membership.[314] It is also not uncommon that these workers are subjected to racially and sexually demeaning verbal abuse coming from the economically threatened picketing workers. Despite the passage of seven years, Judge Millett's concerns raised in *Consolidated Communications* have yet to be truly resolved.

Legal scholars have attempted to answer these concerns with suggestions and proposals on how to address the tension between the NLRA and federal anti-discrimination statutes, but the Board has not decided one way or another. Proposals range from new legislation to interagency guidance to simple reframing and reworking within the setting-specific standard, each with their pros and cons. On the other hand, employers have generally met their need for immediate guidance regarding this question by trying to enact workplace rules, policies, and employee handbook provisions with varying levels of specificity. However, in the same term that brought *Lion Elastomers II*, the Board also issued *Stericycle*, requiring that employers no longer utilize overbroad workplace rules when a narrowly tailored rule can still adequately protect their interests.

Are We Witnessing a 'General Strike' in Our Own Time?, Wash. Post (Nov. 18, 2021), https://www.washingtonpost.com/outlook/2021/11/18/are-we-witnessing-general-strike-our-own-time/.

313. Eastex, Inc. v. NLRB, 437 U.S. 556, 570 n.20 (1978).

314. *See* Arnesen, *supra* note 28, at 326; *see also* Williams, *supra* note 28, at 35.

Overall, it appears that the best method forward is to simply do as *Lion Elastomers II* and *Stericycle* Boards did: embrace setting-specific standards and keep in mind what is the most narrowly tailored path that satisfies employer interests and obligations while steering clear of violating workers' statutorily protected Section 7 rights. And while that may be easier said than done, it appears that we will simply have to wait and see how future case law in the Board and courts of appeal develops. Our most interesting observation may well be how the pending decisions on BLM expression in the workplace—*Fred Meyers* and *Whole Foods*—might continue to develop and reshape the definition of protected concerted activity and influence the application of *Lion Elastomers II* and *Stericycle*. Meanwhile, as worker voice currently grows to a fever pitch, the risks and consequences of exercising one's rights continue to loom large.