Brooklyn Law Review

Volume 87 | Issue 3 Article 6

4-19-2022

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How the National Labor Relations Board Is Still Failing Marginalized Employees

> While the [National Labor Relations Act] properly understands that rough words and strong feelings can arise in the tense and acrimonious world of workplace strikes, targeting others for sexual or racial degradation is categorically different. Conduct that is designed to humiliate and intimidate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment. Full stop. Yet time and again the [National Labor Relations Board's] decisions have given short shrift to gender-targeted behavior, the message of which is calculated to be sexually derogatory and demeaning.[1]

INTRODUCTION

On July 5, 1935, President Franklin D. Roosevelt signed into law the National Labor Relations Act (NLRA) with the explicit goal of protecting the labor rights of employees.[2] The NLRA also created the National Labor Relations Board (NLRB) to implement and enforce it.[3] Key to the NLRA is Section 7, which empowers employees with the labor rights to organize unions, collectively bargain with employers, and engage in protected concerted activity.[4] To safeguard employees who exercise their Section 7 rights, Section

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[1] Consol. Commc'ns, Inc. v. Nat'l Lab. Rels. Bd., 837 F.3d 1, 21 (D.C. Cir. 2016) (Millett, J., concurring).

[2] National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449–50 (1935) (codified as amended at 29 U.S.C. § 151) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

[3] National Labor Relations Act, § 3. The NLRB is the federal agency in which its two main tasks are to (1) "safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative," and (2) "prevent and remedy unfair labor practices committed by private sector employers and unions." *See What We Do*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do#:~:text=The%20National%20Labor%20Relations%20Board,unions%20as%20their%20bargaining%20representative [https://perma.cc/69CZ-AH6Z].

[4] 29 U.S.C. § 157; *see, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793, 795 (1945) (employees possess the Section 7 right to solicit and distribute union materials during nonworking time).

8(a)(3) bars employers from discriminating against such employees by limiting adverse employment action against them (e.g., discipline or discharge).[5] However, employees who engage in Section 7 activity, such as picketing or striking, are not completely protected against an employer's adverse employment action if they simultaneously engage in abusive conduct.[6] While the NLRB has not provided a "single definition of 'abusive conduct,'" courts have held that personal attacks and workplace bullying, for example, qualify.[7]

For such situations, where an employer takes an adverse employment action against an employee simultaneously engaged in Section 7 activity and abusive conduct, the NLRB had previously developed three setting-specific standards to determine if that action was legal or discriminatory. The NLRB's three settings were (1) employee-employer workplace conduct, (2) employee-employee conduct and employee social media use, and (3) employee picket-line conduct.[8] However, in 2020, the NLRB abandoned those three setting-specific standards for its *Wright Line* burden-shifting causation test to determine if an employer violates Section 8(a)(3) after taking adverse action against an employee who simultaneously engages in Section 7 activity and abusive conduct.[9]

The NLRB created its *Wright Line* burden-shifting causation test in 1980, which the Supreme Court quickly

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[5] 29 U.S.C. § 158(a)(3); *see, e.g.*, Com. Testing & Eng'g Co., 262 N.L.R.B. 786 (1982) (employer violated Section 8(a)(3) for firing employee because of its union organizing and ordered to reinstate employee with backpay); Harrison Steel Castings Co., 262 N.L.R.B. 450 (1982) (employer violated Section 8(a)(3) for firing employees because they did not attend an antiunion rally and was ordered to reinstate employees with backpay).

[6] *See, e.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1939) (holding NLRA does not protect strikers who commit trespass or violence toward employer property); NLRB v. Loc. Union No. 1229, Int'l Brotherhood of Elec. Workers, 346 U.S. 464, 472 (1954) (holding employee disloyalty unprotected under the NLRA).

[7] Harry I. Johnson, III et al., *NLRB Limits Protection Given to Abusive, Profane, or Offensive Workplace Conduct*, MORGAN LEWIS (July 27, 2020), https://www.morganlewis.com/pubs/2020/07/nlrb-limits-protection-given-to-abusive-profane-or-offensive-workplace-conduct [https://perma.cc/2JX4-AZ8N]; *see, e.g.*, Cooper Tire & Rubber Co., 363 NLRB 1952 (2016) (finding employer violated Section 8(a)(3) for terminating white striker who yelled racial slurs at Black strike replacement workers).

[8] *See generally* Gen. Motors LLC, 369 N.L.R.B. No. 127 (July 21, 2020); Atl. Steel Co., 245 N.L.R.B. 814 (1979) (establishing a four-factor test to determine if abusive employee conduct toward employer in the workplace was NLRA protected); Pier Sixty, LLC, 362 N.L.R.B. 505 (2015) (applying totality of the circumstances test to determine if abusive employee conduct toward employer outside workplace or on social media was NLRA protected); Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984) (holding that employee picket line conduct that reasonably tended to intimidate coworkers from using their Section 7 rights violated the NLRA).

[9] *See generally Gen. Motors*, 369 N.L.R.B. No. 127 (abandoning *Atlantic Steel*, totality-of-the-circumstances test, and *Clear Pine Mouldings* for *Wright Line* in all employee abusive conduct cases involving Section 7 activity).

approved of, to adjudicate labor disputes where an employer had dual motives for taking an adverse employment action against an employee.[10] Under the *Wright Line* test, first the NLRB's general counsel must show that "the employee engaged in Section 7 activity, . . . the employer knew of [such] activity, and . . . the employer had animus" toward the activity which caused it to take adverse action against the employee.[11] Upon that showing, the employer then bears the "burden of persuasion" in proving that it would have taken the adverse action against the employee despite any Section 7 activity.[12] For example, *Wright Line* would permit an employer to take adverse employment action against an employee who violated a work rule against destroying time cards, but not if the employer took such action as a pretext because it did not like that same employee organizing a union.[13] Ultimately, the NLRB designed the test to "accomplish the 'delicate task' of weighing the interests of employees in concerted activity against the interest of the employer in operating his business."[14]

This note argues that the *Wright Line* test fails to adequately protect marginalized employees from bigoted coworkers who simultaneously engage in bigoted abusive conduct and Section 7 activity in labor disputes. Specifically, it seeks to show that the *Wright Line* test provides for the possibility that employees who simultaneously engage in Section 7 activity and bigoted abusive conduct, such as racist or sexist behavior, may be entitled to reinstatement and backpay by the NLRB. In such circumstances, an NLRB order compelling an employer to reinstate a bigoted employee with backpay would undermine the NLRA by maintaining a workplace that inhibits the ability of marginalized employees to exercise their Section 7 rights. Instead, this note proposes that the NLRB should adopt a per se standard, which would strip NLRA protection from any employee who also engages in bigoted abusive conduct during a labor dispute with their employer, such as racist picket-line behavior. Under such a per se standard, employers could—regardless of their motivation—take adverse action against an employee who commits bigoted acts during Section 7 activity without violating Section 8(a)(3).

Crucially, this note only argues for a per se standard in cases where an employee's bigoted abusive conduct targets a

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[10] *See* Wright Line, 251 N.L.R.B. 1083, 1089 (1980); *see also* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983) (approving *Wright Line* test as a permissible NLRA interpretation).

[11] *Gen. Motors*, slip op. at 2.

[12] *Id.*

[13] *See Wright Line*, 251 N.L.R.B. at 1090.

[14] *Id.* at 1089 (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963)).

fellow employee or employer because of their protected status under federal employment law, such as race, sex, gender, etc. This note does not propose adopting a per se standard beyond such bigoted conduct to include, for example, garden variety workplace profanity or vulgarity. Rather, this note agrees with Judge Patricia Millett that "targeting others for sexual or racial degradation is categorically different" from the "rough words and strong feelings" labor disputes are made of and thus should never be tolerated or protected by federal labor law.[15] Ultimately, this note posits that a per se standard is superior to *Wright Line* because it better promotes the NLRA's goal of industrial peace by protecting marginalized employees and their Section 7 rights when bigoted employee conduct exists during a labor dispute.

Part I of this note provides background on the NLRB's prior setting-specific standards for determining whether an employer's adverse employment action against an employee who engaged in Section 7 activity was a violation of Section 8(a)(3). It concludes that those standards wrongly protected employee bigoted abusive conduct during Section 7 activity, to the detriment of marginalized employees. Part II examines the NLRB's recent abandonment of its setting-specific standards in favor of *Wright Line*. It argues that while *Wright Line* offers less protection to racist or sexist employees during labor disputes than the setting-specific standards, it still fails to categorially strip NLRA protection from bigoted employee behavior. This is because *Wright Line* continues to offer a bigoted employee the possibility of reinstatement with backpay by the NLRB if an employer was motivated by antiunion animus when taking adverse action against that employee. Part III criticizes the NLRB for its recent adoption of *Wright Line* in cases involving labor disputes and bigoted employees. Crucially, it aims to show that *Wright Line* fails marginalized employees by not centering their harm from bigoted employee conduct, instead of employer motivation. Part IV proposes that the NLRB abandon *Wright Line* in such cases for a per se standard, which would categorically strip NLRA protection from bigoted employees—regardless of employer motivation. This note concludes by arguing that a per se standard is superior at a time of racial and sexual reckoning because it would signal to marginalized employees that the NLRA and NLRB offer their bigoted coworkers no legal quarter today.

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[15] Consol. Commc'ns, Inc. v. NLRB, 837 F.3d 1, 21 (D.C. Cir. 2016) (Millett, J., concurring).

I. NLRB'S PRIOR SETTING-SPECIFIC STANDARDS

Historically, the NLRB offered qualified protection to the speech and conduct of employees in labor disputes with their employers given the "animal exuberance" that conflicts over wages, hours, and other working conditions engendered.[16] Prior to the NLRB's adoption of *Wright Line* in 2020, for all cases involving Section 7 activity and abusive employee conduct, including bigoted behavior, it applied three setting-specific standards.[17] Specifically, the NLRB would consider the setting in which an employee's abusive conduct occurred when determining if an employer's adverse employment action against that employee violated Section 8(a)(3).[18] The NLRB previously applied three standards because it felt that different settings warranted different degrees of NLRA protection for employees.[19] For example, the NLRB offered greater protection to employee abusive conduct on the picket line than in the workplace because of the former setting's more adversarial dynamics.[20] If the NLRB found that an employee's abusive conduct during Section 7 activity in a specific setting lost NLRA protection, then an employer's adverse employment action against that employee would not violate Section 8(a)(3).[21]

The remainder of this Part examines the three setting-specific standards that the NLRB used before abandoning them for *Wright Line*: (1) *Atlantic Steel*, (2) totality of the circumstances, and (3) *Clear Pine Mouldings*. This Part concludes by addressing how the NLRB's setting-specific standards failed marginalized employees by protecting bigots.

A. Atlantic Steel*: Employee-Employer Workplace Conduct*

The most common setting-specific standard that the NLRB previously applied was *Atlantic Steel*, which governed

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[16] Milk Wagon Drivers Union of Chi., Loc. 753 v. Meadowmoor Dairies, 312 U.S. 287, 293 (1941).

[17] *See Gen. Motors*, slip op. at 2–11 (abolishing setting-specific standards applying *Atlantic Steel*, totality of the circumstances, and *Clear Pine Mouldings*).

[18] *See id.* at 1.

[19] *See Gen. Motors*, slip op. at 4.

[20] *See, e.g.*, Airo Die Casting, Inc., 347 N.L.R.B. 810, 812 (2006) ("Picket-line misconduct is accordingly evaluated by a different standard than similar conduct in a working environment.").

[21] *See, e.g.*, Aluminum Co. of Am., 338 N.L.R.B. 20, 22 (2002) (holding employer did not violate Section 8(a)(3) by firing employee who profanely invoked union contract, despite frequent profanity in workplace, because the employee's "repeated, sustained, ad hominem profanity cannot be excused as an emotional outburst provoked by any opposition from the Respondent's officials to his grievance activity").

employee abusive conduct in workplace labor disputes with an employer.[22] Typically, this would feature "direct communications, face-to-face in the workplace, between an employee and a manager or supervisor" and would involve employee behavior that might lose NLRA protection.[23] In 1979, the NLRB in *Atlantic Steel* created a four-factor balancing test to determine whether an employee's conduct during a workplace dispute with an employer lost NLRA protection.[24] The NLRB considered: "(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."[25] Indeed, in *Atlantic Steel*, the NLRB found the employer did not violate Section 8(a)(3) for firing an employee who questioned overtime policy because the employee lost NLRA protection for calling a supervisor a "lying s.o.b."[26]

After 1979, the NLRB applied the four-factor balancing test from *Atlantic Steel* to workplace labor disputes with management that involved many types of employee abusive conduct.[27] When analyzing the four *Atlantic Steel* factors, the NLRB provided some leeway for employees committing "impulsive behavior when engaging in concerted activity" by balancing their Section 7 rights against an employer's disciplinary rights.[28] Thus, because the NLRA must "take into account 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," the NLRB provided protection to many types of employee abusive conduct in the workplace.[29]

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[22] Molly Gibbons, Comment, *License to Offend: How the NLRA Shields Perpetrators of Discrimination in the Workplace*, 95 WASH. L. REV. 1493, 1497 n.19 (2020).

[23] Three D, LLC, 361 N.L.R.B. 308, 311 (2014); *see, e.g.*, Media Gen. Operations, Inc., 351 N.L.R.B. 1324 (2007) (involving employee calling manager a "stupid fucking moron" during contract negotiations).

[24] *See* Atl. Steel Co., 245 N.L.R.B. 814, 817 (1979).

[25] *Id.* at 816 (1979); *see, e.g.*, Starbucks Corp., 354 N.L.R.B. 876, 877 (2009) (holding employee lost NLRA protection for screaming "shame, shame, shame" and "we know where you live" to supervisor as he walked home because only "the place of the discussion" factor leaned toward protection, while the other three factors weighed against protection).

[26] *Atl. Steel Co.*, 245 N.L.R.B. at 816 (holding, while applying the four factors, that the nature of the employee's outburst and lack of an employer unfair labor practice resulted in a loss of NLRA protection).

[27] *See, e.g.*, *Media Gen. Operations*, 351 N.L.R.B. at 1330 (profanity where an employee called manager a "stupid fucking moron" during contract negotiations); Felix Indus., Inc., 339 N.L.R.B. 195, 195 (2003) (patronization where an employee told supervisor: "You're just a fucking kid. I don't have to listen to a fucking kid."); Great Dane Trailers, 293 N.L.R.B. 384, 393 (1989) (impulse where an employee told coworker he had a "fucked up foreman" after his request for help on the shop floor was denied).

[28] Piper Realty Co., 313 N.L.R.B. 1289, 1290 (1994).

[29] Consumers Power Co., 282 N.L.R.B. 130, 132 (1986).

Unfortunately, the four *Atlantic Steel* factors did not categorically strip the NLRA protection from employees who engage in bigoted abusive conduct.[30] For example, in 2007, a split NLRB upheld an administrative law judge's (ALJ) finding that the employer did not violate Section 8(a)(3) for issuing an oral warning to an employee who indirectly called a female supervisor "that bitch" during a union organizing drive.[31] The NLRB majority, applying the four *Atlantic Steel* factors, found that only the second factor—the subject matter of the discussion—warranted NLRA protection.[32] However, the dissent rejected that *Atlantic Steel* analysis, finding that the employee's "passing use of profanity in the course of his protected union solicitation" was not "so egregious in nature as to deprive him of the [NLRA's] protection."[33] Ultimately, the dissent, applying *Atlantic Steel*, would have offered the employee's sexist conduct NLRA protection.[34]

B. Totality of the Circumstances: Employee-Employee Conduct and Social Media

In cases involving employee abusive conduct in workplace conversations among employees or on social media, the NLRB has declined to apply the four *Atlantic Steel* factors and has instead adopted a "totality of the circumstances" test.[35]

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[30] Michael Z. Green, *The Audacity of Protecting Racist Speech Under the National Labor Relations Act*, 2017 U. CHI. LEGAL F. 235, 241, 252 (2017) ("[T]he Board has not clearly applied the *Atlantic Steel* factors to protect the use of racial epithets. However, the Board's application of *Atlantic Steel* does suggest broad acceptance of offensive speech as being protected by the NLRA."). For example, see *Constellium Rolled Prod. Ravenswood, LLC*, 366 N.L.R.B. No. 131, slip op. at 1 (July 24, 2018), wherein a split NLRB held that *Atlantic Steel* factors protected male employee who wrote "whore board" on work signup sheets while protesting employer's overtime policy because he was "engaged in a continuing course of protected activity." Notably, the NLRB re-reviewed the case on remand from the D.C. Circuit after *Atlantic Steel* was abolished in *General Motors* and upheld its initial finding that the "whore board" comment was protected under *Wright Line* because of "ample evidence" of similar workplace conduct that the employer previously tolerated. *See* Kevin Stawicki, *Worker's Vulgar OT Protest Was Protected, NLRB Says*, LAW360 (Aug. 25, 2021, 9:05 PM), https://www.law360.com/employment-authority/articles/1416336 [https://perma.cc/RVA2-8MS9].

[31] Cellco P'ship, 349 N.L.R.B. 640, 641 (2007).

[32] *Id.* at 643.

[33] *Id.* at 648.

[34] *Id.*

[35] Christine Neylon O'Brien, *I Swear! From Shoptalk to Social Media: The Top Ten National Labor Relations Board Profanity Cases*, 90 ST. JOHN'S L. REV. 53, 102–03 (2016) ("The most important lesson learned from *Triple Play* is that the Board will not apply the Atlantic Steel test to cases involving social media . . . ."); *see also* Three D, LLC, 361 N.L.R.B. 308, 311 (2014) (noting that *Atlantic Steel* should not apply in employee abusive conduct cases on social media because the "place of the discussion" factor is inapplicable); Desert Springs Hosp. Med. Ctr., 363 N.L.R.B. No. 185, slip op. at 1 n.3 (2016) (holding that the NLRB also applies a totality-of-the-circumstances test when determining if employee-employee workplace discussions that involve abusive conduct violates Section 7).

For example, in 2015, the NLRB in *Pier Sixty* applied a totality-of-the-circumstances test and upheld an ALJ's finding that the employer violated Section 8(a)(3) by discriminatorily firing a banquet server for his profanity-laced Facebook tirade during a union organizing campaign.[36] The NLRB held that the employer discriminated against the employee because even though the employer said the Facebook post violated company policy, managers later refused to explain the firing or policy when asked.[37] Ultimately, the NLRB ordered the employer to offer reinstatement and backpay to the employee because the Facebook post and union campaign were in response to the employer's abuse of employees.[38]

Though short-lived, unfortunately the NLRB's totality-of-the-circumstances test in employee-employee and social media cases involving abusive employee conduct also did not categorically remove NLRA protection for bigoted employee behavior. For example, in *Fresenius USA Manufacturing, Inc.*, the NLRB found an employer violated Section 8(a)(3) for suspending and firing an employee who wrote sexist newsletters that read "Dear Pussies, Please Read!," which his female coworkers found "vulgar, offensive, and threatening."[39] There, the NLRB applied its totality-of-the-circumstances test and found that the employee's sexist screed was protected under the NLRA.[40] Ultimately, the NLRB ordered the bigoted employee to be reinstated with backpay because the sexist newsletters were written during a union decertification campaign, they did not interfere with business, and the employer dealt with prior vulgarities with lesser discipline.[41]

C. Clear Pine Mouldings*: Employee Picket-Line Conduct*

In 1984, the NLRB in *Clear Pine Mouldings* adopted an objective test that would strip NLRA protection from employee picket-line misconduct only if it reasonably tended "to coerce or intimidate employees in the exercise of rights protected under

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[36] Pier Sixty, LLC, 362 N.L.R.B. 505, 505 (2015) ("Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!").

[37] *Id.* at 506.

[38] *Id.* at 530 (noting that supervisor called employee a "fucking little Mexican" and asked if employees were "fucking stupid").

[39] Fresenius USA Mfg. Inc., 358 N.L.R.B. 1261, 1261 (2012), *vacated* (2014).

[40] *Id.* at 1267–68. The Board's decision was vacated in 2014 after the Supreme Court determined the appointment of two NLRB members was invalid. *See* Fresenius USA Mfg., Inc., 362 N.L.R.B. 1065, 1065 (2015).

[41] *Id.*

the [NLRA]."[42] The NLRB justified this highly protective standard for employee picket-line misconduct by pointing to the NLRA's legislative history.[43] Specifically, the NLRB found that while strikers under NLRA Sections 8(c) and 13 have "no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike," they do retain the right to participate in "peaceful picketing and persuasion."[44] Thus, the NLRB found that employee picket-line misconduct only lost NLRA protection when it involved an "overt or implied threat or where there is a reasonable likelihood of an imminent physical confrontation."[45]

Unfortunately, the NLRB's application of *Clear Pine Mouldings* granted NLRA protection to racist and sexist employee picket-line misconduct.[46] For example, in *Airo Die Casting*, the NLRB held that the employer violated Section 8(a)(3) for terminating a striker who screamed "fuck you n[****]r" at a nonstriking Black employee while flashing dual middle fingers.[47] Although the NLRB acknowledged that the white striker's "comment and gestures were clearly repulsive and offensive," it noted that bigoted behavior "did not occur during his working time or in his working place."[48] The NLRB held that, because "[p]icket-line misconduct is accordingly evaluated by a different standard than similar conduct in a working environment," the striker's conduct, "standing alone without any threats or violence, did not rise to the level where he forfeited the protection of the [NLRA]."[49] Sadly, *Clear Pine Mouldings* repeatedly protected bigoted employee picket-line misconduct.[50]

As the above case law shows, the NLRB's prior setting-specific standards for judging whether an employee's conduct in the

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[42] Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044, 1046 (1984) (quoting NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 527 (3d Cir. 1977)).

[43] *Id.* at 1046–47.

[44] *Id.* at 1047; *see also* 29 U.S.C. § 158(c); *id.* § 163.

[45] Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 6 (July 21, 2020).

[46] Green, *supra* note 30, at 243.

[47] Airo Die Casting, Inc., 347 N.L.R.B. 810, 811–12 (2006).

[48] *Id.* at 812.

[49] *Id.*

[50] Michael H. LeRoy, *Slurred Speech: How the NLRB Tolerates Racism*, 8 COLUM. J. RACE & L. 209, 269 (2018) (noting conflict between Title VII's ban on racial or sexual harassment and the NLRB's "anachronistic acquiescence to it"); *see also* Cooper Tire & Rubber Co., 363 N.L.R.B. No. 194 (2016) (finding employer violated Section 8(a)(3) per *Clear Pine Mouldings* for terminating white striker who said he smelled fried chicken and watermelon when he saw Black strike replacements and ordering white striker's reinstatement with backpay); Nickell Moulding, 317 N.L.R.B. 826, 828, 830 (1995) (finding employer violated Section 8(a)(3) per *Clear Pine Mouldings* for terminating striker who held sign stating, "Who is Rhonda F [with an X through the F] Sucking Today?" and ordering striker's reinstatement with backpay (alteration in original)), *enforcement denied by* Nickell Moulding, Inc. v. NLRB, 101 F.3d 528 (8th Cir. 1996).

workplace, on social media, or along a picket line warranted NLRA protection unduly shielded bigotry. These standards did so in part because the NLRB wrongly focused on the place where labor disputes occur, rather than on the people who participate in them, especially marginalized people. Instead of employing nebulous multi-factor, totality-of-the-circumstance, or coercion-based tests, all of which, as shown above, may ignore the harm bigotry can inflict on marginalized people, the NLRB should simply no longer tolerate bigotry during labor disputes and strip it of all NLRA protection. Over time, criticisms of these setting-specific standards grew, and the NLRB finally abandoned them in *General Motors*.

II. NLRB ABANDONS SETTING-SPECIFIC STANDARDS FOR *WRIGHT LINE*

After decades of precedent protecting employee abuse, ranging from garden-variety profanity to deeply bigoted conduct, the NLRB received a crescendo of criticism for sheltering such conduct under the NLRA.[51] In response, the NLRB invited interested parties to assist it in "reconsidering the [setting-specific] standards for determining whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the [NLRA]."[52] After all, the NLRB's mandate under the NLRA was in part to protect employee speech in seeking union representation—not bigotry.[53]

A. NLRB Overturns Setting-Specific Standards in Employee Abuse Cases

In 2020, the NLRB in *General Motors* abandoned its setting-specific standards when determining if employee abusive conduct during Section 7 activity loses NLRA protection.[54] There, Charles Robinson, a Black employee who represented union members and served on union bargaining committees, received three separate suspensions for his abusive

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[51] *See, e.g.*, Ryan H. Vann & Melissa A. Logan, *The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Management Perspective*, 33 A.B.A. J. LAB. & EMP. L. 291, 295 (2018) (noting that employers argued NLRB's setting-specific standards barred them from taking adverse employment action against bigoted employees).

[52] Gen. Motors LLC, 368 N.L.R.B. No. 68, slip op. at 2 (Sept. 5, 2019).

[53] Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 Yale L.J. 2415, 2420 (2003) (characterizing the NLRA as preventing employers from "discriminating against workers for union activity" and creating "protections for worker speech relating to unionization").

[54] *See* Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 9 (July 21, 2020).

conduct during three different meetings with management.[55] Specifically, during the first meeting about overtime during employee cross-training, Robinson told a manager "that he did not 'give a fuck about your cross-training'" and that he "could 'shove it up [his] fuckin' ass.'"[56] Secondly, Robinson portrayed himself as a slave by saying "Yes, Master" and asking the manager, in a meeting about subcontracting employee work, if he should "be a good Black man," while also speaking loudly and pointing fingers.[57] Lastly, Robinson told the manager during a personnel meeting that he would "mess [the manager] up" and that the manager should take his comment as a threat if he wanted to.[58] At that time, Robinson was also loudly playing "profane, racially charged, and sexually offensive lyrics" for about ten to thirty minutes when the manager was present.[59]

Applying *Atlantic Steel*, the ALJ held that Robinson retained NLRA protection in the first abusive meeting,[60] but lost protection during the second[61] and third meetings.[62] Crucially, however, the NLRB overturned the four-factor *Atlantic Steel* test because historically it had "not assigned specific weight to any of the factors generally, and it [had] chosen in specific cases to give certain factors more or less weight without adequately explaining why."[63] The NLRB explained that *Atlantic Steel*'s "second factor—the subject matter of the discussion—*always* tilts the scale in favor of employees retaining protection for abusive conduct," regardless of its abusive nature.[64] Moreover,

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[55] *Id.* at 2.

[56] *Id.* (alteration in original) (noting that the first meeting occurred on April 11, 2017, and Robinson received a three-day suspension).

[57] *Id.* (noting that the second meeting occurred on April 25, 2017, and Robinson received a two-week suspension).

[58] *Id.* (noting that the third meeting occurred on October 6, 2017, and Robinson received a thirty-day suspension).

[59] *Id.*

[60] The ALJ held that Robinson retained NLRA protection during his first meeting on April 11, 2017, because his behavior during that meeting did not cause business disruption, regarded overtime coverage that directly related to protected concerted activity, did not seem objectively threatening, and was provoked by an honest belief that the employer committed an unfair labor practice and breached the collective bargaining agreement. *Id.* at 20–22.

[61] The ALJ held that Robinson lost NLRA protection during his second meeting on April 25, 2017, because his outburst was not incited by management and its racially charged nature "diverted from his union representational purpose and disagreement with management's subcontracting out of work," despite the setting and subject matter. *Id.* at 23.

[62] The ALJ held that Robinson lost NLRA protection during his third meeting on October 6, 2017, because his offensive music, "mess . . . up" comment, and profanity in the absence of an unfair labor practice by management outweighed the setting and subject matter, which weighed toward protection. *Id.* at 23–24.

[63] *Id.* at 4.

[64] *Id.* at 5–6 (holding that the totality of the circumstances test applied to employee abusive conduct on social media and in coworker workplace discussions was

the NLRB noted that *Atlantic Steel* "failed to produce reliably consistent results that provide clear guidance for when an employer will violate federal labor law by disciplining an employee who has engaged in abusive conduct in the course of otherwise-protected activity."[65]

The NLRB also overturned the totality-of-the-circumstances test[66] and *Clear Pine Mouldings* because, specifically under *Clear Pine Mouldings*, "the Board has found appallingly abusive picket-line misconduct to retain protection, including racially and sexually offensive language."[67] The NLRB stated that *Clear Pine Mouldings* conflicted with "federal, state, and local antidiscrimination laws" that compel employers to protect employees on the basis of race, sex, and other protected characteristics.[68] The NLRB contrasted its legacy of tolerating employee intolerance while enforcing the NLRA with the Equal Employment Opportunity Commission's (EEOC) enforcement of federal antidiscrimination laws.[69] The NLRB noted that the EEOC did not "forgive abusive conduct because, for instance, it arises from heated feelings about working conditions or because crude language is common in the workplace."[70] Ultimately, the NLRB found that employee "abusive conduct is separable from the connected Section 7 activity" and that it would no longer place greater importance on the context over the content of bigoted employee abusive conduct.[71]

*B. Post-*General Motors *NLRB Adopts* Wright Line *in Employee Bigotry Cases*

By abandoning its setting-specific standards, the NLRB in *General Motors* adopted its *Wright Line* burden-shifting

"unmoored from any specific factors" and created "the same, if not more, inconsistency and unpredictability as has been found in cases applying *Atlantic Steel*").

[65] *Id.*; *see, e.g.*, Cellco P'ship, 349 N.L.R.B. 640 (2007) (split NLRB over whether *Atlantic Steel* factors protected male employee who called female supervisor "that bitch").

[66] *Gen. Motors*, slip op. at 6 (rationalizing alternative justification for employer discharging employee who published profane Facebook post in *Pier Sixty*).

[67] *Id.* at 6.

[68] *See id.* at 1, 6–7; *see, e.g.*, Detroit Newspaper Agency, 342 N.L.R.B. 223, 268 (holding that striking employee who called the nonstriker "fucking n[****]r loving bitch whore" who was responsible for "the n[****]rs taking their jobs" was protected under the NLRA).

[69] *See Gen. Motors*, slip op. at 7 & n.17 (finding the setting-specific standards to be in conflict with Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990).

[70] *Id.*

[71] Gen. Motors LLC, 369 NLRB. No. 127, 2020 WL 4193017, at *1 (July 21, 2020); *see, e.g.*, Carly Thelen, Note, *Hate Speech As Protected Conduct: Reworking the Approach to Offensive Speech Under the NLRA*, 104 IOWA L. REV. 985, 1006 (2019) (arguing that employee hate speech targeting people based on their race should be unprotected under the NLRA).

causation test to see if an employer violates Section 8(a)(3) after taking adverse action against a bigoted employee who engaged in both abusive conduct and Section 7 activity.[72] In 1980, the NLRB in *Wright Line* held that the employer violated Section 8(a)(3) for terminating an employee who broke work rules by altering time sheets but was also a "leading union advocate."[73] There, the NLRB was faced with an employer who took an adverse action against an employee engaged in Section 7 activity and had to decide whether the action was union discrimination or legal termination.[74] Given the employer's dual motives behind firing the employee—one antiunion based on the employee's organizing activity, another a legitimate business reason, namely the work rule defiance—the NLRB adopted a burden-shifting causation test to determine what the employer's true motive behind the adverse action was.[75] The Supreme Court quickly accepted *Wright Line* as a valid interpretation of the NLRA by the NLRB.[76]

Applying the burden-shifting causation test under *Wright Line* in employer dual-motive cases, the NLRB's general counsel carries an initial burden of "showing 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."[77] The NLRB's general counsel must prove its initial burden before an ALJ by showing that the employee's Section 7 activity was a motivating factor behind the employer's adverse employment action with "evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity."[78] This initial burden can be satisfied by direct or circumstantial evidence showing employer antiunion animus existed based on "[i]nferences of knowledge,

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[72] *Gen. Motors*, slip op. at 7.

[73] Wright Line, 251 N.L.R.B. 1083, 1090–91 (1980).

[74] *Id.* at 1089–90.

[75] *Id.* at 1083, 1090–91. The NLRB adopted the test the Supreme Court applied in *Mt. Healthy City School District Board of Education v. Doyle*, wherein the Court vacated the lower court's ruling that the school board wrongfully refused to reinstate an untenured teacher after he used obscene language and gestures in the cafeteria and spoke about school policy on a radio station. *Wright Line*, 251 N.L.R.B. at 1086. The lower court had found the school board's refusal to renew the teacher's employment contract improper because the decision was in response to largely constitutionally protected activity by the teacher. *Id.* The Supreme Court rejected this reasoning as incomplete and remanded the case to give the school board a chance to demonstrate that its decision not to renew would have been the same in the absence of the teacher's constitutionally protected activity. *Id.*

[76] *See* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 404–05 (1983) (upholding NLRB's finding that employer violated Section 8(a)(3) by terminating employee who organized union because employer's reasoning for the termination, i.e., employee left keys in company vehicle, was pretext for its real reason—union organizing).

[77] *Gen. Motors*, slip op. at 2 (noting the standard is from *Wright Line*).

[78] *Id.*

animus and discriminatory motivation."[79] While the NLRB's "general counsel is not required" to initially "disprove the existence of other, lawful motivating factors for the [employee] discipline," its evidence must create a "reasonable inference" that "Section 7 activity was a motivating factor" for the employer's adverse action.[80]

If the NLRB's general counsel satisfies its initial burden of proof by a preponderance of the evidence, then the employer carries a burden of persuasion "that it would have taken the same action even in the absence of the Section 7 activity."[81] Crucially, the employer does not carry its burden by simply offering "a legitimate reason for an adverse action" when the facts reveal that the real reason was the employer's motivation to punish the employee for protected activity.[82] Consequently, an employer cannot rely solely on pretextual evidence, such as false or irrelevant reasons, when taking an adverse action against an employee engaged in Section 7 activity.[83] However, even when an employer's "stated reasons for its decision are found to be pretextual . . . discriminatory motive *may* be inferred, but such an inference is not compelled."[84]

If the employer's reasoning for the adverse action persuades an ALJ, then it will constitute an affirmative defense, despite an employee's related Section 7 activity.[85] Federal appellate courts may review the NLRB's finding that an employer violated Section 8(a)(3) under *Wright Line*.[86] However, judicial review of NLRB decisions, which occurs after an appeal from an ALJ's decision, is limited, and NLRB holdings can only be overturned when unsupported "by substantial evidence."[87] Still, federal appellate courts can more heavily scrutinize NLRB

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[79] Electrolux Home Prod., Inc., 368 N.L.R.B. No. 34, slip op. at 13 (Aug. 2, 2019).

[80] *Gen. Motors*, slip op. at 10.

[81] *Id.* at 10; *see also* Peter G. Albert, Comment, *Transportation Management: The Validation of* Wright Line, 2 HOFSTRA LAB. L.J. 185, 202 (1984); Wright Line, 251 N.L.R.B. 1083, 1088 n.11 (1980).

[82] Lucky Cab Co., 360 N.L.R.B. 271, 276 (2014).

[83] *Id.*

[84] *Electrolux*, slip op. at 3 (emphasis in original).

[85] *See* Michael J. Hayes, *Has* Wright Line *Gone Wrong? Why Pretext Can Be Sufficient to Prove Discrimination Under the National Labor Relations Act*, 65 MO. L. REV. 883, 893 (2000); *see also Wright Line*, 251 N.L.R.B. at 1084 n.5, 1088 n.11.

[86] Albert, *supra* note 81, at 206 ("The Supreme Court has stated that decisions by the Board should be accorded considerable deference and has designated the 'substantial evidence test' as the standard for judicial review of Board decisions."); *see also* 29 U.S.C. § 160(e).

[87] *See* Bruce Packing Co. v. NLRB, 795 F.3d 18, 22 (D.C. Cir. 2015); *see also* Fort Dearborn Co. v. NLRB, 827 F.3d 1067, 1072 (D.C. Cir. 2016) ("[Appellate] review of the [NLRB's] conclusions as to discriminatory motive is even more deferential, 'because most evidence of motive is circumstantial.'").

decisions if they conflict with an ALJ's factual findings and determinations.[88]

C. NLRB Justifies Wright Line *in Employee Bigotry Cases*

In *General Motors*, the NLRB justified its adoption of *Wright Line*—which originally applied only to dual-motive cases—in all employee abusive conduct cases because the setting-specific standards failed to require proof of employer antiunion discrimination in Section 8(a)(3) cases.[89] The NLRB noted that its setting-specific standards wrongly assumed employer discrimination "by treating union activity as inseparable from related abusive conduct."[90] The NLRB reasoned that would not occur under *Wright Line*,[91] which recognized that employee "abusive conduct is separable from the connected Section 7 activity."[92] Thus, the NLRB held that *Wright Line* was appropriate because "the causal connection between protected activity and discipline *is* properly in dispute."[93]

In conclusion, while the NLRB recognized the failings of its prior setting-specific standards in *General Motors*, it unfortunately did not sufficiently interrogate the potential shortcomings of *Wright Line*. Even though the NLRB's adoption of *Wright Line* is an improvement because it no longer analyzes employee bigotry on a sliding scale based on its setting, the test still misses the mark. Specifically, while the setting-specific standards erred by focusing on location, *Wright Line* erroneously fixates on employer motivation behind adverse employment action. Neither prioritizes what arguably matters most in employee bigoted abusive conduct cases: the harm that such bigotry inflicts on marginalized people in the workplace.

III. NLRB SHOULD ABANDON *WRIGHT LINE* IN EMPLOYEE BIGOTRY CASES

While this note agrees with the NLRB's retreat from its setting-specific standards in employee bigotry cases because they occasionally protected bigotry during Section 7 activity, it argues that *Wright Line* does not guarantee such bigotry will

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[88] *See* Nichols Aluminum, LLC v. NLRB, 797 F.3d 548, 553–54 (8th Cir. 2015) (first quoting Earle Indus., Inc. v. NLRB, 75 F.3d 400, 404 (8th Cir. 1996); then quoting GSX Corp. of Mo. v. NLRB, 918 F.2d 1351, 1355 (8th Cir. 1990)).

[89] Gen. Motors LLC, 369 NLRB. No. 127, slip op. at 9 (July 21, 2020).

[90] *Id.*

[91] *See id.* at 9–10.

[92] Gen. Motors LLC, 369 NLRB. No. 127, 2020 WL 4193017, at *1 (July 21, 2020).

[93] *Gen Motors*, slip op. at 9.

never receive NLRA protection. Indeed, the NLRB in *General Motors* tacitly acknowledged as much by noting that several amici, including the agency's general counsel office, urged the agency to adopt a standard that would find any employee's bigotry to be unprotected under the NLRA.[94]

This Section demonstrates two main issues with the *Wright Line* burden-shifting causation test in the context of bigoted employee abuse during labor disputes. First, *Wright Line* ignores the harm that employee bigotry inflicts on marginalized employees and their Section 7 rights by only focusing on whether employer antiunion motivation existed when the bigoted employee suffered an adverse employment action. Second, *Wright Line*'s high evidentiary burden on employers when they attempt to articulate an affirmative defense against a Section 8(a)(3) violation could ultimately shield bigoted employee conduct under the NLRA.

A. Wright Line *Ignores the Harm Employee Bigotry Inflicts on Marginalized People*

Wright Line fails to offer a full-stop guarantee against protecting bigoted employee conduct because the "central question" in *Wright Line* "is the employer's motivation for taking the adverse action" in Section 8(a)(3) cases.[95] In asking that question, the NLRB's general counsel merely "gropes for evidentiary inferences from which to construct the actual 'cause' of the challenged conduct."[96] Completely missing from a *Wright Line* analysis is the harm that employee bigotry does to marginalized coworkers and the exercise of their Section 7 rights.[97] Indeed, the NLRB admitted in *General Motors* that *Wright Line* may protect bigoted employees

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[94] *See id.* at 4; *see also* General Counsel's Brief at 3, Gen. Motors LLC, 369 N.L.R.B. No. 127, 368 N.L.R.B. No. 68 (2019) (Case Nos. 14-CA-197985, 14-CA-208242) ("[T]he Board should . . . develop a new standard to apply to all conduct that is racist, sexist, or could reasonably lead to violence, ensuring that it never enjoys the protection of the NLRA.").

[95] Tasty Baking Co. v. NLRB, 254 F.3d 114, 125 (D.C. Cir. 2001); *see also* Chevron Mining, Inc. v. NLRB, 684 F.3d 1318, 1328 (D.C. Cir. 2012) ("The ultimate inquiry [in *Wright Line* cases] is whether there is a 'link, or nexus, between the employees' protected activity and the adverse employment action.'" (quoting Tracker Marine, LLC, 337 N.L.R.B. 644, 646 (2002))).

[96] *See* Charles C. Jackson & Jeffrey S. Heller, *The Irrelevance of the* Wright Line *Debate: Returning to the Realism of* Erie Resistor *in Unfair Labor Practice Cases*, 77 NW. U. L. REV. 737, 771–73 (1983) (arguing *Wright Line* fails as a test because by only focusing on employer motivation in adverse action cases it does not balance employee and employer interests).

[97] *See* Albert, *supra* note 81, at 186 ("An employer may fire any employee for any cause, good or bad—or no cause at all—as long as anti-union sentiment is absent from the decision. However, where there is evidence of both proper and improper reasons for termination or other discriminatory conduct, the test used to determine the employer's motive will likewise determine the outcome of the case.").

if an employer took adverse action against them assuming similar workplace bigotry was previously tolerated.[98] Thus, where an employer previously tolerated bigoted employees but belatedly took action against them during or after a labor dispute involving Section 7 activity, the NLRB applying *Wright Line* could order the bigot's reinstatement.[99]

Crucially, under *Wright Line*, the NLRB's narrow and exclusive focus on the employer's motivation is silent on the harm that employee bigotry during Section 7 activity inflicts on marginalized employees and their ability to exercise their own Section 7 rights.[100] When the NLRB adopted *Wright Line* in *General Motors*, it myopically focused its concern on "an employer's right to maintain order and respect."[101] However, the NLRB's justification for adopting *Wright Line* in employee bigotry cases failed to acknowledge how such bigotry can also interfere with, restrain, or coerce other employees—especially marginalized employees in the exercise of their own Section 7 rights.[102] A better accounting of the scope of the harm caused by employee bigotry would consider its effect not just on employer interests, but also on other employees' interests. After all, how can marginalized employees effectively engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" when their coworkers are abusing them on the basis of their protected characteristics during Section 7 activity?[103] Below are real-world cases to illustrate this point.

For example, is it possible for Black employees to effectively exercise their Section 7 right to strike alongside white striking employees who abused them with racist slurs or rhetoric because they crossed a picket line?[104] How can female employees functionally exercise their Section 7 right to attend union meetings with male employees who belittled them by writing signs that asked who they were "[s]ucking [t]oday?"[105]

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[98] *See Gen. Motors*, slip op. at 10 n.26.

[99] *See id.*

[100] *See* Albert, *supra* note 81, at 186–88 (explaining absence of "degree of 'discriminatory intent' necessary to" establish employer violation of Section 8(a)(3) and the sole focus of *Wright Line* on employer motivation behind adverse employment action taken against an employee engaging in Section 7 "protected conduct").

[101] *See Gen. Motors*, slip op. at 10 (quoting DaimlerChrysler Corp., 344 N.L.R.B. 1324, 1329 (2005)).

[102] While acknowledging *Wright Line* may protect Section 7 rights, the Board does not refer to marginalized employees or the impact bigotry has on their Section 7 rights. *See id.*

[103] 29 U.S.C. § 157.

[104] *See* Airo Die Casting, Inc., 347 N.L.R.B. 810, 810–11 (2006).

[105] *See* Nickell Moulding, 317 N.L.R.B. 826, 826 (1995), *enforcement denied by* Nickell Moulding, Inc. v. NLRB, 101 F.3d 528 (8th Cir. 1996).

Can LGBT employees productively exercise their Section 7 right to distribute union literature when a non-LGBT employee challenges them to "come out of the closet" and "to come out of hiding?"[106] Could Jewish employees soundly exercise their Section 7 right to serve on a union organizing committee alongside anti-Semitic employees who said that "Hitler should have killed 'every fuckin' Jew?'"[107]

If future cases similar to the above scenarios were to occur, then the NLRB's general counsel would apply *Wright Line* to determine whether an employer who terminated any of those bigoted employees engaging in Section 7 activity violated Section 8(a)(3). While *Wright Line* may allow an employer in those cases to fire such bigoted employees without violating Section 8(a)(3) by providing an alternative legitimate reason, they may not have one because of their own antiunion animus or prior tolerance of such bigotry. In such cases, the NLRB would find that employer violated Section 8(a)(3) and order the bigoted employee's reinstatement with backpay[108]—ultimately to the detriment of marginalized people in the workplace.

B. Wright Line*'s Evidentiary Burden on Employers Could Shield Employee Bigotry*

While an employer could avoid violating Section 8(a)(3) under *Wright Line* by offering an affirmative defense, that evidentiary burden is high—and if it is not cleared then marginalized employees will pay the price when the NLRB reinstates the bigoted employee with backpay.[109] Under *Wright Line*, the NLRB's general counsel has satisfied its initial burden by showing employer antiunion animus based on timing,[110] other

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[106] *See* Honda of Am. Mfg., Inc., 334 N.L.R.B. 746, 747 (2001).

[107] *See* Domsey Trading Corp., 310 N.L.R.B. 777, 809 (1993).

[108] See *infra* text accompanying notes 121–133 for discussion of *Wismettac Asian Foods, Inc.*, a post-*General Motors* case wherein the NLRB ordered an employer to reinstate and provide backpay to an employee who engaged in Section 7 activity and racist behavior.

[109] Bally's Park Place, Inc., 355 N.L.R.B. 1319, 1321 (2010) (reversing ALJ and holding employer violated Section 8(a)(3) because judge failed to consider the "strength of the General Counsel's case in finding that the Respondent met its *Wright Line* rebuttal burden"); *see also* Wismettac Asian Foods, Inc., 371 N.L.R.B. No. 9, slip op. at 7 (July 16, 2021) ("Where the General Counsel makes a strong showing of discriminatory motivation, the employer's defense burden is substantial.").

[110] *See* NLRB v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984) (holding employer's decision to lay off employees and shutter warehouse two days after receiving union recognition demand letter demonstrated antiunion animus); NLRB v. Indus. Erectors, Inc., 712 F.2d 1131, 1137 (7th Cir. 1983) (holding employer's decision to fire employees was "made in response to the union's drive"); NLRB v. Gogin, 575 F.2d 596, 601–02 (7th Cir. 1978) (holding employer possessed antiunion animus because it fired an employee four days after it questioned him about his union activities, which included signing a union authorization card).

unfair labor practices (ULP),[111] coercive antiunion statements,[112] disparate treatment of employees,[113] clear breach of past practices,[114] shifting reasons for adverse employment actions,[115] disparate rules enforcement,[116] refusal to conduct a fair and full investigation of alleged employee misconduct,[117] early and open hostility against union activity,[118] or pretext.[119] When the NLRB's general counsel satisfies its initial burden of proof with a "strong showing of discriminatory motivation," as indicated by the nonexhaustive list of factors above, then "the employer's rebuttal burden is substantial."[120] This is important because, if the NLRB can show that an employer was motivated by any of the above antiunion factors when taking an adverse employment

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[111] *See* Richardson Brothers S., 312 N.L.R.B. 534, 534 (1993) (finding antiunion animus from employer's "threats of plant closure and a threatened refusal to bargain" that violated Section 8(a)(3)).

[112] *See* Dayton Newspapers, Inc. v. N.L.R.B., 402 F.3d 651, 659–60 (6th Cir. 2005) (finding NLRA violation when "substantial evidence demonstrates that the employer's statements, considered from the employees' point of view, had a reasonable tendency to coerce. . . . Thus, for example, threatening employees with loss of employment or other adverse consequences should they strike or trying to induce employees to rid themselves of the union by promising they would be better off without it are well-established violations of § 8(a)(1).").

[113] *See* Naomi Knitting Plant, 328 N.L.R.B. 1279, 1283 (1999) (holding employer engaged in a "classic case of disparate treatment" against a union-sympathizing employee by firing her for failing to sign a work form, despite not also firing two other employees who also committed the same minor work infraction).

[114] *See* Johnson Architectural Metal Co., 294 N.L.R.B. 896, 905 (1989) (holding employer's use of seniority as the sole basis for terminating employees departed from past disciplinary practices and was based on union activity).

[115] *See* Swift & Co., 250 N.L.R.B. 1223, 1225 (1980) (holding employer's shifting reasons for terminating union steward employee—improper medical excuse or failure to call into work—showed antiunion animus); *see also* State Mech. Constructors, Inc., 191 N.L.R.B. 393, 396 (1971) (holding employer's initial reason for laying off union steward based on "undue trouble on the job" was an "apparent afterthought" because five subsequent reasons were given and really based on the employee's "diligence as job steward in pursuing the employees' complaints").

[116] *See* Gary Aircraft Corp., 193 N.L.R.B. 108, 111 (1971) (holding employer's selective termination of "active union supporters" for violating discretionary discharge rules revealed antiunion animus).

[117] *See* Hewlett Packard Co. & United Steel Workers, 341 N.L.R.B. 492, 498 (2004) ("The Board has consistently held that a respondent's failure to conduct a full and fair investigation of an employee's alleged misconduct is evidence of discriminatory intent."); *see also* Firestone Textile Co., 203 N.L.R.B. 89, 95 (1973); Diamond Elec. Mfg. Corp., 346 N.L.R.B. 857, 860 (2006) (discussing past Section 8(a)(3) cases that found employer antiunion animus where employees were denied an opportunity to give a "potentially exculpatory explanation prior to being discharged" or dismissed "allegations of unlawful discharge where such an opportunity was provided").

[118] *See* Teamsters Loc. Union No. 171 v. NLRB, 863 F.2d 946, 956 (D.C. Cir. 1988) (holding employer's "early open hostility toward Union activity" was "clearly sufficient" to establish antiunion animus under *Wright Line*).

[119] *See* Wismettac Asian Foods, Inc., 370 N.L.R.B. No. 35, slip op. at 22 (Oct. 14, 2020) (noting pretext was found in a "variety of circumstances," including where an employer's reasoning for adverse action was "implausible or illogical, unfounded or untrue, exaggerated or inflated, . . . inconsistent, shifting, or post hoc" (citations omitted)).

[120] Bally's Park Place, Inc. v. NLRB, 646 F.3d 929, 936 (D.C. Cir. 2011).

action against an employee who simultaneously engages in Section 7 activity and bigoted conduct, then the employer's antiunion motivation could ultimately act as a shield for the bigot and result in their reinstatement with backpay.

For example, in *Wismettac Asian Foods*, the NLRB held that a Japanese food distributor violated Section 8(a)(3) under *Wright Line* for suspending and firing an employee who had engaged in Section 7 activity and racist behavior, and ultimately ordered the employee's reinstatement with backpay.[121] There, Alberto Rodriguez, a forklift driver, spoke with his fellow employees about unionizing, collected union cards, and often wore a union t-shirt.[122] Shortly after Rodriquez engaged in such Section 7 activities, his employer took adverse action against him by issuing him verbal warnings for tardiness and unprofessional conduct, as well as barring him from forklift duty.[123] However, Rodriguez also played music during his break on employer property that included use of the words "n[****]r" and "n[***]a," which another employee found racist.[124] The employee asked a supervisor to make Rodriguez stop playing the music, but Rodriguez initially resisted.[125] Moreover, after the supervisor left, Rodriquez "continued to play the music and would turn it up during a racist hook."[126]

Here, the NLRB applied *Wright Line* and held that the employer violated Section 8(a)(3) by suspending and subsequently terminating Rodriguez due to an antiunion motivation—despite Rodriguez's racist conduct—because the employer's delayed reaction revealed a pretextual motive.[127] Per *Wright Line*, the NLRB's general counsel met its initial burden of showing that the employer was motivated by antiunion animus because of "extensive emails between the [employer's] supervisors, managers, and the outside labor consultants, discussing Rodriguez' [sic] union activity."[128] With the NLRB general counsel's initial burden satisfied, the employer then had "the burden to demonstrate it would have reached the same decision without reliance on the discriminatorily issued prior discipline."[129] The employer cited Rodriquez's "racial

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[121] Wismettac Asian Foods, Inc., 370 N.L.R.B. No. 35, slip op. at 3 (Oct. 14, 2020).

[122] *Id.* at 14.

[123] *Id.*

[124] *Id.* at 15.

[125] *Id.*

[126] *Id.*

[127] *Id.* at 3, 27 (stating that "racial harassment is grounds for immediate termination, yet the incident where Rodriguez was playing racially offensive music occurred on January 11, management knew about it that same day, and took no action"); *see, e.g.*, Doctors' Hosp. of Staten Island, Inc., 325 N.L.R.B. 730, 738 (1998) ("A delay between alleged employee misconduct and an employer's disciplinary action is evidence of pretext.").

[128] *Wismettac Asian Foods*, slip op. at 26.

[129] *Id.* at 27.

harassment" as motivation for his suspension and termination, and thus its affirmative defense for the firing.[130] However, the NLRB rejected the employer's proffered motive because "management knew about [Rodriguez's racist conduct] that same day, and took no action."[131] Moreover, the NLRB noted that the employer "acted swiftly to terminate two other employees . . . for racial/sexual harassment."[132] Lastly, the NLRB observed that the employer suspended and fired Rodriguez only after he "served as observer to the [union] election."[133]

Thus, in *Wismettac Asian Foods*, the NLRB—applying *Wright Line* to an employee bigotry case post-*General Motors*—offered NLRA protection, including reinstatement and backpay, to an employee who engaged in Section 7 activity and bigoted conduct because of the employer's antiunion motivation in Rodriguez's termination.[134] Unfortunately, this *Wright Line* analysis utterly ignores the harm that Rodriguez's bigotry inflicted on the offended coworker who complained about it.[135] Also lost is the damage Rodriguez's bigotry imposed on any Black employees,[136] who will now have to endure his workplace presence with the knowledge that the NLRB offered him reinstatement with backpay. Moreover, absent from the NLRB's *Wright Line* analysis in *Wismettac Asian Foods* is the harm done to marginalized employees' ability to exercise their Section 7 rights in the employer's workplace.[137]

As the NLRB's *Wright Line* analysis in *Wismettac Asian Foods* shows, a marginalized employee may be forced to endure another employee's bigotry if the employer cannot demonstrate that they "would have issued the same discipline even in the absence of the related Section 7 activity."[138] This is a problem because employers that have previously tolerated or failed to timely correct bigoted employee behavior may not be able to persuade an ALJ or the NLRB's general counsel that it took adverse employment action against a bigoted employee on the basis of that bigotry—and not tangential Section 7 activity. Indeed, *Wismettac Asian Foods* crystalizes the NLRB's acknowledgement in *General Motors* that if an employer cannot prove it would have taken adverse employment action against a racist employee absent

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130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 *See supra* text and accompanying notes 121–133.
135 *See Wismettac Asian Foods*, slip op. at 15.
136 *See id.* at 15, 26–27.
137 *See id.*
138 Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 10 (July 21, 2020).

Section 7 activity, "perhaps because of a history of tolerating such conduct," then it would "still find the violation under *Wright Line*."[139] Ultimately, the reinstatement of an employee by order of the NLRB, like Rodriguez in *Wismettac Asian Foods*, is detrimental to marginalized employees who must endure a bigoted coworker's presence because of the failures of their employer.

In *General Motors*, while the NLRB acknowledged that its role is "not to affirmatively sanction an employer for failing to take steps to . . . fight discrimination on the basis of protected classes," that still ignores the harm bigoted employees cause their marginalized coworkers.[140] By allowing for the possibility of reinstatement and backpay of bigoted employees based on an employer's antiunion animus or prior tolerance of workplace bigotry under *Wright Line*, the NLRB again ignores its other role as protector of all employees.[141] To adequately protect the Section 7 rights of marginalized employees, the NLRB must consider the harm employee bigotry can inflict.[142] While employers can interfere with, restrain, or coerce marginalized employees by disciplining or terminating them for Section 7 activity, so can other employees by belittling them on the basis of a protected status in the workplace, through social media, or on picket lines.[143] Unfortunately, *Wright Line* may place a marginalized employee in a double bind by forcing a bigoted employer to reinstate and offer backpay to a bigoted employee during a labor dispute. Ultimately, marginalized employees should not be trapped with bigoted coworkers merely because of their employer's antiunion animus or bigoted coworker's Section 7 activity.

IV. NLRB SHOULD ABANDON *WRIGHT LINE* FOR A PER SE STANDARD IN EMPLOYEE BIGOTRY CASES

Given these critiques of the *Wright Line* burden-shifting causation test in employee bigotry cases, the NLRB should abandon it for a per se standard, which would strip all NLRA protection from bigoted employee conduct during Section 7 activity. Crucially, in contrast to *Wright Line*, a per se standard requires "no

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[139] *Id.* at 10 n.26.

[140] *Id.*

[141] General Counsel's Brief, *supra* note 94, at 3 ("The Board must no longer allow the [NLRA] to become a shield for racists and bigots.").

[142] Gibbons, *supra* note 22, at 1530 ("Racist, sexist, and potentially violent speech is harmful to an employee's right to a safe and discrimination-free workplace.").

[143] *Id.* at 1530–31 ("[I]ncivility in the workplace 'is often an antecedent to workplace harassment, as it creates a climate of "general derision and disrespect" in which harassing behaviors are tolerated.' Racially or sexually offensive comments serve only to harm those to whom they are directed.").

proof of causation" because it would find employee bigotry to be an NLRA violation "because the conduct itself is unlawful."[144] Specifically, under the per se standard that this note proposes, employee bigotry would lose NLRA protection "regardless of the true motivation" of the employer's adverse employment action against the bigoted employee.[145] Therefore, if the NLRB adopted a per se standard, then marginalized employees would not have to worry about a bigoted coworker's reinstatement. Ultimately, the NLRB should adopt a per se standard because it properly centers marginalized employee harm—not the underlying cause of an employer's motivation, per *Wright Line*—that occurs from bigoted employee conduct during labor disputes.

A. Per Se Standard Addresses Wright Line*'s Flaws in Employee Bigotry Cases*

Unlike *Wright Line*, which (1) ignores the harm that bigotry inflicts on marginalized employees and (2) creates an evidentiary hurdle which can shield employee bigotry as argued above, a per se standard lacks these flaws. Recall that the high evidentiary hurdle that *Wright Line* places on employers to successfully mount an affirmative defense resulted in the NLRB reinstating a bigoted employee in *Wismettac Asian Foods*.[146] In contrast, had the NLRB in *Wismettac Asian Foods* applied a per se standard, then that analysis would have automatically held Rodriguez's racism as unprotected by the NLRA and allowed the employer to fire him without fear of violating Section 8(a)(3). Specifically, under a per se standard, the "extensive emails" between the employer's "supervisors, managers, and the outside labor consultants, discussing Rodriguez' [sic] union activity" would not have offered Rodriguez NLRA protection precisely because he engaged in racist behavior.[147]

The underlying rationale of this per se standard analysis is that there is no legitimate reason for employees, such as Rodriguez in *Wismettac Asian Foods*, to engage in bigoted behavior while exercising their Section 7 rights—no matter how contentious a labor dispute may become.[148] While the NLRB has acknowledged that Section 7 activity, such as a polarizing strike, often pits

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144 Richard Renner, *Per Se Violations Do Not Require Any Showing of Causation*, KALIJARVI, CHUZI, NEWMAN & FITCH, P.C. (July 12, 2017), https://kcnfdc.com/blog/per-se-violations-do-not-require-any-showing-of-causation/ [https://perma.cc/BB4R-ANF8].

145 *Id.*

146 *See supra* text accompanying notes 121–133.

147 *See supra* note 128 and accompanying text.

148 Renner, *supra* note 144.

employees against each other,[149] there is no just reason for offering explicitly bigoted behavior the NLRA protection that nonbigoted Section 7 activity enjoys. Simply put, Rodriguez in *Wismettac Asian Foods* could have—and should have—exercised his Section 7 rights while union organizing without being racist. Had he not been racist, under a per se standard, if the employer still fired him, then the NLRB could have still found the employer violated Section 8(a)(3).[150] However, unlike *Wright Line*, a per se standard would not have allowed evidence of the employer's failure to fire Rodriguez on the same day of his racist behavior to result in his reinstatement with backpay because NLRA protection ends where employee bigotry begins.[151]

Moreover, unlike *Wright Line*, a per se standard does not ignore the harm that employee bigotry inflicts on marginalized coworkers. In fact, a per se standard would categorically and unequivocally strip NLRA protection from such bigotry, even if it occurred during Section 7 activity. Again, by forcing the NLRB to only look at an employer's motivation, *Wright Line* fails to see the harm done to marginalized employees by potentially forcing them to endure coworkers whose bigotry is protected because of their Section 7 activity.[152] However, a per se standard properly centers the damage that employee bigotry imposes on marginalized coworkers—as opposed to employer motivation—by always deeming such bigotry unworthy of NLRA protection.

B. NLRB Precedent Supports Adoption of Per Se Standard Under Section 8(a)(3)

In addition to addressing the flaws of *Wright Line* in employee bigotry cases, NLRA precedent supports the adoption of a per se standard because the NLRB has previously found certain conduct to constitute a per se violation of Section 8(a)(3).[153] For

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[149] *See, e.g.*, Chi. Typographical Union No. 16 (Alden Press, Inc.), 151 N.L.R.B. 1666, 1669 (1965) ("One of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees.").

[150] For example, had Rodriguez not engaged in racist behavior but was still fired, then the NLRB may have found his employer violated Section 8(a)(3) under *Wright Line* if the NLRB general counsel had shown that the employer's decision to fire him was motivated by his union organizing, which the employer's emails seemed to indicate. *See Wismettac Asian Foods*, slip op. at 26–27.

[151] *See* Wismettac Asian Foods, Inc., 370 N.L.R.B. No. 35 (Oct. 14, 2020).

[152] *Id.*

[153] *See* Local 357, Int'l Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 669 (1961) (noting that NLRB held union hiring-hall contract provision was a per se violation of Section 8(a)(3)); *see also* Melville Confections, Inc., 142 NLRB 1334, 1338 (1963) (stating that "unilateral changes in employment status made by an employer based on the exercise of the right to act collectively, are repugnant to the basic purposes of the Act, are *per se* at variance with the interdiction in Section 8(a)(3) against discrimination").

example, in *Local 357*, the NLRB held that a union hiring hall, which is an organization that funnels new employees to unionized employers, was a per se violation because by its very nature it was "violative of section 8(a)(3) through its discriminatory effect on casual employees who failed to seek employment through the hall."[154] Moreover, the Supreme Court has read the NLRA as allowing certain conduct to constitute a per se violation of Section 8(a)(3).[155] Given that, an NLRB rule finding that employee bigotry constitutes a per se violation of the NLRA would arguably be a permissible interpretation of the NLRA and plausibly in keeping with its legislative history.[156] Thus, in light of this prior NLRB and Supreme Court precedent, the Board could plausibly adopt a per se standard holding that any employee conduct targeting a person because of their protected status permits an employer to then take an adverse action without violating Section 8(a)(3).

A per se standard, unlike *Wright Line*, is more akin to an alternative test that the NLRB has used which looks not to the cause of an employer's motivation, but rather toward balancing the interests of employees and employers.[157] In *Erie Resistor*, the Supreme Court upheld the NLRB's use of a balancing test that determined that an employer's grant of superseniority status, which provided greater seniority-related benefits, to striker replacements violated Section 8(a)(3)—regardless of the employer's underlying motivation.[158] At issue were the employer's interest in maintaining plant operations during a strike and the employees' interest in protecting their jobs by striking.[159] There, the "destructive nature" of the employer's action and the effect it had on the balance of rights between employees and employers were what determined whether it violated Section 8(a)(3).[160]

While *Erie Resistor* focused on the "inherently discriminatory or destructive nature of the [employer's] conduct itself," a per se standard would view bigoted employee conduct

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[154] Dennis M. Kelly, Note, *Employer Motivation under Section 8(a)(3) of the National Labor Relations Act*, 43 NOTRE DAME L. REV. 202, 205 (1968); *see also* Local 357, Int'l Brotherhood of Teamsters, 365 U.S. at 669.

[155] Radio Officers' Union of Com. Tels. Union, 347 U.S. 17, 44–45 (1954) ("Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement.").

[156] *Id.* at 44 ("This fact was recognized in the House Report on the Wagner Act when it was stated that under [Section] 8[a](3) 'agreements more favorable to the majority than to the minority are impossible.").

[157] *See, e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221, 228–29 (1963) (discussing the difficulty in labor disputes in distinguishing between discriminatory motives and legitimate business reasons for employer adverse action).

[158] *Id.* at 235–37.

[159] *Id.* at 229.

[160] *Id.* at 228.

similarly.[161] For example, if an employer's refusal to grant strikers their vacation benefits was "inherently destructive" to employee interests, then a striker's racial slurs targeting coworkers could arguably be viewed as similarly destructive in kind.[162] Thus, a per se standard, unlike *Wright Line*, sees employee bigotry as inherently destructive toward marginalized coworkers and the exercise of their Section 7 rights—regardless of any employer motivation for taking an adverse employment action against the bigot.

A per se standard would also square with the NLRB's hostility toward bigoted conduct during other NLRA-related activity. For example, in 1962, the NLRB overturned a union election result that featured a "deliberate, sustained appeal to racial prejudice."[163] In *Sewell Manufacturing Company*, the NLRB set aside the union's defeat in an election campaign because the employer's racist fearmongering "created conditions which made impossible a reasoned choice of a bargaining representative"[164] under Section 9.[165] The NLRB noted that "prejudice based on color is a powerful emotional force" and that it was "indisputable that a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty."[166]

While the bigotry in *Sewell* came from the employer, employee bigotry during union organizing campaigns can arguably do as much or more harm to marginalized employees, who risk becoming ensnared within a bigoted union.[167] Indeed, it is hard to imagine how marginalized employees in such a situation could effectively exercise their Section 7 rights if their union seeks

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[161] *Erie Resistor*, 373 U.S. at 228.

[162] *Compare* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33–35 (1967) (holding employer's refusal to grant strikers vacation benefits violated Section 8(a)(3) because of its inherently destructive nature to employee Section 7 rights), *with* Detroit Newspaper Agency, 342 N.L.R.B. 223, 234, 268 (2004) (holding employer violated Section 8(a)(3) for terminating striker who screamed "fuck you n[****]rs" to a Black nonstriker without analyzing effect racism had on nonstriker's Section 7 rights).

[163] Sewell Mfg. Co., 138 N.L.R.B. 66, 70 (1962).

[164] *Id.*

[165] National Labor Relations Act, § 9, 29 U.S.C § 159 (establishes NLRB procedures empowering employees to choose a union as their democratically elected bargaining representative with management).

[166] *Sewell Mfg.*, 138 N.L.R.B. at 71.

[167] *See* Kevin Stawicki, *Racism Still Haunts Unions. Will NLRB's Top Prosecutor Act?* (Feb. 25, 2022), https://www.law360.com/employment-authority/labor/articles/1465985/racism-still-haunts-unions-will-nlrb-s-top-prosecutor-act- [https://perma.cc/43D7-ZQYD] ("While the NLRB could issue remedies to combat racial discrimination by declining to certify a union for an election or decertifying a union engaged in racially discriminatory practices, it hasn't shown interest in doing so, said William B. Gould IV, the NLRB's first Black chairman who served under President Bill Clinton. 'There needs to be some policing of unions engaged in racism," Gould said. "This may be uncomfortable for the trade union movement, but [NLRB General Counsel] Abruzzo's commitment to racial justice should induce her to make the trade unions uncomfortable where the movement itself has not pursued objectives of racial equality.'").

reinstatement and backpay for a bigoted coworker who was terminated.[168] There, marginalized employees would effectively be trapped within a bigoted union and alongside bigoted coworkers.

The NLRB's aversion to protecting bigotry in union organizing campaigns could, and should, also be applied to bigoted employees, regardless of their tangential Section 7 activity. Just as the NLRB recognized in *Sewell* that employer bigotry can interfere with employees' Section 9 rights to choose their collective bargaining representative, so too should it acknowledge that employee bigotry can harm marginalized employees' Section 7 rights to, for example, attend union meetings. Indeed, the NLRA's legislative history stems from a vision of the "collective bargaining process as a cooperative venture guided by intelligence."[169] Correspondingly, because the NLRB acknowledged in *Sewell* that racial prejudice could distort an employee's reasoned choice under Section 9,[170] it should also find that such bigotry can diminish an employee's effective use of Section 7. Moreover, the NLRB in *General Motors* already—correctly—acknowledged that employee bigotry should not be judged based on the setting in which it occurs.[171] Thus, a logical next step would be for the NLRB to recognize that bigotry can harm Section 7 rights as much as Section 9 rights and deny it any NLRA protection.

C. NLRB Per Se Standard in Employee Bigotry Cases Harmonizes with Employment Law

An NLRB rule finding that employee bigotry during Section 7 activity constitutes a per se violation of the NLRA also arguably harmonizes with a growing trend in employment law, which has found that a single severely bigoted act violates federal antidiscrimination law.[172] For example, in *Boyer-Liberto*, the Fourth Circuit held that an isolated incident where a supervisor called a Black employee a "porch monkey" could violate Title VII of the Civil Rights Act of 1964.[173] The court found that, despite the isolated incident, it could "properly be deemed to be 'extremely serious'" and thus illegal under Title VII.[174] Indeed, the Fourth

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[168] *See id.*

[169] Leon H. Keyserling, *Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 221 (1960).

[170] *Sewell Mfg.*, 138 N.L.R.B. at 71.

[171] *See* Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 1 (July 21, 2020) ("These setting-specific standards aimed at deciding whether an employee has or has not lost the [NLRA's] protection, however, have failed to yield predictable, equitable results.").

[172] *See* Gibbons, *supra* note 22, at 1536.

[173] Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 280–81 (4th Cir. 2015).

[174] *Id.* at 281.

Circuit is not alone among federal appellate courts that have recently found that a single bigoted incident violates Title VII.[175] The court in *Boyer-Liberto* and its analogues rightly acknowledge the profound harm isolated incidents of workplace bigotry can inflict on marginalized employees.[176]

A per se standard finding employee bigotry loses NLRA protection—and that an employer can fire that bigot without violating Section 8(a)(3)—would join this trend in employment law, which properly centers the harm marginalized employees suffer from bigotry. While *Boyer-Liberto* involved a supervisor targeting a marginalized employee with racist language, such harm would arguably still be severe if the language was used by a coworker or union officer. Indeed, an NLRB order reinstating a bigoted employee conceivably would make marginalized employees "prisoners of the [u]nion."[177] As shown above, that can occur under *Wright Line*.[178] However, under a per se standard, any bigoted employees would instantly lose NLRA protection. Therefore, any marginalized employee targeted by bigots will never see them reinstated nor suffer "[t]he inertia of weak-kneed, docile union leadership [that] can be as devastating to the cause of racial equality as aggressive subversion."[179]

D. Per Se Standard Could Receive Bipartisan NLRB Support

In addition to the arguments in favor of a per se standard in employee bigotry cases on the merits, the approach would arguably also be more likely to receive bipartisan support at the NLRB and ultimately stand the test of time. This is because a per se standard offers something for both employers and employees. Specifically, employers gain greater disciplinary discretion by being able to terminate a bigoted employee without fear of violating Section 8(a)(3) and having the NLRB order them

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[175] *See, e.g.*, Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[I]n my view, being called the n-word by a supervisor—as Ayissi–Etoh alleges happened to him—suffices by itself to establish a racially hostile work environment. . . . Other courts have explained that 'perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of . . . "n[——]r" by a supervisor in the presence of his subordinates.'").

[176] *See* CHAI R. FELBLUM & VICTORIA A. LIPNIC, EQUAL EMP. OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF THE CO-CHAIRS (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace [https://perma.cc/MU53-CALM].

[177] Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 73 (1975) (Douglas, J., dissenting) (arguing Black employees should be able to picket their employer for alleged racist practices without waiting for their union to file charges with the NLRB).

[178] *See* Wismettac Asian Foods, Inc., 370 N.L.R.B. No. 35 (Oct. 14, 2020); *see also* text accompanying notes 121–133.

[179] *Emporium Capwell*, 420 U.S. at 76.

to reinstate and give backpay based on their antiunion motivation. Also, marginalized employees receive greater protection because they do not have to fear being trapped in their workplace alongside a bigoted coworker since their employer's motivation in firing the bigot will never result in reinstatement under a per se standard.

In other words, Republican NLRB-appointees, who tend to come from management-side law firms, and Democratic NLRB-appointees, who often hail from union-side law firms, can both score ideological points.[180] The per se standard's potential bipartisan appeal is important if it is to survive a change in administration because, since the late 1970s, presidential NLRB-appointees have become more ideological.[181] Former Republican President Donald Trump's NLRB was accused of being categorically promanagement by rubberstamping the business community's desire for so-called labor law reform.[182] Those partisan and ideological accusations were in part why subsequent Democratic President Joe Biden made the unprecedented move of firing Peter Robb, Trump's NLRB general counsel, on inauguration day.[183]

President Biden's NLRB general counsel replacement, Jennifer Abruzzo, was previously special counsel for strategic initiatives at the Communications Workers of America, as well as acting general counsel and deputy general counsel at the NLRB.[184] Given Abruzzo's background, she received organized labor's support and was widely anticipated to reverse Trump-era precedent at the NLRB.[185] Indeed, on August 12, 2021, Abruzzo issued her first memo as NLRB general counsel laying out her

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[180] Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935-2000*, 61 OHIO ST. L.J. 1361, 1383–84, 1394 (2000).

[181] *Id.* at 1398.

[182] *See* Lynn Rhinehart, *It's Official: The Chamber of Commerce's Agenda Rules at the Trump NLRB*, ON LAB. (Oct. 25, 2019), https://www.onlabor.org/its-official-the-chamber-of-commerces-agenda-rules-at-the-trump-nlrb/ [https://perma.cc/EEN7-683Z]; *see also* U.S. CHAMBER OF COM., RESTORING COMMON SENSE TO LABOR LAW: TEN POLICIES TO FIX AT THE NATIONAL LABOR RELATIONS BOARD (2017). https://www.uschamber.com/report/restoring-common-sense-labor-law-ten-policies-fix-the-national-labor-relations-board [https://perma.cc/A85V-F4EH].

[183] *See* Ian Kullgren, *Abruzzo Confirmed as NLRB Top Lawyer by Harris Tiebreak (1)*, DAILY LAB. REP. (July 21, 2021), https://news.bloomberglaw.com/daily-labor-report/abruzzo-confirmed-as-labor-board-top-lawyer-by-harris-tiebreak [https://perma.cc/S9KY-N75Q].

[184] *The NLRB Welcomes Jennifer Abruzzo as General Counsel*, NLRB (July 22, 2021), https://www.nlrb.gov/news-outreach/news-story/the-nlrb-welcomes-jennifer-abruzzo-as-general-counsel [https://perma.cc/T4W2-P8MF].

[185] *See, e.g.*, Press Release, NLRB General Counsel Nominee Is Lifelong Protector of Working People (Feb. 21, 2021), https://aflcio.org/press/releases/nlrb-general-counsel-nominee-lifelong-protector-working-people [https://perma.cc/B2AD-X6GR] ("There is no better person than Jennifer Abruzzo to help return the NLRB to its core mission of upholding and protecting workers' rights to form unions and bargain collectively.").

agenda, which specifically listed *General Motors* among the Trump-era precedent that her office may consider revisiting in future cases.[186] Moreover, on July 28, 2021, the Senate confirmed two of President Biden's picks for the NLRB, which gave Democrats a majority and the ability to reverse Trump-era precedent, including *General Motors*.[187] Thus, given the politically partisan and ideologically promanagement rationale underlying *General Motors*, the new NLRB and NLRB general counsel may overturn *Wright Line* in bigoted employee cases.

Returning to the per se standard, to improve its chances of receiving bipartisan support from current and future NLRB members, the agency should implement it in a procedurally fair and forward-looking manner. Specifically, unlike the Trump NLRB—which adopted *Wright Line* in employee bigotry cases without any Democratic appointees presiding at the time[188]—the agency should implement the per se standard in a bipartisan fashion. While the Trump NLRB did generally invite interested parties to comment on the possibility of it abandoning the now-defunct setting-specific standards prior to *General Motors*, it did not specifically offer parties a chance to comment on whether *Wright Line* was appropriate in employee bigotry cases involving Section 7 activity.[189] Thus, a more specific invitation for interested parties to comment on the appropriateness of a per se standard would allow advocacy groups that have experience representing the interests of marginalized people to comment on how their constituents' Section 7 rights may be affected.[190]

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[186] *See General Counsel Jennifer Abruzzo Releases Memorandum Presenting Issue Priorities*, NLRB (Aug. 12, 2021), https://www.nlrb.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue [https://perma.cc/WK3U-8DJF].

[187] Daniel Wiessner & David Shepardson, *U.S. Senate Approves Union Lawyers to NLRB, Giving Democrats Control*, REUTERS (July 28, 2021), https://www.reuters.com/legal/legalindustry/senate-approves-union-lawyer-wilcox-nlrb-seat-2021-07-28/ [https://perma.cc/6MQR-BZSA].

[188] Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 1 (July 21, 2020). Then NLRB Chair John Ring and NLRB Members Marvin Kaplan and William Emanuel were all former President Trump appointees, and current NLRB Chair Lauren McFerran, who was appointed by former President Obama, was not serving when *General Motors* was decided. *See Board Members Since 1935*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/board/board-members-1935 [https://perma.cc/J3PA-VKQ7]; *see also* Braden Campbell, *NLRB Makes It Easier to Fire Workers over Profane Outbursts* (July 21, 2020), https://www.law360.com/articles/1294083/nlrb-makes-it-easier-to-fire-workers-over-profane-outbursts [https://perma.cc/X9PQ-A2H6].

[189] In 2019, the Trump NLRB did not mention *Wright Line* as a potential replacement for its (now-defunct) setting-specific standards under *Atlantic Steel*, totality of the circumstances, and *Clear Pine Mouldings*. Rather, the NLRB invited parties to critique those standards, without offering its desired policy change in employee abuse cases. *See General Motors* LLC, 368 N.L.R.B. No. 68, slip op. at 1–2 (Sept. 5, 2019).

[190] For example, the NAACP Legal Defense and Educational Fund could comment on how a per se standard in employee bigotry cases may help Black employees

Moreover, unlike the Trump NLRB's decision to retroactively impose *Wright Line* "to all pending cases,"[191] the agency should apply a per se standard prospectively in the interest of procedural fairness. Also, the NLRB could implement the per se standard via rulemaking with notice and comment, rather than through ad hoc adjudication, because it is "within the NLRB's discretion," and would be forward-looking and fair.[192]

E. NLRB Per Se Standard in Employee Bigotry Cases Aligns with Contemporary Social Norms and Movements

By properly centering the harm that employee bigotry inflicts on marginalized people in the workplace, a per se standard that always permits employers to terminate bigots without violating Section 8(a)(3) effectively responds to contemporary social norms and movements, such as Black Lives Matter[193] and #MeToo.[194] The NLRB can honor and advance these causes by holding that any bigoted employee conduct loses NLRA protection, regardless of any antiunion employer motivation underlying an adverse employment action.[195]

Indeed, these social movements and arguments in favor of a per se standard coincide with America's increasingly diverse working class.[196] A per se standard would signal to marginalized employees that their bigoted coworkers cannot use the NLRA as a shield for their bigotry because of an employer's workplace norms.[197] Contrary to what some union advocates have argued, a

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better exercise their Section 7 rights or Lambda Legal could speak to how a per se standard would benefit LGBT employees in the use of their Section 7 rights.

[191] Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 10 (July 21, 2020). The Trump NLRB's decision to retroactively impose *Wright Line* makes it even more vulnerable to being overturned because unions and employees could argue that they previously relied in good faith on the (now-defunct) setting-specific standards and will ultimately be retroactively punished for it, amounting to a "manifest injustice" because the new rule was not announced in advance of *General Motors*. *See id.* at 10–11 (quoting *SNE Enter., Inc.*, 344 N.L.R.B. No. 81, 1 (May 17, 2005)).

[192] NLRB v. Bell Aerospace Co., 416 U.S. 267, 268 (1974).

[193] *Black Lives Matter: About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ [https://perma.cc/36JM-TTJD].

[194] *#MeToo: A Timeline of Events*, CHI. TRIBUNE (Feb. 4, 2021, 1:52 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [https://perma.cc/CT2H-2M6D].

[195] Allen J. McKenna, Comment, *Mixed Motive Discharges Under the NLRA*, 10 OHIO N.U. L. REV. 299, 312 (1983); *see also* 29 U.S.C. § 160(c).

[196] *See* Juliana Menasce Horowitz, *Americans See Advantages and Challenges in Country's Growing Racial and Ethnic Diversity*, PEW RSCH. CTR. (May 8, 2019), https://www.pewsocialtrends.org/2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/ [https://perma.cc/K8BM-V5TJ].

[197] Brief of *Amici Curiae* Coalition for a Democratic Workforce et al. at 15–16, General Motors LLC, 368 N.L.R.B. No. 68 (2017), 369 N.L.R.B. No. 127 (2020) (Case Nos. 14-CA-197985, 14-CA-208242).

per se standard would not create a "code of etiquette" that imposes "Victorian-era manners" on employees in labor disputes with their employers.[198] Rather, a per se standard would seek to eradicate bigoted conduct because of the heightened harm it inflicts relative to other, less egregious workplace misconduct, such as garden-variety profanity or vulgarity.

Moreover, it is misguided to argue that because some marginalized employees may use "what ordinarily is a racial slur in a non-derogatory manner," they should then still receive NLRA protection when engaging in Section 7 activity during labor disputes with their employer.[199] That defense of bigotry ignores the harm such slurs may inflict on employees who belong to different marginalized groups or marginalized employees in the same group harmed by the slur.[200] While members of a marginalized group may use a racial slur in certain settings in a nonderogatory manner, that does not mean the NLRB should be indifferent to it in a workplace setting—let alone reward it with NLRA protection during a labor dispute!**[201]**

Rather than returning to the Victorian era, a per se standard would modernize the NLRB's application of the NLRA by heeding the righteous call of today's social justice movements to end legalized protection of bigotry in all its forms.[202] A per se standard would do so by "recognizing the diversity of today's workforce . . . and counsel employees and [union] members against the use of any terms that denigrate and slur."[203] By categorically denying protection to bigoted employees, the NLRB via a per se standard would be properly exercising what the Supreme Court noted was its "responsibility to adapt the [NLRA] to changing patterns of industrial life."[204] Indeed, the reality of America's workforce today increasingly includes a zero-tolerance policy toward employee bigotry.[205] A per se standard meets that reality by protecting marginalized employees from coworker bigotry by

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[198] Brief of LIUNA Mid-Atl. Reg'l Org. Coal. at 4, *Gen. Motors*, 368 N.L.R.B. No. 68, 369 N.L.R.B. No. 127 (Case Nos., 14-CA-197985, 14-CA-208242).

[199] *Id.* at 14.

[200] *See* Jeremy Helligar, *Kendrick Lamar's Onstage Outrage: Why Rap Should Retire the N-Word for Good*, VARIETY (May 22, 2018), https://variety.com/2018/music/opinion/kendrick-lamar-rappers-should-stop-using-n-word-1202818977/ [https://perma.cc/Q6VZ-BYXH].

[201] *See* Gary Suarez, *When Latinx People Use the N-Word*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/opinion/gina-rodriguez-n-word-latinx.html [https://perma.cc/AHU3-BADD].

[202] *See supra* note 194 and accompanying text.

[203] NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635 (6th Cir. 2001).

[204] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

[205] *See* Brief of *Amici Curiae* Coalition for a Democratic Workforce et al., *supra* note 197, at 13.

ensuring that such behavior never receives NLRA support from "an arm of the federal government."[206]

F. NLRB Per Se Standard in Employee Bigotry Cases Does Not Erase the Underlying Contentiousness of Labor Disputes

Critics may also argue that a per se standard fails to acknowledge the contentious nature of labor disputes, especially on picket lines and during strikes, which perhaps should compel the NLRB to tolerate some employee bigotry.[207] The problem with this argument is that labor disputes are contentious *economic* contests that often resort to a "particular *economic* weapon used in support of genuine negotiations," such as a picket or strike.[208] Economic weapons are not designed to be intentionally aimed at employees based on their protected status, and the NLRB should not protect those who wield them with that intent.[209] While the Supreme Court has noted that collective bargaining can be a "brute contest of economic power somewhat masked by polite manners," it is not and should not be a protected forum for bigotry—no matter how hot the heat of the moment may become.[210]

There is simply no economic justification, let alone moral defense, for legal protection of bigoted employee conduct toward, for example, nonstriking coworkers of a different race or sex. Indeed, such bigotry would likely weaken the economic position of strikers by eroding support for them among marginalized employees.[211] Also, granting NLRA protection to employee bigotry during Section 7 activity could further discourage marginalized employees from exercising their own Section 7 rights in future labor disputes.[212]

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[206] *See* Consol. Commc'ns, Inc. v. NLRB, 837 F.3d 1, 24 (D.C. Cir. 2016) (Millett, J., concurring).

[207] *See* Amicus Brief by SEIU Local 32BJ at 8, 12, *Gen. Motors*, 368 N.L.R.B. No. 68, 369 N.L.R.B. No. 127 (Case Nos. 14-CA-197985, 14-CA-208242) ("Picket lines are not academic forums where philosophies of labor relations are debated. An essential part of the pickets' appeal to others to respect the picket line is the depth of the pickets' emotion, specifically their fear and sense of betrayal for those who take their jobs and threaten their ability to feed their families.").

[208] *See* NLRB v. Katz, 369 U.S. 736, 747 (1962) (emphasis added).

[209] *See* NLRB v. Ins. Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 489–90 (1960).

[210] *Id.* at 489.

[211] *See supra* notes 104–107 and accompanying text providing examples of past employee bigotry and positing how marginalized coworkers can then close ranks behind them during Section 7 activity, such as picketing employers.

[212] *See Consol. Commc'ns*, 837 F.3d at 24 ("The assumption that such gender- and race-based attacks can be contained to the picket line blinks reality. It will often be quite hard for a woman or minority who has been on the receiving end of a spew of gender or racial epithets—who has seen the darkest thoughts of a co-worker revealed in a deliberately humiliating tirade—to feel truly equal or safe working alongside that

While "some types of impulsive behavior must have been within the contemplation of Congress when it provided for the right to strike," neither the statutory text nor the legislative history of the NLRA requires the NLRB to protect employee bigotry during Section 7 activity.[213] Though it is true that the "reality of the modern workplace is that employees do not typically curse each other and their superiors like characters in a Scorsese film,"[214] the same cannot be said for labor disputes involving pickets or strikes.[215] A per se standard acknowledges that difference by tolerating profanity on picket lines and in strikes, but not bigotry. Moreover, employee bigotry is arguably far more destructive toward the NLRA's ultimate goal of resolving "industrial strife or unrest," particularly in diverse workplaces, compared to mere profanity or vulgarity.[216]

There is arguably no labor dispute that can be resolved or de-escalated by employee bigotry, especially when that bigotry could erode the worker solidarity necessary to reach an agreement with management. A per se standard would still permit "a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."[217] However, under a per se standard, that union license ends where bigotry begins. It is also insulting to argue that employees are incapable of effectively exercising their Section 7 rights without securing NLRA protection for their bigotry during tense labor disputes with employers.[218] Employees are capable of passionately, vigorously, and effectively

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employee again. Racism and sexism in the workplace is a poison, the effects of which can continue long after the specific action ends.").

[213] Allied Indus. Workers, AFL-CIO Local Union No. 289 v. NLRB, 476 F.2d 868, 879 (D.C. Cir. 1973); *see also* Theodore J. St. Antoine*, How the Wagner Act Came to Be: A Prospectus,* 96 MICH. L. REV. 2201, 2202 (1998) ("[T]he avoidance of labor unrest *was* a major theme of the principal proponents of the Wagner Act, along with the nobler aims of 'social justice' and economic prosperity."); Gerard D. Reilly, *Legislative History of the Taft-Hartley Act*, 29 GEO. WASH. L. REV. 285, 289 (1960) (Taft-Hartley Act was passed amid the "chaotic state of industrial relations in the immediate postwar period" and after congressional hearings into labor violence, intimidation, and racketeering—not to protect employee bigotry with respect to unions.).

[214] Plaza Auto Ctr., Inc., 360 N.L.R.B. 972, 986 (2014).

[215] *See, e.g.*, Allied Indus. Workers No. 289 v. NLRB, 476 F.2d 868, 879 (D.C. Cir. 1973) ("Impulsive behavior on the picket line is to be expected especially when directed against nonstriking employees or strike breakers.").

[216] 29 U.S.C. § 151.

[217] Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283 (1974).

[218] *See* Cooper Tire & Rubber Co. v. NLRB, 866 F.3d 885, 897 (8th Cir. 2017) (Beam, J., dissenting); *see also* Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*,* 253 F.3d 19, 26 (D.C. Cir. 2001) ("We do not share the Union's low opinion of the working people it purports to represent. America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who now condescend to them.").

vindicating their Section 7 rights without engaging in "sexually and racially degrading conduct in service of that admirable goal."[219]

To that end, a per se standard is not aimed at policing profanity or vanquishing vulgarity; rather, its aim is to banish bigotry from NLRA protection in labor disputes. A per se standard toward employee bigotry does not ignore the reality that "the language of the shop is not the language of 'polite society.'"[220] Instead, it draws a well-deserved distinction between profane or vulgar behavior on the one hand and racist or sexist conduct on the other because the former merely offends a particular individual, while the latter stigmatizes an entire group. Garden-variety profanity or vulgarity is unlikely to harm the ability of marginalized employees to effectively exercise their Section 7 rights. However, racist or sexist conduct does real harm to marginalized employees by targeting their individual human worth *because of* their oppressed group status. This is especially true because the effective exercise of Section 7 rights by marginalized employees often require them to engage in concerted activities, which may require them to close ranks with the bigoted coworkers who abused them. While employers may desire a per se standard to improve workplace decorum and civility, that does not mitigate the benefits it would also confer on marginalized employees.[221]

E. NLRB Per Se Standard Would Not Become Susceptible to Employer Abuse

A per se standard also would not be vulnerable to abuse from employers. This is because, while a per se standard would strip employees of any NLRA protection if they engage in bigoted abusive conduct, it would be the NLRB—not the employer—that ultimately makes factual determinations in ULP cases.[222] The NLRB would investigate whether an employee engaged in bigoted abusive conduct the same way the agency determines what occurred in other ULP complaints filed with its regional offices. Specifically, if employees file a Section 8(a)(3) ULP complaint

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[219] Consol. Commc'ns, Inc. v. NLRB, 837 F.3d 1, 24 (D.C. Cir. 2016) (Millett, J., concurring).

[220] Dreis & Krump Mfg., Inc., 221 N.L.R.B. 309, 315 (1975).

[221] Under the per se standard this note posits, in Section 8(a)(3) bigoted employee cases, both employers and marginalized employees would arguably benefit because the former could summarily discipline the bigot regardless of its intent and the latter would not have to worry about any potentially antiunion malice in the former's intent when imposing such discipline since that could result in reinstatement under *Wright Line*.

[222] *See Investigating Charges*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges [https://perma.cc/NBR5-CE9K].

against their former employer for erroneously claiming they engaged in bigoted abusive conduct, then the NLRB regional office with jurisdiction over that employer would investigate the veracity of that claim.[223] If the NLRB concludes that the employer lied in claiming the disciplined employees engaged in bigoted abusive conduct, then the agency would order them reinstated with backpay.[224] Moreover, the NLRB could then require that employer to post a notice informing other employees of their rights and their employer's lies about the previously terminated employees.[225]

Indeed, under a per se standard, the NLRB's factual investigation of such claims would be analogous to the EEOC's investigation into whether an employer violated federal employment law by discriminating against employees on the basis of a protected status, such as race or sex.[226] While there may be difficult cases where it is ambiguous as to whether an employee engaged in bigoted abusive conduct, for example, because of a vague or veiled reference to a protected group, it would be the NLRB's role to ultimately make a factual determination in such cases. Given the NLRB's institutional experience in investigating complicated, contentious, and even violent labor disputes,[227] the agency should be well-equipped to also investigate bigotry cases. Moreover, the NLRB can seek guidance from the EEOC and review federal employment case law to better determine when employee conduct crosses the line into bigoted behavior. Ultimately, under a per se standard, while an employer may discipline employees in the short term by falsely claiming they engaged in bigoted conduct, if those employees did not, then in the long run they would be reinstated with backpay after an NLRB investigation confirms that.

CONCLUSION

In 2020, the NLRB's decision in *General Motors* to abandon its setting-specific standards for the *Wright Line* test in cases involving employee abuse during Section 7 activity is an improvement because it narrows the scope of NLRA protection afforded to bigoted employees. However, as shown above,

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[223] *See id.*

[224] *See id.*

[225] *See id.*

[226] *See Formal Complaint & Investigation Process*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/federal-sector/formal-complaint-investigation-process [https://perma.cc/5VNZ-HWSC] (describing EEOC's investigatory process).

[227] *See Investigating Charges*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges [https://perma.cc/NBR5-CE9K] (noting that "[t]he NLRB receives about 20,000 to 30,000 charges per year from employees, unions and employers covering a range of unfair labor practices described in Section 8 of the Act").

Wright Line unfortunately falls short of fully protecting marginalized employees and their Section 7 rights by not categorically stripping all NLRA protection from bigoted employees.[228] Given that, the NLRB should abandon *Wright Line* for a per se standard by adapting the NLRA's application based on the "realities of industrial life" to help marginalized employees.[229]

A per se standard properly centers the harm that employee bigotry specifically inflicts on marginalized employees, who would otherwise benefit from Section 7 activity that organizes unions and fosters collective bargaining.[230] As the NLRB has acknowledged, "scurrilous racial, religious, and sexual remarks at nonstriking employees solely for the reason that they declined to participate in the strike . . . can reasonably be expected to have a more lasting traumatic effect."[231] Indeed, bigoted employees that abuse marginalized coworkers, or arguably even managers, during Section 7 activity "are unlikely to be forgotten or forgiven after the strike is over, thus leading to potentially disruptive conditions in the workplace if the offender were to be returned to her job."[232] Examples of such disruptive conditions may include lower workplace morale, splintered employee solidarity, and even wildcat strikes.[233]

A per se standard reduces the likelihood that these conditions fester in a workplace by effectively imposing a zero-tolerance policy toward employee bigotry, which complements contemporary social norms and movements.[234] Under a per se standard, the NLRB would never reinstate a bigoted employee with backpay after an impartial, agency-led investigation discovers employee bigoted abusive conduct. The per se standard's hardline stance against employee bigotry reduces the harm marginalized people face in the workplace and advances the NLRA's primary purpose of industrial peace by reducing tensions that may cause labor unrest.[235]

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[228] *See supra* Section III.B.

[229] Consumers Power Co., 282 N.L.R.B. 130, 132 (1986).

[230] *See* Folayemi Agbede, *The Importance of Unions for Workers of Color*, CTR. FOR AM. PROGRESS (Apr. 4, 2011), https://www.americanprogress.org/issues/economy/news/2011/04/04/9402/the-importance-of-unions-for-workers-of-color/ [https://perma.cc/R4LU-WRVQ].

[231] Nassau Ins. Co., 280 N.L.R.B. 878, 894 (1986).

[232] *Id.*

[233] *See, e.g.*, Duncan Tarr, *50 Years Since Detroit's Dodge Revolutionary Union Movement*, BLACK PERSPS. (July 19, 2018), https://www.aaihs.org/50-years-since-detroits-dodge-revolutionary-union-movement/ [https://perma.cc/84SR-NV8N] (describing wildcat strike by Black Chrysler employees in response to a "deep mistrust of the existing United Automobile Workers (UAW) union" and calling for "an equal [pay] scale as their white racist co-workers").

[234] *See* Vann & Logan, *supra* note 51, at 291 (discussing public opinion increasingly in favor of "harsher sanctions" for employees who engage in discriminatory and harassing behavior).

[235] *See* Tarr, *supra* note 233; *see also* 29 U.S.C. § 151.

It is time for the NLRB to meet the new reality of America's workforce in the twenty-first century by recognizing the harm that employee bigotry can inflict on marginalized coworkers and adopting a per se standard stripping such conduct of any NLRA protection. To do so, it must look beyond the motivations of employers and instead focus squarely on the Section 7 rights of marginalized employees and how they may be interfered with, restrained, or coerced by bigoted coworkers. By adopting a per se standard in employee bigotry cases, the NLRB can finally shed the impression that "time and again" its interpretation of the NLRA has "given short shrift to gender-targeted [and other bigoted] behavior, the message of which is calculated to be . . . derogatory and demeaning."[236]

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[236] Consol. Commc'ns, Inc. v. NLRB., 837 F.3d 1, 21 (D.C. Cir. 2016) (Millett, J., concurring).

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