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Walking Between the Lines: Why the Wright Line Standard is Not Always Applicable While Employees Demand Safer COVID-19 Working Conditions

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WALKING BETWEEN THE LINES: WHY THE *WRIGHT LINE* STANDARD IS NOT ALWAYS APPLICABLE WHILE EMPLOYEES DEMAND SAFER COVID-19 WORKING CONDITIONS

ABSTRACT

Before the National Labor Relation Board's (NLRB) July 2020 decision in General Motors LLC and Charles Robinson, employers faced difficulty in disciplining employees that engaged in protected activity under the National Labor Relations Act (NLRA) when their behavior was abusive. However, this changed after the NLRB adopted the Wright Line standard in General Motors, a burden-shifting analysis that gives employers the opportunity to prove that the employer would have taken the same action even without the NLRA protected activity. Compared to the NLRB's prior standards, this standard offers employers a clear-cut defense and the ability to adhere to discrimination laws and their workplace policies, but it is too broad in that it does not recognize the heightened emotions of employees during turbulent working conditions. This is an especially prevalent concern during the COVID-19 pandemic, where employees must advocate for themselves as they face several setbacks including: lack of assistance from the Occupational Safety and Health Administration, difficulty in receiving workers compensation or inability to take off work after contracting COVID-19, and fear of not receiving unemployment benefits on time.

This Note seeks to establish that by creating per se unprotected categories of behavior, which include conduct that is offensive to a protected class or conduct that could reasonably lead to violence, employers can use these unprotected categories as a defense when the burden shifts to them in the Wright Line analysis. Such a tactic would also eradicate employees' fears of being disciplined for passionately advocating for their rights in a manner that may be considered offensive, but not to the same degree as the per se unprotected categories.

INTRODUCTION

Imagine calling the vice president of the company you work for a "stupid f***ing moron."[1] One might expect you to be disciplined right on the spot. Despite that reasonable expectation, if the NLRB found that you were engaged in concerted activity protected under the NLRA, taking adverse action against you would be an uphill battle for your employer, despite your abusive behavior.[2] However, employers now have some recourse with the

1. *General Motors LLC*, 369 N.L.R.B. No. 127 at 4 (2020).

2. Most employees are generally employed at-will. This means that an employer can terminate an employee at any time for any reason (except an illegal one), while an employee can leave the job at any time for any reason. There are very few exceptions to employment at-will, such as adverse action that violates a public policy or an implied contract, and these exceptions are difficult for the

NLRB's July 21, 2020, decision in *General Motors LLC and Charles Robinson*.[3]

In the *General Motors* decision, the NLRB adopted the *Wright Line* standard to be the only determinative standard on whether concerted activities were protected in situations where employees engaged in abusive behavior.[4] Under the *Wright Line* standard, an employee that alleges that adverse action was motivated by protected activity must make an initial showing that (1) the employee was engaged in NLRA Section 7 activity,[5] (2) the employer knew of that activity, and (3) the employer had animus against the activity, with sufficient evidence to establish a causal relationship between the discipline and the NLRA Section 7 activity.[6] If an employee can establish this initial showing, the burden of persuasion shifts to the employer to prove that it would have taken the same action even without the NLRA Section 7 activity.[7]

The NLRA was passed in 1935 "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices."[8] The NLRB is the federal agency tasked with enforcing the NLRA.[9] The right to engage in concerted activity under Section 7 of the NLRA applies to all private sector employees, whether or not they are represented by a union.[10] An employee is engaged in concerted activity when two or more employees engage in acts for their mutual aid to

employee to prove. However, when employees are engaged in concerted activity, they fall under the NLRA's protection, which does not allow an employer to terminate employees engaging in that concerted activity. *Id.* at 1; *At-Will Employment*, NAT'L CONF. OF STATE LEGISLATURES (April 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx; *Interfering with Employee Rights (Section 7 & 8(a)(1)*, NAT'L LAB. RELS. BD. (last visited Feb. 16, 2022), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1; 29 U.S.C. §151-169.

3. *General Motors LLC*, 369 N.L.R.B. No. 127 at 1 (2020).

4. *Id.*

5. Section 7 of the NLRA guarantees employees "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." *Interfering with Employee Rights (Section 7 & 8(a)(1)*, NAT'L LAB. RELS. BD. (last visited Feb. 16, 2022), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1; 29 U.S.C. §157.

6. *General Motors LLC*, 369 N.L.R.B No. 127 at 2 (2020).

7. *Id.* at 1.

8. *The Law*, NAT'L LAB. RELATIONS BD. (last visited Feb. 16, 2022), https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law#:~:text=Congress%20enacted%20the%20National%20Labor,businesses%20and%20the%20U.S.%20economy.

9. *Who We Are*, NAT'L LAB. RELATIONS BD. (last visited Feb. 16, 2022), https://www.nlrb.gov/about-nlrb/who-we-are?.

10. This note will focus on employees who are not represented by a union and thus will only focus on the Section 7 NLRA right to engage in concerted activities, rather than the right to self-organize and bargain collectively. *Employee Rights*, NAT'L LAB. RELATIONS BD. (last visited Feb. 16, 2022), https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights; 29 U.S.C. §151-169.

improve their terms and conditions of employment.[11] In some cases, concerted activity could consist of a single employee acting on behalf of other employees and bringing their complaints to the attention of their employer.[12] Importantly, Section 8(a)(1) of the NLRA forbids an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," such as threatening adverse consequences if an employee is engaged in concerted activity.[13]

Nonunion employees began to engage in concerted activity with the emergence of the COVID-19 pandemic to demand safer working conditions.[14] As stated on NLRB's website, an example of a protected concerted activity includes "two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other."[15] For instance, in May 2020, "essential employees" from Amazon, Target, and Walmart protested the inadequate safety protections provided to them by their employers during the beginning of the pandemic.[16] Target and Walmart employees requested safer working conditions since they could not avoid being around people who were shopping inside the stores.[17] Further, due to state and city lockdowns, a rise in online shopping and deliveries ensued, leading Amazon employees to constantly fulfill orders in hazardous warehouses.[18]

As a result of these protests, Amazon claimed that the health and safety of its employees was its top priority and that it would spend its entire operating profit (approximately $4 billion) to provide protective equipment to workers, clean warehouses, increase pay, and test employees for COVID-19.[19] Target also stated that it would invest more than $300 million to establish "dozens of measures" to keep workers, as well as shoppers, safe in the stores.[20] While protest organizers recognized their employers' efforts to improve working conditions, organizers have attributed employees' infection, and in some cases, death, to the failings of their employers.[21]

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11. *Id.*
12. *Id.*
13. *Interfering with Employee Rights (Section 7 & 8(a)(1)*, *supra* note 5.
14. Robert Combs, *Analysis: Covid-19 Has Workers Striking. Where are the Unions?*, BLOOMBERG L. (Apr. 14, 2020), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-covid-19-has-workers-striking-where-are-the-unions.
15. *Employee Rights*, *supra* note 10.
16. Shannon Bond, *'We're Out There' So Protect Us, Protesting Workers Tell Amazon, Target, Instacart*, NPR (May 1, 2020), https://www.npr.org/2020/05/01/849218750/workers-walk-off-jobs-demand-safer-working-conditions.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

The NLRB released several advice memo emails discussing protected concerted activity that transpired during the pandemic.[22] In *Marek Bros. Drywall Co.*, 16-CA-258507, the NLRB found that an employee who raised concerns "about the lack of available resources for employees to wash or sanitize their hands as a precaution against the growing COVID-19 pandemic" was engaged in protected concerted activity because he raised concerns for all employees on the jobsite.[23] However, the NLRB held that the employee's dismissal was warranted, and the employer did not violate Section 8(a)(1) of the NLRA because the employee did not make an initial showing that the employer's motive for termination was based on knowledge of the protected activity and that the employer had animus against the protected activity, which are two elements an employee must establish under the *Wright Line* standard.[24]

In another memo email, *Hornell Gardens, LLC*, 03-CA-258740 & 03-CA-258740, the NLRB held that a nurse, who discussed her concerns with a co-worker that nurses had to share gowns, was not engaged in protected concerted activity.[25] The NLRB held that "there was no evidence that the object of the conversation was initiating or inducing or preparing for group action in the interest of employees, as opposed to simply discussing that the nurses now had to share gowns."[26] Although these two cases did not involve employees engaging in abusive behavior, they illustrate the types of concerns that employees were expressing during this turbulent time and the NLRB's more employer-friendly approach in its decisions.

The *Wright Line* standard may help employers tackle abusive behavior that occurs during protected activity, which could severely interfere with their workplace policies. However, the standard overreaches because it does not acknowledge the realities of the workplace and how certain types of offensive behavior stems from employees' emotional and passionate reactions to undesirable workplace conditions. This is an especially pressing concern in the COVID-19 workplace.[27] Thus, to ensure employers can defend their discipline of protected activities that run contrary to workplace policies, the NLRB should categorize certain types of conduct per se unprotected in

22. Ryan J. Munitz and John S. Bolesta, *NLRB Releases More Employer-Friendly COVID Advice*, NAT'L L. REV. (August 31, 2020), https://www.natlawreview.com/article/nlrb-releases-more-employer-friendly-covid-advice.

23. Advice Memorandum Email from the National Labor Relations Board on *Marek Bros. Drywall Co.*, 16-CA- 258507 (July 20, 2020, 3:19:38 PM) (on file with the National Labor Relations Board).

24. *Id.*

25. Advice Memorandum Email from the National Labor Relations Board on *Hornell Gardens, LLC, 03-CA-258740 & 03-CA-258740* (July 31, 2020, 8:41:49 AM) (on file with the National Labor Relations Board).

26. *Id.*

27. AJ Horch, *Coronavirus stress: Mental health issues are rising among workers, but help is available*, CNBC (Oct. 5, 2020), https://www.cnbc.com/2020/10/05/coronavirus-stress-mental-health-issues-rising-among-workers-.html.

all settings under the *Wright Line* standard—including conduct that is offensive on the basis of a protected class, such as race or sex, or conduct that could reasonably lead to violence. Such a tactic would also eradicate employees' fears of being disciplined for passionately advocating for their rights in a manner that could be considered offensive but does not rise to the same degree as the per se unprotected categories.

This Note examines how creating per se unprotected activities offers employers a clear-cut and predictable defense under the *Wright Line* standard while giving deference to employees' emotions that are raised in different protected activity contexts. Part I provides overviews of the *General Motors* NLRB decision, the *Wright Line* standard, and the NLRB's prior standards used to determine whether employees were unlawfully disciplined when engaging in abusive conduct in connection with activities protected by Section 7 of the NLRA. Part II discusses the NLRB's rationale for adopting the *Wright Line* standard. Part III reviews the criticisms of the *Wright Line* standard. Finally, Part IV proposes how the *Wright Line* standard should evaluate per se unprotected categories to better deal with COVID-19 and future dangerous workplace environments.

I: OVERVIEW OF *GENERAL MOTORS LLC* AND CHARLES ROBINSON DECISION

The NLRB decided *General Motors LLC and Charles Robinson* on July 21, 2020.[28] The Charging Party in the case, the employee complaining of an unfair labor practice, was Charles Robinson.[29] Mr. Robinson worked as a union committeeperson at General Motor's automotive assembly in Kansas City, Kansas, and had represented bargaining unit members since 2012.[30] Robinson was suspended three times by General Motors in 2017, following incidents where "he engaged in profane or racially offensive conduct towards management or at bargaining meetings in the course of union activity."[31]

Robinson's first incident was with his manager while discussing overtime coverage for employees on cross-training. Robinson yelled that he did not "give a f*** about your cross-training," that "we're not going to do any f***'in cross-training if you're going to be acting that way," and that his manager could "shove it up [his] f***'in ass."[32] Robinson was suspended for three days.[33] The second incident occurred at a meeting with two other union committeepersons and a dozen managers. After Robinson was told he was speaking too loudly by manager Anthony Stevens, Robinson "mockingly acted a caricature of a slave," stated "Yes, Master, Your Master Anthony"

28. *General Motors LLC*, 369 N.L.R.B. No. 127 at 1 (2020).
29. *Id.* at 2.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

and that his manager wanted him "to be a good Black man."[34] Robinson was suspended for two weeks.[35] In the third incident, at a meeting with one union committeeperson and four managers, including Stevens, Robinson said he would "mess Stevens up" when Stevens stated they were going to move on.[36] At the same meeting, Robinson also played loud music from his phone that contained "profane, racially charged, and sexually offensive lyrics."[37] Robinson was suspended for 30 days.[38]

On September 18, 2018, the administrative law judge applied the four-factor *Atlantic Steel*[39] standard to analyze whether Robinson lost protection under the NLRA for his abusive conduct while engaged in union activity.[40] The four factors weighed in *Atlantic Steel* are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.[41] The judge concluded that Robinson lost protection in the second and third incidents, but not the first, and therefore, General Motors violated Section 8(a)(1) of the Act for suspending Robinson.[42]

In the 2020 decision, the NLRB analyzed the standards it had previously utilized to determine whether employers unlawfully disciplined employees who engaged in abusive conduct during Section 7 protected activity.[43] These standards applied to different circumstances and settings in the workplace.[44] One standard, as stated previously, is the *Wright Line* standard, where an employee that alleges that adverse action was motivated by protected activity must make an initial showing that: (1) the employee engaged in Section 7 activity; (2) the employer knew of that activity; and (3) the employer had

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Atlantic Steel* was decided by the NLRB in 1979. An employee was discharged after calling his foreman in the production area a "lying son of a b***h" or stated that the foreman had told a "m–f–lie" after asking about overtime hours. The NLRB discussed how the Board and courts recognized that "even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act." Therefore, the NLRB created the four-factor test. The factors would have to be carefully balanced to reach a decision. The NLRB agreed with the arbitrator's consideration of the factors and held that the employee's discharge was warranted: (1) the incident occurred on the production floor during working time (not at a grievance meeting); (2) the employee's question about overtime expressed legitimate concern which could be grieved' and (3) the supervisor had investigated and answered his question promptly but the employee still reacted in an obscene fashion without provocation and in work setting where such conduct was not normally tolerated. These factors, considered with the employee's past record, established a reasonable basis for the discharge. *In re Atlantic Steel Co*., 245 N.L.R.B. 814, 816–17.
40. *General Motors LLC*, 369 N.L.R.B. No. 127 at 2 (2020).
41. *Id.* at 4.
42. *Id.* at 2.
43. *Id.* at 1.
44. *Id.* at 5.

animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity.[45] If the employee can establish this initial showing, the burden of persuasion shifts to the employer to prove that it would have taken the same action even without the Section 7 activity.[46]

Another commonly used standard was *Atlantic Steel*, which the NLRB applied in situations when there were workplace discussions with management.[47] To determine whether abusive conduct was severe enough to lose the NLRA's protection, the NLRB applied the four factors stated previously.[48] However, the NLRB held that *Atlantic Steel* does not pertain to conduct that occurs on social media or while co-workers engage in workplace discussions.[49] Instead, a "totality of the circumstances" approach, with no specific factors, was to be applied in those circumstances.[50]

Lastly, the NLRB applied a completely distinctive standard, the *Clear Pine Mouldings* standard, when abusive conduct transpired on the picket line. Under *Clear Pine Mouldings*, the abusive conduct loses NLRA protection where "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[51]

After reviewing all the standards, the NLRB ultimately held that all future cases where abusive conduct occurred during Section 7 activity would be analyzed under the *Wright Line* standard.[52] The *General Motors* case was remanded to offer both parties the opportunity to present evidence that would be relevant under the *Wright Line* standard.[53]

II: WHY THE NLRB CHOSE THE *WRIGHT LINE* STANDARD

In the *General Motors* decision, the NLRB discussed various rationales as to why the *Wright Line* standard is superior to their prior standards.[54] First, the NLRB's main concern was that past standards did not produce predictable and reliable results because each standard was applied in different specific contexts.[55] Next, the NLRB emphasized how the other standards undermine employers' ability to regulate their establishments to prevent discriminatory behavior that violates federal and state antidiscrimination laws.[56]

45. *Id.* at 1–2.
46. *Id* at 1.
47. *Id.* at 4.
48. *Id.*
49. *Id.* at 6.
50. *Id.*
51. *Id.*
52. *Id.* at 1-2.
53. *Id.* at 3.
54. *Id* at 7.
55. *Id.*
56. *Id.* at 6.

Accordingly, the NLRB reasoned that the *Wright Line* standard would be easier to apply in all situations and would create more equitable treatment of abusive conduct.[57]

A. NLRB'S PAST STANDARDS DO NOT PRODUCE PREDICTABLE AND RELIABLE RESULTS

1. The *Atlantic Steel* Standard

The NLRB emphasized that the *Atlantic Steel* standard, which was used when workplace discussions with management occurred, produced unpredictable and unreliable results.[58] No factor was assigned a specific weight and, in different cases, certain factors were given more or less weight without a sufficient explanation.[59] For example, in *Tampa Tribune*, 351 NLRB 1324 (2007), where the employee referred to his vice president as a "stupid f***ing moron," the NLRB afforded NLRA protection because a stronger weight was accorded to the location and subject matter of the statements, and less weight was designated to the nature of the outburst.[60] Conversely, in *Trus Joist MacMillan*, 341 NLRB 369 (2004), where an employee called a manager a "liar," "lying bastard," and "prostitute" while grabbing his own crotch, the nature of the outburst factor was assigned the most weight.[61] These two instances exemplify how the *Atlantic Steel* standard confers discretion to the NLRB to prescribe more or less weight to the same factor in an inconsistent manner. In these two cases, the administrative law judges arrived at different conclusions, despite both employees engaging in behavior that a reasonable person would find extremely offensive.

Further, the NLRB reasoned that the second factor of *Atlantic Steel* (the subject matter of the discussion) will always fall in the favor of employees because *Atlantic Steel* "only applies when the subject matter of the discussion is related to Section 7 activity."[62] Consequently, if the NLRB decides to give the most weight to this second factor in one case, this would implicate the NLRB's concern that the *Atlantic Steel* standard does not consider employers' rights to preserve order and respect in their business establishments.[63] This concern was exemplified in *NLRB v. Starbucks Coffee Co*., where an employee yelled "You can go f*** yourself. If you want to f*** me up, go ahead, I'm here" to a manager in front of customers.[64] The Second Circuit held that when the NLRB found the employee protected under

57. *Id.* at 10.
58. *Id.* at 6.
59. *Id.* at 4.
60. *Id.* at 4–5.
61. *Id* at 5.
62. *Id.*
63. *Id.*
64. *Id.;* NLRB v. Starbucks Coffee Co., 679 F.3d 70, 73–74 (2d Cir. 2012).

Atlantic Steel, it "improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers."[65] The Fourth Circuit also concluded in *Tampa Tribune v. NLRB*, that "[t]he Act's protections are not limitless, . . . and where they do not reach, employers cannot be compelled to tolerate language or behavior that undermines workplace discipline."[66]

2. The "Totality of the Circumstances" Approach

The NLRB explained that the "totality of the circumstances" standard, which is used in situations analyzing social media posts and co-worker discussions, also produced the same inconsistent and unpredictable results as *Atlantic Steel*.[67] This is particularly due to the fact that in past social media post decisions, the precedent the NLRB used to find protected activity was not based on abusive conduct, but on the basis of disparagement or disloyalty to the employer.[68] Moreover, no specific factors attached to the standard, allowing the NLRB to be flexible in each specific situation.[69] In *NLRB v. Pier Sixty LLC,* the Second Circuit did not address the validity of the "totality of the circumstances" approach solely because Pier Sixty did not object to the administrative law judge's use of the test.[70] However, the Circuit was not convinced that the "amorphous" test sufficiently balanced employers' interests.[71]

3. The *Clear Pine Mouldings* Standard

The NLRB stated that the *Clear Pine Mouldings* standard, used when behavior occurs on the picket line, found "appallingly abusive picket-line misconduct to retain protection, including racially and sexually offensive language," because loss of protection occurred only when there was an overt or implied threat, or reasonable likelihood of imminent physical confrontation.[72] This standard produces unpredictable and unreliable results because the NLRB affords protection to "appallingly abusive" behavior solely based on whether there is an overt or implied threat, and regardless of the conduct which might be found unprotected under other standards. To give an illustration, the NLRB cited *Cooper Tire & Rubber Co*., 363 NLRB No. 194, slip op. at 7–10 (2016), where white picketers were protected after

65. *General Motors LLC*, 369 N.L.R.B. No. 127 at 5 (2020); *Starbucks Coffee Co*., 679 F.3d at 79–80.

66. *General Motors LLC*, 369 N.L.R.B. No. 127 at 6 (2020); Tampa Tribune v. NLRB, 560 F.3d 181, 188 (4th Cir. 2009).

67. *General Motors LLC*, 369 N.L.R.B. No. 127 at 6 (2020).

68. *Id.*

69. *Id.*

70. *Id.*; NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123–124 (2d Cir. 2017).

71. *General Motors LLC*, 369 N.L.R.B. No. 127 at 6 (2020); *Pier Sixty, LLC*, 855 F.3d at 123–124.

72. *General Motors LLC*, 369 N.L.R.B. No. 127 at 6 (2020).

saying "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon" to black workers.[73] Since there was no overt or implied threat, the employees on the picket line could not be lawfully disciplined even though they were engaged in what one would undoubtedly describe as abusive behavior.

4. The *Wright Line* Standard

The *Wright Line* standard is the most predictable and reliable standard because it is not a setting-specific standard like the other standards mentioned above, according to the NLRB in its decision.[74] The NLRB's prior rationales for applying setting-specific standards to Section 7 activities was both to afford employees freedom to express their discontent with the realities of their workplace, and to consider that disputes over wages, hours, and working conditions elicit resentment and strong responses against employers.[75] The NLRB reasoned that this rationale is overstated and the standard infringes upon employers' rights to maintain order in the workplace, "free from invidious discrimination."[76] Therefore, the *Wright Line* standard addresses employers' essential right to combat discrimination by shifting the burden on them to prove that they would have taken the same adverse action against an employee, regardless of the facts of the situation, since any discriminatory behavior is inherently unwelcome in their workplace.

B. EMPLOYERS WHO VIOLATE OTHER STANDARDS CANNOT MEET THEIR OBLIGATIONS UNDER FEDERAL AND STATE ANTIDISCRIMINATION LAWS

All employers are subject to follow federal and state laws that protect employees from discrimination in the workplace based on protected characteristics that include race, color, religion, national origin, age, and disability.[77] The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing federal laws that forbid employment discrimination.[78] Title VII of the Civil Rights Act, passed in 1964, prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.[79]

73. *Id.*
74. *Id.* at 8.
75. *Id.*
76. *Id.*
77. *Id.* at 6.
78. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Feb. 16, 2022), https://www.eeoc.gov/overview.
79. *See Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Feb. 16, 2022), https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964.

According to the EEOC, harassment is employment discrimination that violates Title VII of the Civil Rights Act.[80] Harassment may also occur when an employee discriminates against a co-worker for their disability under the Americans with Disabilities Act of 1990[81] or if an employee over 40 years old is discriminated against for their age under the Age Discrimination in Employment Act of 1967.[82]

For harassment to be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to a reasonable person.[83] If an employee creates a hostile work environment by engaging in harassment based on a protected characteristic, the employer is held liable if it "knew or should have known about the offending conduct and failed to take prompt and appropriate corrective action."[84] Accordingly, as stated in the EEOC's Amicus Brief in *General Motors*, the employer may face liability if it fails to take corrective action and harassment continues to the level of a hostile work environment.[85] The NLRB also concluded that that EEOC laws, unlike standards such as *Atlantic Steel*, "do not forgive abusive conduct because, for instance, it arises from heated feelings about working conditions or because crude language is common in the workplace."[86]

Thus, the NLRB determined that the other standards it applied to analyze abusive conduct did not take into account employers' legal obligations to prevent hostile work environments in order to avoid liability.[87] This obligation has been recognized by reviewing courts, such as the Court of Appeals for the District of Columbia, where the court denied enforcement of a NLRB decision that found an employee who wrote "whore board" on the company's bulletin board retained NLRA protection under *Atlantic Steel*.[88] The court concluded that the abusive behavior that occurred during concerted activity did not retain protection and adverse action was warranted because the employer had a duty to comply with antidiscrimination laws, prompting it to take action against the employee in spite of its conflicted duties under the NLRA.[89]

80. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Feb. 16, 2022), https://www.eeoc.gov/harassment.

81. *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (last visited Feb. 16, 2022), https://www.eeoc.gov/disability-discrimination.

82. *Age Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, (last visited Feb. 16, 2022), https://www.eeoc.gov/age-discrimination.

83. *Harassment, supra* note 80.

84. *Id.*

85. *General Motors LLC*, 369 N.L.R.B. No. 127 at 7 (2020).

86. *Id.*

87. *Id.*

88. *Id.* (citing *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019)).

89. *Id.*

C. THE NLRA DOES NOT EXPRESSLY PROTECT ABUSIVE CONDUCT

The NLRB also highlighted how most American workers can employ the rights and activities provided to them by Section 7 every day without resorting to abuse.[90] Speech or conduct protected by Section 7 includes articulating a concerted grievance or demonstrating in a picket line, which is different than abusive speech that is a "profane ad hominem attack or racial slur."[91] Thus, by utilizing the *Wright Line* standard, the NLRB can better promote the purpose of the NRLA, and employees engaged in abusive conduct would not be protected as easily as they would have been under the NLRB's prior standards.

III: CRITICISM OF THE *WRIGHT LINE* STANDARD

Notwithstanding the fact that the NLRB prefers the *Wright Line* standard compared to its alternatives, several amici and circuit courts have criticized the *Wright Line* standard and its application.[92]

A. AMICI IN *GENERAL MOTORS* ARGUED THAT THE *ATLANTIC STEEL* STANDARD BETTER ACKNOWLEDGES THE REALITIES OF EMPLOYEES' WORKPLACE

Several amici in *General Motors* pressed the NLRB to continue analyzing cases under *Atlantic Steel* because of the specific facts of each case.[93] They reasoned that *Atlantic Steel* acknowledges that "speech protected by Section 7 of the Act can be coarse because of the passions such topics inflame and that it should not be censored or hindered."[94] In *Consumers Power Co*., 282 NLRB 130, 132 (1986), the NLRB had previously recognized the principle that "[t]he protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses."[95]

B. CIRCUIT SPLITS ON THE 1980 *WRIGHT LINE* DECISION

After the 1980 *Wright Line* decision, the Third, Seventh, Eighth and Ninth Circuits were split in analyzing the soundness of the standard's burden of proof. In 1982, the Third Circuit in *Behring Intern., Inc. v. NLRB* held that shifting the burden of persuasion to employers to demonstrate that they

90. *Id.* at 8.
91. *Id.*
92. *Id.* at 3.
93. *Id.*
94. *Id.*
95. *Id.*

would have taken the same action in the absence of protected activity, "undermines the *Wright Line* 'but for' test," which requires that an "employee would not have been discharged but for his protected union activity."[96] In *NLRB v. Webb Ford, Inc*., the Seventh Circuit applied *Behring Intern., Inc.* and agreed that the employer should not have the burden of persuasion.[97] Conversely, the Ninth and Eighth Circuits approved the NLRB's formulation in *Wright Line*. In *Zurn Industries, Inc. v. NLRB*, the Ninth Circuit held that it was within the NLRB's authority to adopt this burden-shifting framework[98] and in *NLRB v. Fixtures Mfg. Corp.*, the Eighth Circuit held that there was a "reasonable basis in laws" for the NLRB to use the *Wright Line* standard because it protects both the rights of employees to engage in protected activity and the right of employers to discharge for valid cause.[99]

However, *Behring Intern., Inc. v. NLRB* and *NLRB v. Webb Ford, Inc.* were both overruled by the Supreme Court's decision in *NLRB v. Transportation Management Corp*. in 1983.[100] The Supreme Court approved the burden-shifting framework of the *Wright Line* standard and that it is permissible as an affirmative defense because it "does not change or add to the elements of the unfair labor practice" that the employee still has the burden to prove.[101]

IV: WHY *WRIGHT LINE* OVERREACHES IN THE COVID-19 WORKPLACE AND FUTURE DANGEROUS WORKPLACE ENVIRONMENTS

A. EMPLOYERS HAVE THE RIGHT TO MAINTAIN A POSITIVE WORK ENVIRONMENT, BUT THEY NEED TO CONSIDER THE EMOTIONAL WELL-BEING OF THEIR EMPLOYEES

From one perspective, a component of the NLRB's rationale behind adopting the *Wright Line* standard in *General Motors* seems justified. It is unreasonable for a standard to completely hinder employers from disciplining employees who engaged in behavior that is contrary to their workplace policies or antidiscrimination laws simply because the behavior occurred during concerted activity.[102] Without the burden-shifting analysis of *Wright Line*, employers would not be able to more predictably persuade the NLRB that this specific discriminatory or violent behavior was the reason for

96. Behring Int'l, Inc. v. NLRB., 675 F.2d 83, 87-88 (3d Cir. 1982).
97. NLRB v. Webb Ford, Inc., 689F.2d 733, 739 (7th Cir. 1982).
98. Zurn Indus., Inc. v. NLRB, 680 F.2d 683, 689 (9th Cir. 1982).
99. NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 (8th Cir. 1982).
100. NLRB v. Transportation Mgmt. Corp., 462 U.S. 393 (1983).
101. *Id.*
102. *General Motors LLC*, 369 N.L.R.B. No. 127 at 7 (2020) (citing *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019)).

the discipline, not the employee's Section 7 activity. If employees are permitted to engage in offensive behavior without any repercussions, this may diminish employers' missions of creating positive cultures within their companies. The *Wright Line* standard provides employers with more protection to do so.

In the context of COVID-19 specifically, employers could demonstrate compassionate leadership by showing awareness and empathy to promote a positive company culture and ensure safety and security.[103] The COVID-19 pandemic was, and continues to be, a stress-inducing period; an early Centers for Disease Control and Prevention (CDC) survey found that almost 41% of respondents stated they were struggling with mental health issues due to the pandemic.[104] This is especially true for workers,[105] who are still struggling almost two years after the pandemic began.[106] During this time, employers were hesitant to address side effects of mental health during the pandemic and "they did not realize that employees were pushing themselves to their limits" causing them to feel burned out and seek resources for support.[107] Given the mental and emotional strain that COVID-19 has placed on workers, their emotions and passions that have emerged under these unprecedented labor circumstances should be given substantial consideration as they engage in protected activity.[108]

For this reason, the NLRB should incorporate the General Counsel's and certain amici's recommendation in *General Motors* to categorize certain types of abusive conduct as per se unprotected in all settings and only consider those categories in its *Wright Line* analysis.[109] Although the NLRB did not discuss their views on this proposal in their decision, they described

103. Johnathan Emmet, Gunnar Schrah, Matt Schrimper, & Alexandra Wood, *COVID-19 and the employee experience: How leaders can seize the moment*, MCKINSEY & COMPANY (June 29, 2020), https://www.mckinsey.com/business-functions/organization/our-insights/covid-19-and-the-employee-experience-how-leaders-can-seize-the-moment#.

104. Jacqueline Howard & Andrea Kane, *CDC study sheds new light on mental health crisis linked to coronavirus pandemic*, CNN (Aug. 13, 2020), https://www.cnn.com/2020/08/13/health/mental-health-coronavirus-pandemic-cdc-study-wellness/index.html.

105. Horch, *supra* note 27.

106. *See* A SOCIETY FOR HUMAN RESOURCE MANAGEMENT survey of 1,099 employees found that more than 40% of employees felt hopeless, burned out, and exhausted dealing with the COVID-19 pandemic. Allen Smith, *Ongoing Pandemic Takes Toll on Workers' Mental Health*, SOC'Y FOR HUM. RES. MGMT. (August 19, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/coronavirus-ongoing-pandemic-worker-mental-health.aspx.

107. Horch, *supra* note 27.

108. As stated in Part III, "Criticism of the *Wright Line* Standard," several amici in the General Motors LLC decision view Atlantic Steel as "properly recognizing the speech protected by Section 7 of the Act can be coarse because of the passions such topics inflame and that it should not be censored or hindered." The NLRB also has a long history of providing leeway to employees engaged in Section 7 activities because of the "realities of industrial life" and that certain conditions create strong responses by employees. *General Motors LLC*, 369 N.L.R.B. No. 127 at 3 (2020).

109. *Id.* at 4.

the different categories the amici recommended.[110] Some argued that per se unprotected categories should include conduct that is offensive on the basis of race or sex while others argued for conduct that is offensive on the basis of any protected class (race, sex, religion, color, national origin, age, and disability).[111]

By creating these per se unprotected categories, when the burden shifts to an employer in the *Wright Line* analysis to prove that it would have taken the same action even without the NLRA Section 7 activity, the employer could more easily prove that the employee was disciplined for engaging in behavior that is offensive to a certain protected class, rather than the Section 7 activity. Employers would be able to exercise their right to maintain a workplace environment "free from invidious discrimination"[112] and comply with all federal laws enforced by the EEOC, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and Age Discrimination in Employment Act of 1967.

Most importantly, defining per se categories would also coincide with *Atlantic Steel's* recognition that "speech protected by Section 7 of the Act can be coarse because of the passions such topics inflame and that it should not be censored or hindered."[113] Thus, employees engaged in concerted activity to demand safer working conditions during the pandemic should still retain protection under NLRA if they also make an offensive comment to a co-worker or supervisor because they feel burnt out from the unprecedented situation at hand.[114] This would grant them the autonomy to express their discontent with the realities of their workplace without fear of discipline.[115] However, employees would still be constrained, as they would not be able to justify behavior that is offensive to a per se category on the basis that they are pushed to their limits.

Nevertheless, there must be an additional limit to the offensiveness of the employee's behavior as well, since some may argue that creating per se unprotected categories based on a protected class does not allow an employer to discipline employees that create threatening situations. Therefore, another category that should be considered per se unprotected in the *Wright Line* analysis is one that the amici in *General Motors* also recommended: abusive conduct that would reasonably lead to violence.[116] If a manager or co-worker reasonably believes that an employee's protesting of unsafe working conditions would lead to violence and upheaval in the workplace, then the

110. *Id.*
111. *Id.*
112. *Id.* at 8.
113. *Id.* at 3.
114. Horch, *supra* note 27.
115. *General Motors LLC*, 369 N.L.R.B. No. 127 at 8 (2020).
116. *Id.* at 4.

employer has the ability to prove that this conduct is per se unprotected and that the adverse action was not in violation of NRLA Section 8(a)(1).

If this per se unprotected *Wright Line* analysis is applied to *General Motors*, where an employer is only permitted to take adverse action against employees engaged in conduct that is offensive to a protected class or would reasonably lead to violence, then the NLRB would have come to the same conclusion as the administrative law judge. The judge held that Robinson lost NRLA protection for the second instance (where Robinson "mockingly acted a caricature of a slave," stated "Yes, Master, Your Master Anthony" and that his manager wanted him "to be a good Black man"[117]) and the third instance (where Robinson said he would mess up his manager and played loud music from his phone that contained "profane, racially charged, and sexually offensive lyrics").[118] However, the judge held that Robinson did not lose protection for the first instance (where Robinson stated that he did not give a f*** about your cross-training," that "we're not going to do any f***'in cross-training if you're going to be acting that way," and that his manager could "shove it up [his] f***'in ass.")[119] The second instance included behavior that was offensive to a protected class, which is a per se unprotected category, and the third instance, where Robinson stated he would mess up his manager, could be argued to be conduct that could reasonably lead to violence. The first instance, although it contained offensive language, did not involve a per se unprotected category and gave Robinson the freedom to express his discontent with the realities of his workplace.[120] It also recognizes how that particular discussion with his manager was coarse because of the passions Robinson felt about cross-training. [121]

B. EMPLOYEES PROTESTING SAFER WORKING CONDITIONS DO NOT HAVE MANY OPTIONS TO ADDRESS THEIR CONCERNS, WHICH CAN LEAD TO STRONG EMOTIONS AND REACTIONS

1. The Occupational Safety and Health Administration

It is important to recognize that employees may be more emotional and passionate while protesting for safer working conditions during COVID-19 because they do not have many avenues to obtain safety and health protection, especially from the Department of Labor's Occupational Safety and Health Administration (OSHA). Congress created OSHA with the Occupational Safety and Health (OSH) Act of 1970, to ensure safe and healthy working conditions by "setting and enforcing standards and by

117. *Id.* at 2.
118. *Id.*
119. *Id.*
120. *Id.* at 8.
121. *Id.* at 3.

providing training, outreach, education and assistance."[122] Employers have a responsibility to provide a safe workplace by complying with standards and regulations issued under the OSH Act and to ensure that workplace conditions conform to applicable OSHA standards.[123] OSHA's standards are created by its own initiative through advisory committees, or in response to petitions from third parties such as the Secretary of Health and Human Services (HHS), the National Institute for Occupational Safety and Health (NIOSH), state and local governments, or employer or labor representatives.[124]

Some of the most frequently cited standards include fall protection in construction, hazard communication, respiratory protection, machinery and machine guarding, and eye and face protection.[125] While these are all federal standards, OSHA has approved state plans that are operated by individual states rather than federal OSHA to develop their own job safety and health programs.[126]

Federal OSHA has jurisdiction to inspect approximately seven million worksites.[127] OSHA inspectors focus primarily on inspecting the most hazardous workplaces, with different priorities based on the circumstances.[128] If an inspector finds a violation of OSHA standards or a serious hazard, OSHA may issue citations, which describe the requirements violated, list any penalties, or give a deadline for correcting the hazard.[129] However, if an employer is not inspected and an employee believes his or her working conditions are "unsafe or unhealthful," his or her only redress is to file a complaint with OSHA to request an on-site OSHA inspection.[130]

In April 2020, it was reported that thousands of employees from several different workplaces, such as hospitals, grocery stores, airlines, and

122. *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/aboutosha.

123. *Employer Responsibilities*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/as/opa/worker/employer-responsibility.html#:~:text=Provide%20a%20workplace%20free%20from,and%20properly%20maintain%20this%20equipment.

124. *OSHA Standards Development,* OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/laws-regs/standards-development.

125. *Top 10 Most Frequently Cited Standards*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/top10citedstandards.

126. OSHA has approved 22 state plans for both private and state and local government workers and 6 state plans covering only state and local government workers. *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/stateplans.

127. *Occupational Safety and Health Administration (OSHA) Inspections*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf.

128. The first priority for inspections are workplaces that are "imminent danger situations." Next, OSHA will inspect workplaces with "severe injuries and illnesses." The third priority for inspectors is worker complaints. *Id.*

129. *Id.*

130. *Workers' Rights,* OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/Publications/osha3021.pdf.

pharmacies, filed complaints with OSHA based on the lack of safety measures provided by their employers.[131] The employees who filed complaints did not hear back from federal safety inspectors for several weeks.[132] For example, after a poultry plant in Camila, Georgia filed a complaint when three employees died of COVID-19, the president of the union that represents poultry workers stated, "People don't even waste their time calling OSHA anymore. We've called OSHA and they're useless."[133]

During the beginning of the pandemic in 2020, OSHA published a "Guidance on Preparing Workplaces for COVID-19."[134] However, it stated that "[t]his guidance is advisory" and is "not a standard or a regulation, and it neither creates new legal obligations nor alters existing obligations created by OSHA standards of the *Occupational Safety and Health* (OSH Act)."[135] In other words, the COVID-19 recommendations in the guidelines are not mandatory for employers.[136] OSHA has continued to update its guidance, most recently on August 13, 2021, to "reflect developments in science, best practices, and standards," such as mask and testing recommendations for fully vaccinated people, which was not a reality in the beginning of the pandemic.[137]

Nonetheless, from the start of the COVID-19 pandemic until October 29, 2020, OSHA had only conducted 179 inspections and, while it did issue citations, those citations were based on OSHA standards that had existed prior to the pandemic.[138] Of the 32 workplaces cited, 30 were healthcare facilities, such as nursing and residential care facilities and general medical

131. Peter Whoriskey, Jeff Stein, & Nate Jones, *Thousands of OSHA complaints filed against companies for virus workplace safety concerns, records show*, WASH. POST (Apr. 16, 2020), https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints/.

132. *Id.*

133. *Id.*

134. *Guidance on Preparing Workplaces for COVID-19,* OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/Publications/OSHA3990.pdf.

135. *Id.*

136. Whoriskey, Stein, & Jones, *supra* note 131.

137. *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (last visited Feb. 16, 2022), https://www.osha.gov/coronavirus/safework.

138. These violations included failure to implement written respiratory protection program (last updated in 2011), failure to report an injury, illness or fatality (last updated in 2014), or failure to comply with the general duty clause of the OSH Act of 1970. *U.S. Department of Labor's OSHA Announces $2,496,768 in Coronavirus Violations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., (Nov. 6, 2020), https://www.osha.gov/news/newsreleases/national/11062020; OSHA Standard 1910.134, (last visited Feb. 16, 2022); *Respiratory Protection*, OCCUPATIONAL SAFETY & HEALTH ADMIN. https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134; OSHA Standard 1904.39, (last visited Feb. 16, 2022).; *Reporting Fatalities, Hospitalizations, Amputations, and Losses of an Eye as a result of Work-related Incidents to OSHA.*, OCCUPATIONAL SAFETY & HEALTH ADMIN. https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.39 (last visited Feb. 16, 2022); 29 U.S.C §654.

and surgical hospitals, leading to fines amounting to $2,496,768.[139] By June 2021, slightly more than one year into the pandemic, OSHA conducted 2,452 inspections compared to the 1,672 inspections in June 2020.[140] However, there were only 83 COVID-related complaints in June 2021 as opposed to the 1,339 COVID-related complaints in June 2020.[141] Nonetheless, OSHA still created a National Emphasis Program that was initiated in March 2021 to inspect health-care facilities, as well as a COVID-19 emergency temporary standard for health care, which became effective on July 6, 2021.[142] Further, on March 8, 2022, OSHA released an enforcement memorandum that stated a new initiative to increase highly focused inspections in hospitals and skilled nursing facilities that treat COVID-19 related patients, which is a supplement to the National Emphasis Program.[143] This exhibits how employees that work in non-healthcare related facilities are more or less outside of OSHA's radar and focus.[144] While OSHA did conduct some inspections on wholesalers and retailers, such as Walmart and Family Dollar stores, as well as warehouse and transportation industries by June 2021,[145] the Select Subcommittee on the Coronavirus Crisis,[146] put out a press release on October 27, 2021, stating that "new evidence reveals that OSHA made a 'political' decision not to set regulatory standards that would have protected workers and could have saved lives" for workers in the five largest meatpacking conglomerates.[147]

139. Hailey Mensik, *COVID-19 related OSHA complaints, fines pile up for healthcare facilities*, HRDIVE (November 9, 2020), https://www.hrdive.com/news/COVID19-OSHA-complaints-citations-healthcare-hospitals/589224/.

140. Bruce Rolfsen, *OSHA Inspections Ticking Up Again as Covid-19 Restrictions Ease*, BLOOMBERG LAW (July 21, 2021), https://news.bloomberglaw.com/safety/osha-inspections-ticking-up-again-as-covid-19-restrictions-ease.

141. *Id.*

142. *Id.*

143. Johnathan H. Schaefer & Megan Baroni, *OSHA Announces COVID-19 Enforcement Initiative for Hospitals and Nursing Care Facilities*, NAT'L L. REV (March 10, 2022), https://www.natlawreview.com/article/osha-announces-covid-19-enforcement-initiative-hospitals-and-nursing-care-facilities.

144. Some states who have OSHA approved state plans have implemented their own safety standard requirements. For example, New Jersey Governor Murphy signed an executive order requiring employers to provide sanitization materials, ensure employees practice hand hygiene, and routinely disinfect all high-touch areas, conduct daily health checks with temperature screenings. Governor Murphy explained that he needed to take this action because the federal government "has failed to provide all workers the proper standards and protections that they deserve." Although this may protect New Jersey employees to an extent, employees in states where there are no executive orders or OSHA approved state-plans are still dependent on federal OSHA to protect them. *Governor Murphy Signs Executive Order to Protect New Jersey's Workforce During the Covid-19 Pandemic*, STATE OF N.J. (October 28, 2020), https://nj.gov/governor/news/news/562020/approved/20201028a.shtml.

145. Rolfsen *supra*, note 140.

146. The Select Subcommittee on the Coronavirus Crisis was established by the House of Representatives on April 23, 2020, to examine the response to the coronavirus crisis, among several other duties. *About*, SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS, https://coronavirus.house.gov/about.

147. *Select Subcommittee Releases Data Showing Coronavirus Infections And Deaths Among Meatpacking Workers At Top Five Companies Were Nearly Three Times Higher Than Previous*

Employees who found themselves outside of OSHA's reach were blocked by yet another barrier as they fell outside of the protection of courts as well.[148] On November 2, 2020, in *Palmer v. Amazon.com Inc*., the U.S. District Court for New York's Eastern District dismissed a lawsuit against Amazon filed by four employees from Amazon's Staten Island, New York fulfillment center.[149] The employees sought an injunction against Amazon to comply with safety recommendations.[150] The complaint alleged that Amazon violated public nuisance and workplace safety laws because the company engaged in "purposeful miscommunication with workers" and prioritized "productivity at the expense of safety."[151] Judge Brian Cogan dismissed the employees' claims because OSHA, rather than the courts, should decide whether Amazon is doing enough to protect its workers.[152] Judge Cogan explained, "Courts are not expert in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance."[153] Another federal judge in Missouri also dismissed similar allegations against Smithfield Foods, Inc. by stating that OSHA should have primary jurisdiction over whether an employer is complying with workplace safety regulations.[154] These decisions ultimately demonstrate how employees are stuck in a never-ending cycle when it comes to being afforded workplace safety protections.

Recently, even when OSHA took some action by issuing a vaccine-or-testing mandate for large employers, the mandate was blocked by the Supreme Court on January 13, 2022.[155] The mandate issued by OSHA in November 2021 required workers in companies with more than 100 employees to either be vaccinated against COVID-19, or wear masks and be tested weekly.[156] The Supreme Court majority argued that OSHA lacked congressional authority to impose this requirement, reversing the Sixth

Estimates, SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS (Oct. 27, 2021), https://coronavirus.house.gov/news/press-releases/select-subcommittee-releases-data-showing-coronavirus-infections-and-deaths.

148. Annie Palmer, *Judge dismisses Amazon worker lawsuit over coronavirus safety*, CNBC (Nov. 2, 2020), https://www.cnbc.com/2020/11/02/judge-dismisses-amazon-worker-lawsuit-over-coronavirus-safety.html.

149. This Amazon fulfillment center is the same facility that held the March protest demanding safer working conditions. *Id.*

150. *Id.*

151. *Id.*

152. Braden Campbell, *NY Judge Shoots Down COVID-19 Safety Suit Against Amazon*, LAW360 (Nov. 2, 2020), https://www.law360.com/articles/1325057/ny-judge-shoots-down-covid-19-safety-suit-against-amazon.

153. *Id.*

154. Vin Gurrieri, *COVID Suits Test 'Public Nuisance' Claim in Workplace Cases*, LAW360 (June 9, 2020), https://www.law360.com/articles/1281347.

155. Adam Liptak, *Supreme Court Blocks Biden's Virus Mandate for Large Employers*, N.Y. TIMES (Jan. 13, 2022), https://www.nytimes.com/2022/01/13/us/politics/supreme-court-biden-vaccine-mandate.html.

156. *Id.*

Circuit's decision that the mandate was lawful because OSHA must be able to respond to the dangers of COVID-19 to protect workers.[157]

2. Workers Compensation & Paid Sick Leave

Additionally, even if an employee does get infected with COVID-19 during the course of employment, it may be difficult for the employee to receive workers compensation.[158] The majority of states have their own workers' compensation policies which require employers to obtain insurance to cover employees' medical care that resulted from an injury or illness caused by their working environment.[159] In exchange for employers covering employees' medical care, rehabilitation and cash benefits, employees cannot file any negligence lawsuits against their employer in court.[160]

The pandemic has made the workers' compensation process extremely complicated because most policies do not generally cover "routine community-spread illnesses like a cold or the flu," since it is difficult to connect that illness to the workplace.[161] Certain states extended workers compensation coverage to include COVID-19 as a work-related illness for health care workers and other essential workers.[162] Yet, employees were having trouble receiving their benefits.[163] In the beginning of the pandemic in Massachusetts, out of 5,030 reports of first injury (which is the first step in a workers compensation claim), 734 were denied and 69 were in dispute.[164] Over 370 of the claims that were denied in Massachusetts were from health care workers.[165] While some states signed executive orders allowing a presumption in workers compensation systems that workers contracted COVID-19 through their employment, there were time limitations.[166] For instance, in July 2020, Connecticut Governor Ned Lamont's executive order that created such a presumption only covered employees who contracted COVID-19 at work up until May 20, 2020, leaving employees that contracted COVID-19 after that date out of the executive order's reach.[167] In Florida, the

157. *Id.*

158. Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 9, 2020), https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx.

159. Josh Cunningham, *Workers' Compensation: Keeping Injured and Ill Workers in the Workforce*, NAT'L CONF. OF STATE LEGISLATURES (May 24, 2019), https://www.ncsl.org/research/labor-and-employment/workers-compensation-report.aspx.

160. *Id.*

161. Cunningham, *supra* note 158.

162. Some of these states include Alaska, California, Washington, Illinois, and a few more. *Id.*

163. Bryce Covert, *COVID-19 Workers' Comp Claims Are Being Held Up or Denied*, THE INTERCEPT (Sept. 7, 2020), https://theintercept.com/2020/09/07/coronavirus-workers-compensation-claims-labor/.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

executive order providing workers compensation during the pandemic expired in January 2022.[168] Thus, employees in states that have enacted the presumption still have a slim opportunity to receive benefits.[169]

Further, many workers that contract COVID-19 cannot afford to isolate at home to beat the virus because they are not receiving paid sick leave.[170] About one-fifth of all United States workers do not receive paid sick leave, and low-wage workers are even less likely to receive it.[171] Only fourteen states and Washington D.C. have paid-sick-day laws, but that leaves 75 million private-sector workers without paid sick leave in jurisdictions that have not enacted these types of laws.[172] Some companies, such as Walmart, offered their own paid sick leave for two weeks, but later lowered the paid leave to one week as the CDC lowered its required isolation time.[173] Importantly, non-union employees do not have much of a choice when being asked to work while they are infected with the virus, because they fear losing their jobs or not being able to afford food.[174] OSHA received several complaints from employees stating that their bosses allowed sick workers to return to work or that other workers were being disciplined for not returning to work while they were quarantining.[175] Many of these OSHA complaints were "closed" complaints, which meant that OSHA did not respond with more than a call to the employer requesting them to stop, according to Deborah Berkowitz, a former OSHA senior policy advisor.[176]

Since employees do not have OSHA, most workers' compensation policies, paid sick leave, or the courts on their side, their only viable option is to resort to engaging in concerted activity to put pressure on their employers to guarantee safer working conditions and other benefits. There is no doubt that their frustration with the lack of assistance they are receiving, coupled with their extreme mental health strain and burnout, would lead to strong and passionate reactions towards their employers. The current *Wright Line* standard, without the per se unprotected categories, would completely overlook this current reality of the workplace. Under the current *Wright Line* standard, if an essential worker screams at a supervisor while protesting and

168. Denise Sawyer, *Workers' compensation protection expires for COVID-19 cases in Florida*, CBS 12 NEWS (Jan. 4, 2022), https://cbs12.com/news/local/workers-compensation-protection-expires-for-covid19-cases-in-florida.

169. Covert, *supra* note 163.

170. Olga Khazan, *The Real Reason Americans Aren't Isolating*, THE ATLANTIC (Jan. 13, 2022), https://www.theatlantic.com/politics/archive/2022/01/lack-paid-sick-leave-undermines-covid-isolation/621233/.

171. *Id.*

172. *Id.*

173. Melissa Repko, *Walmart cuts paid Covid leave in half, as CDC isolation guidance changes*, CNBC (Jan. 5, 2022), https://www.cnbc.com/2022/01/05/walmart-cuts-paid-leave-in-half-as-cdc-guidance-changes-.html.

174. Khazan, *supra* note 170.

175. *Id.*

176. *Id.*

is disciplined, when the burden shifts to the employer to prove that adverse action was taken because the employee engaged in offensive behavior, the employer will most likely prevail.

3. Unemployment Benefits

If the NLRB does not consider employees' frustration with the current workplace and allows employers to claim any comment to be offensive enough to lose NLRA protection, many employees may be left without employment during a period where unemployment rates continued to rise.[177] The prospect of being terminated for expressing their concern with their workplace and ultimately needing to depend on unemployment benefits, is another stress that employees, and the NLRB, must likewise contemplate during this pandemic. In the beginning of the pandemic, during early Spring 2020, more than 6 million people filed for state unemployment.[178] Despite being approved for unemployment, thousands of employees were still waiting to receive their unemployment benefits.[179] Before the pandemic spread widely throughout the United States, about 93 percent of people were paid within three weeks after applying for benefits.[180] By September 2020, the United States Department of Labor reported that the percentage had dropped to 60 percent.[181] The Department of Labor also reported that one-in-five people paid in September had to wait more than two months for their benefits to arrive.[182] Consequently, people waiting for their unemployment benefits had to use credit cards or loans to put food on their tables, creating a burdensome amount of future debt.[183] For instance, a woman who lost her job in a restaurant had incurred $20,000 in credit card debt to cover basic needs for her family.[184] This is a daunting consequence for employees who make one offensive comment while protesting safer working conditions, and it must be taken into consideration by the NLRB.

177. In the beginning of 2022, as the Omicron COVID-19 variant continued to rise, the number of Americans filing new claims for unemployment benefits had increased to an eight-week high in the first week of January due to a surge in COVID cases. However, economists expected that the number of claims would return to more normal numbers once Omicron passed. Lucia Mutikani, *Omicron wave lifts U.S. weekly jobless claims; monthly producer inflation slows*, REUTERS (Jan. 13, 2022), https://www.reuters.com/world/us/us-weekly-jobless-claims-unexpectedly-rise-covid-19-cases-soar-2022-01-13/.

178. Greg Iacurci, *$20,000 in credit card debt and a negative bank account: The cost of one woman's wait for unemployment benefits during Covid-19*, CNBC (Nov. 21, 2020), https://www.cnbc.com/2020/11/21/delayed-unemployment-benefits-led-to-20000-in-credit-card-debt-.html.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

C. THE GENERAL MOTORS DECISION MIGHT BE CHANGED UNDER PRESIDENT JOE BIDEN'S ADMINISTRATION

Importantly, the *General Motors* decision was decided under former President Donald Trump's appointed NLRB.[185] Now that President Joe Biden has assumed the presidential position, several changes could be made to the NLRB's decisions.[186] For instance, a Biden appointed NLRB could reinstate *Purple Communications,* 361 NLRB 1050 (2014), where former President Barack Obama's appointed NLRB determined that employees had a NLRA-protected right to use work emails for organizing purposes, despite an employer prohibiting non-work related use of work emails.[187] Other current NLRB decisions that overruled Obama-era NLRB tests and decisions might also be changed back.[188] Keeping all this in mind, the *General Motors* decision might be overruled as well.[189] In September 2021, while prosecuting an unfair labor practice case against Google, a lawyer from the NLRB general counsels' office argued that the board's ruling in *General Motors* should be struck down.[190] If the ruling is altered, the analysis for determining whether an employee can be disciplined for abusive behavior during concerned activity might be transformed back to the *Atlantic Steel*, "totality of the circumstances", and *Clear Pine Mouldings* standards, as urged by several amici in *General Motors*.[191] If this does happen, employers will again have trouble disciplining employees who engage in behavior that is offensive to a protected class or would reasonably lead to violence, which are the recommended per se protected categories by other amici in *General Motors*.[192] Nevertheless, it is still up in the air whether *General Motors* will be overruled.

CONCLUSION

There are several worrisome scenarios for employees during COVID-19. First, employees are working in unsafe working conditions, which are not being properly regulated by OSHA.[193] Next, if they contract COVID-19 while working, they will struggle to receive any workers compensation to

185. Matthew A. Fontana & Daniel H. Dorson, *Potential Changes to Labor Policy Under a Biden Administration*, NAT'L L. REV. (Nov. 10, 2020), https://www.natlawreview.com/article/potential-changes-to-labor-policy-under-biden-administration.

186. *Id.*

187. *Id.*

188. *Id.*

189. Braden Campbell, *5 Cases that Could Shift NLRB Precedent in 2022*, LAW360 (Jan. 3, 2022), https://www.law360.com/employment-authority/articles/1450602.

190. Robert Iafolla, *Google's NLRB Case Creates Chance for New Rules on Worker Speech*, BLOOMBERG L. (Sep. 9, 2021), https://news.bloomberglaw.com/daily-labor-report/googles-nlrb-case-creates-chance-for-new-rules-on-worker-speech.

191. *General Motors LLC*, 369 N.L.R.B. No. 127 at 3-4 (2020).

192. *Id.* at 4.

193. Whoriskey, Stein & Jones, *supra* note 131.

cover their medical costs or paid sick leave to isolate and recover.[194] Lastly, if they do get terminated, they may not receive unemployment benefits on time, leaving them without any income to provide for themselves and their families.[195] All of these factors may contribute to employees' struggles with mental health[196] and burnout[197] during this chaotic time. Therefore, when employees engage in concerted activity to demand safer working conditions, employers should not be able to terminate an employee who may overstep and say something a supervisor might find offensive. In its *Wright Line* analysis, employees' circumstances must be considered when the NLRB analyzes an employer's defense on whether employees retain NLRA protection when they engage in abusive behavior. The behaviors that should never be protected are behaviors that are offensive to a protected class, or that reasonably lead to violence. These two per se unprotected categories allow employers to maintain a positive work culture during the pandemic[198] and adhere to federal and state antidiscrimination laws.[199] The per se categories produce a win-win situation for both employers and employees. It is better for the NLRB to walk the *Wright Line* standard now, rather than to cross the wrong line later.

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194. Covert, *supra* note 163.
195. Iacurci, *supra* note178.
196. Howard & Kane, *supra* note 104.
197. Horch, *supra* note 27.
198. Emmet, Schrah, Schrimper, & Wood, *supra* note 103.
199. *Overview*, supra note 78.

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