

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: March 12, 2021

S.A.M.

TO: Ronald K. Hooks, Regional Director  
Region 19

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

SUBJECT: Amazon.com  
Case 19-CA-266977

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The Region submitted this case for advice as to whether the Employer unlawfully discharged two tech industry employees in retaliation for their protected concerted activity. First, we conclude that the employees were discharged for activity that was part of the *res gestae* of their protected conduct and that doctrinal law in that area should be applied in assessing the instant case.<sup>1</sup> Specifically, we find that the Employer unlawfully discharged the employees for publicly supporting and soliciting employee support of warehouse employees, and criticizing Employer comments as racist, in violation of Section 8(a)(1) of the Act.<sup>2</sup> Second, to the extent the Board's decision in *General Motors* eliminates setting-specific standards, its tenets apply solely to situations involving abusive conduct, i.e., profane *ad hominem* attacks, threats of violence, or speech or conduct implicating Title VII discrimination concerns.<sup>3</sup> Insofar as the Board in two cases subsequent to *General Motors* appears to be signaling an intention to apply the decision more broadly, the

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<sup>1</sup> See, e.g., *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 n.1, 15–16 (2019) (*Wright Line* inapplicable where causation was not at issue); *KHRG Employer, LLC, d/b/a Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 2 & n.5 (Feb. 28, 2018) (same); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002) (same).

<sup>2</sup> We conclude there was no actual or perceived union activity warranting an allegation under Section 8(a)(3) of the Act.

<sup>3</sup> 369 NLRB No. 127 (July 21, 2020).

Region should urge that the Board clarify and limit it as discussed below. Consequently, *General Motors* does not apply to the non-abusive conduct of unapproved third-party communications and solicitation the Employer alleges as misconduct here. Finally, the Employer unlawfully applied its facially neutral external communications and solicitations policies to restrict Section 7 rights.

### FACTS

Two engineers stationed out of the Employer's Seattle headquarters (b) (6), (b) (7)(C) an employee group, Amazon Employees for Climate Justice or "AECJ," comprised of hundreds of tech employees devoted to climate justice. Over the course of a year and a half, the two Charging Parties engaged in continuous and increasingly public activity to persuade the Employer to adopt a comprehensive climate plan to reduce carbon emissions, sever relationships with fossil fuel companies, and make sustainability a core component of its technical products. The Charging Parties used social media and a public website to communicate this plan with the public and other tech employees; they were quoted in articles chronicling their activism published by (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) among others.

Meanwhile, ongoing unionization efforts at various Employer warehouses across the country continued. In (b) (6), (b) (7)(C) 2020, seeking greater workplace safety amidst the onset of the pandemic, warehouse employees created a national COVID-related petition and contacted the AECJ seeking tech industry employees' support. The Charging Parties solicited signatures for the warehouse employees' petition by forwarding it to various tech employee email lists, and used their personal Twitter accounts to criticize warehouse conditions, call for action, and publish the statements of several warehouse employees.<sup>4</sup> Five days later, (b) (6), (b) (7)(C) published a leaked memo from the Employer's (b) (6), (b) (7)(C) revealing Amazon's plan to publicly exploit a recently terminated (b) (6), (b) (7)(C) warehouse employee as the "not smart, inarticulate" face of the union organizing movement, using (b) (6), (b) (7)(C) as a pawn in their long-running strategy to smear ongoing organizing efforts. Four days later, one of the Charging Parties emailed a large tech-employee listserv condemning the Employer's leaked statements as racist and tying the incident to the broader warehouse movement by criticizing the lack of warehouse protection, quoting employee concerns, and noting COVID-19's disproportionate impact on (b) (6), (b) (7)(C) people working service sector jobs. Four more days later, just ninety minutes after AECJ invited thousands of employees to a virtual town hall for the purpose of listening to

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<sup>4</sup> The (b) (7)(A) 2020 tweets read: "I'm matching donations up to \$500 to support my Amazon warehouse worker colleagues. 'The lack of safe and sanitary working conditions' puts them and the public at risk. It's bad ya'll"; and "The situation is FUCKED. I'm an Amazon tech worker and I am horrified and appalled. Amazon needs to protect logistics workers and the public NOW. I hope you will join me in donating to support them fight this and win! I'm matching up to \$500."

warehouse employee concerns, and after over 1500 employees confirmed their attendance, the Charging Parties were discharged.

The Employer argues that the Charging Parties were discharged for violating its External Communications and Solicitation policies.<sup>5</sup>

### **ACTION**

We conclude that the Employer unlawfully discharged both Charging Parties because of their protected March and April 2020 advocacy for fellow warehouse employees.

As an initial matter, although not specifically raised by the Employer,<sup>6</sup> we consider the question of whether *General Motors*, which requires the use of the *Wright Line* standard when evaluating cases involving abusive conduct that occurs during the course of protected activity, applies here.<sup>7</sup> At face value, it is reasonable to conclude that *General Motors* is inapplicable to purported misconduct that fails to rise to the level of abusive conduct, leaving the res gestae totality of the circumstances standard intact for this set of cases.<sup>8</sup> Nevertheless, shortly after the decision in *General Motors* issued, the Board issued two other decisions where, in comments relegated to dicta because *Burnup and Sims* was dispositive, it signaled

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<sup>5</sup> The External Communications policy requires that “external communications by employees about Amazon’s business, products, services, technology, or customers must be approved in advance,” including “communications in any public forum in which the speaker is identified as an Amazon employee, such as media interviews, speaking engagements (including panel discussions), articles, academic papers, and social media posts such as Twitter, Instagram, and Medium.” The Solicitation policy prohibits solicitation “of any kind by associates on company property during working time,” including “solicitation via company bulletin boards or email or through other electronic communication media” and “soliciting for financial or other contributions...and signatures on petitions.”

<sup>6</sup> The Employer argued that *Wright Line* applies without specifically referring to *General Motors*.

<sup>7</sup> 369 NLRB No. 127 (July 21, 2020).

<sup>8</sup> See, e.g., *Hotel Burnham & Atwood Café*, 366 NLRB No. 22, slip op. at 2 & n.5 (totality of the circumstances analysis of misconduct of gaining unauthorized access to a secure area through misrepresentation); *Nynex Corp.*, 338 NLRB 659, 660-61 (2002) (totality of the circumstances analysis of misconduct of causing 2-hour disruption by confronting other employees and persistently refusing to leave premises); *Phoenix Transit*, 337 NLRB at 510 (totality of the circumstances analysis of misconduct of confidentiality breach).

it may broaden its application. First, in *Nestlé USA, Inc.*,<sup>9</sup> the Board indicated that had there been no question as to whether the employee actually engaged in the misconduct—namely fabricating that a line coordinator used racist language—*General Motors* would have applied. Subsequently, in *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*,<sup>10</sup> the Board similarly explained that had there been no issue as to whether the employee engaged in the purported misconduct—this time harassing a coworker by discussing benefits of union representation and using profanity in referring to a manager—*General Motors* would have applied. These two cases have now blurred the potential scope of *General Motors*, raising the question of whether it applies to non-abusive misconduct not explicitly discussed therein, such as the alleged misconduct here of third-party communications and solicitation in violation of company policy. As discussed below, we urge that the Board limit *General Motors* solely to the abusive conduct addressed within the decision, and we conclude that it does not apply to the non-abusive misconduct alleged in the instant case.

**I. The Board should clarify and limit *General Motors* to the extent that subsequent discussions of the decision signaled an intent to apply it more broadly.<sup>11</sup>**

*General Motors* applies only to abusive conduct, which is limited therein to profane ad hominem attacks, threats of violence, or conduct implicating Title VII discrimination. As noted above, despite the confines inherent in the decision, the Board has subsequently signaled an intent to apply it more broadly by virtue of the decisions in *Nestlé* and *KOIN-TV*, referred to above. The Board should therefore clarify its definition of abusive conduct and limit its application accordingly.

In *General Motors*, the Board eliminated setting-specific standards when evaluating abusive conduct, explicitly overruling *Atlantic Steel*, typically applied to workplace discussions with management, and *Clear Pine Mouldings*, applied to picket line conduct.<sup>12</sup> The Board directed the application of *Wright Line*, regardless

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<sup>9</sup> 370 NLRB No. 53, slip op. at 1, n.2 (Dec. 7, 2020) (“we eliminated the totality-of-the-circumstances test and other setting-specific standards and replaced them with the standard set forth in *Wright Line*” in *General Motors*).

<sup>10</sup> 370 NLRB No. 68, slip op. at 1, n.1 (Jan. 7, 2021) (in *General Motors* “we held that the Board will no longer apply various setting-specific standards and decide whether misconduct in the course of protected activity lost the Act’s protection,” and “[i]nstead, in all such cases, the Board will apply *Wright Line*”).

<sup>11</sup> Even assuming *General Motors* applies narrowly, i.e., only to the abusive conduct discussed therein, the Acting General Counsel does not necessarily take the position that it was properly decided.

<sup>12</sup> 369 NLRB No. 127, slip op. at 1-2, 4-7.

of the setting in which the conduct occurred, to situations specifically involving conduct found to be abusive, noting, e.g., that it does not apply to cases where the employer asserts disloyalty or disparagement.<sup>13</sup> In defining abusive conduct, the Board provided the primary examples of a “profane ad hominem attack” or “racial slur.”<sup>14</sup> Indeed, the conduct in *General Motors* included profane ad hominem attacks, threats of violence, and illegal/invidious language concurrent with protected concerted activity, and the Board cited numerous scenarios involving the same.<sup>15</sup> Any argument that *General Motors* applies to a wider range of conduct beyond discussed therein is unsupported given the express bounds formed by the cases discussed and, importantly, the Board’s central objective of accommodating an employer’s duty to comply with EEO laws and maintain a civil workplace free from invidious discrimination.<sup>16</sup>

*General Motors* further eliminated a totality of the circumstances standard for *abusive conduct or speech* in social media posts or conversations among employees in the workplace.<sup>17</sup> In cases pre-dating *General Motors*, the Board held that *Atlantic Steel* did not apply to social media posts or workplace discussions among coworkers, so in two cases where abusive conduct occurred under those circumstances it applied a totality of the circumstances standard.<sup>18</sup> Finding a totality of circumstances review problematic for the same reason as under the

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<sup>13</sup> *Id.*, slip op. at 1-2, 6 n.16 (“today’s decision only addresses abusive conduct”).

<sup>14</sup> *Id.*, slip op. at 8 (“Abusive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act”).

<sup>15</sup> *Id.*, slip op. at 2 (union committeeperson’s misconduct included profane ad hominem attack, racially charged language); *Id.*, slip op. at 1 n.1-3 & 5; citing *Plaza Auto Center, Inc.*, 360 NLRB 972, 977–980 (2014) (calling employer’s owner a “fucking mother fucking,” “fucking crook,” and “asshole,” and making protected compensation-related complaints during a workplace meeting), *Pier Sixty, LLC*, 362 NLRB 505, 506–508 (2015) (calling manager a “nasty mother fucker,” stating “fuck his mother and entire family”; and urging employees to vote yes for the union in a social media post), *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 7–10 (2016) (racist bullying while picketing), and *Roemer Industries, Inc.*, 362 NLRB 828, 834 n.15 (2015) (bullying and harassment during a grievance investigation meeting).

<sup>16</sup> *Id.*, slip op. at 6-7, 7 n.18, 8 (discussing how setting-specific standards are in tension with antidiscrimination laws).

<sup>17</sup> *Id.*, slip op. at 6.

<sup>18</sup> *Id.*, citing *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 1 n.3 (2016); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017).

*Atlantic Steel* standard, i.e., that it has yielded inconsistent and unpredictable results, the *General Motors* Board held that *Wright Line*, not a totality of the circumstances analysis, would apply to abusive social media and inter-employee discussions.<sup>19</sup> In doing so, the Board eliminated a totality of the circumstances assessment only as to the specific and narrow confines it set forth in the decision—abusive conduct occurring on social media or in a workplace discussion among coworkers.<sup>20</sup>

There are countless situations where an employee may engage in alleged misconduct not involving abuse (i.e., profane attacks, threats of violence, or invidious language) that is part of the *res gestae* of the protected activity. In those cases, causation is not at issue, and the only inquiry is whether there is some aspect of the alleged misconduct that caused the employee to lose the Act's protection, e.g., the conduct was illegal or otherwise egregious.<sup>21</sup> To extend *General Motors* to all forms of alleged misconduct is to place unnecessary requirements on the General Counsel to establish causation where there is no question that causation is not at issue.

Nevertheless, the Board in *Nestlé* and *KOIN-TV* appear to have signaled an intent to broaden *General Motors* well beyond abusive conduct. The Region should urge that the Board clarify these ambiguities, and, to the extent the Board has suggested the possibility of a broader application of *General Motors*, contain its application solely to the types of abusive conduct the decision addressed, i.e., involving profane ad hominem attacks, threats of violence, or concerns of Title VII discrimination.<sup>22</sup> Further, to the extent that the dicta in *Nestlé* and *KOIN-TV* conflict with the parameters discussed above, the Board should correct these overgeneralizations.

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<sup>19</sup> *Id.*, slip op. at 6.

<sup>20</sup> *Id.*, slip op. at 5-6.

<sup>21</sup> See, e.g., *ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 n.1, 15–16 (*Wright Line* inapplicable where employee undisputedly discharged for social media posts that “publicly insulted” employer’s client); *Phoenix Transit*, 337 NLRB at 510 (*Wright Line* inapplicable where employee undisputedly discharged for writing about employer’s handling of sexual harassment complaints in union newsletter and employer asserted employee violated confidentiality instruction).

<sup>22</sup> (b) (5)

(b) (5)

**II. *General Motors* does not apply to the alleged misconduct here.**

Notwithstanding the ambiguity, we conclude the conduct at issue here falls far outside the scope of abusive conduct *General Motors* intended to address. The pertinent conduct includes: soliciting signatures for a protected warehouse employee petition and forwarding the petition via email; publicly tweeting criticism of warehouse conditions by calling the situation, *inter alia*, “bad” and “fucked,” soliciting monetary donations, and calling for an Employer response to employee complaints; and sending an email to coworkers condemning Employer statements as racist and tying the racism to the Employer’s failure to protect warehouse employees. Thus, this case does not involve the type of abusive conduct *General Motors* intended to cover. Finally, the Employer asserted disloyalty and disparagement as a defense; as stated above, *General Motors* expressly does not apply to misconduct argued to be unlawful disparagement or disloyalty under *Jefferson Standard*.<sup>23</sup>

**III. The Employer unlawfully discharged the Charging Parties for advocating for warehouse employees, and their conduct was not otherwise unprotected; even assuming *Wright Line* applies, the discharges were unlawful.**

Turning to the instant matter, the Employer contends the Charging Parties were discharged for violating their external communication and solicitation policies by continuing to speak publicly and to the media without approval, but that conduct was part of the *res gestae* of their protected concerted activity raising awareness of warehouse conditions and condemning the Employer’s union suppression strategy as racist by speaking to other employees and third parties. First, we need not reach the question of whether their climate activism was protected because we find the Charging Parties’ March 2020 appeals to employees and the public to support the warehouse movement and April 2020 condemnation of the Employer’s leaked statements to be fundamental Section 7 activity, and that the Employer discharged them for engaging in this activity. When an employee is disciplined or discharged for conduct that is part of the *res gestae* of protected concerted activity, the only inquiry is whether the conduct lost the Act’s protection because it “disclosed confidential information or otherwise crossed over the line separating protected and unprotected activity.”<sup>24</sup> We find nothing in the Charging Parties’ comments that

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<sup>23</sup> *General Motors*, 369 NLRB No. 127, slip op. at 6 n.16 (“precedent on disparagement or disloyalty is beyond the scope” of the decision, which addresses only abusive conduct).

<sup>24</sup> *Phoenix Transit Sys.*, 337 NLRB at 510 (*Wright Line* inapplicable where employee undisputedly discharged for writing about employer’s handling of sexual harassment complaints in union newsletter and employer asserted employee violated confidentiality instruction), *enforced per curiam*, 63 F. App’x 524 (D.C. Cir.

crossed the line, including statements that the Employer's failure to respond to employees' pleas for basic sanitation after the onset of COVID-19 posed employee and public health risks, or that the situation was "fucked" and the Charging Parties were horrified and appalled; the post simultaneously called the Employer to protect logistics workers and the public, making its lawful goal of mutual aid and protection explicit.<sup>25</sup> Consequently, the discharges were unlawful.

Even assuming the Board believes *General Motors* should apply in this case, thereby compelling a *Wright Line* analysis, a violation would still be found here. In an act of classic collective action, the Charging Parties boldly led hundreds of highly skilled tech employees with demonstrated power to join forces with the warehouse movement, comprised of thousands of employees who have remained largely voiceless thus far. As discussed above, their March and April 2020 actions forwarding the warehouse petition to coworkers, criticizing union-related Employer statements as racist, and public social media posts calling on the Employer to ameliorate deplorable warehouse conditions constituted protected concerted activity. The Employer's abrupt discharge of the Charging Parties following that support—after seventeen months of near complete tolerance for climate-related external communications—combined with the contemporaneous evidence of animus toward warehouse unionization, establishes a *prima facie* case. The Employer has failed to rebut the inference of unlawful motivation, i.e., that the discharges were an effort to slow the expanding influence of the two tech employee leaders and break the tech-warehouse employee alliance. On top of the Employer's admission that there are no comparators, there is evidence that the Employer has tolerated other employees' climate-related external communications and other unprotected employee solicitations for, e.g., girl scout cookies and Black Lives Matter. The discharges were therefore also unlawful under a *Wright Line* analysis.

#### **IV. The Employer unlawfully applied its external communications and solicitation policies to restrict Section 7 activity.**

Finally, we conclude that the external communications and solicitation policies were applied unlawfully to restrict the Charging Parties' Section 7 activity.

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2003); *see also ODS Chauffeured Transportation*, 367 NLRB at 1 n.1, 15–16 (*Wright Line* inapplicable where employee undisputedly discharged for social media posts that "publicly insulted" employer's client).

<sup>25</sup> *See, e.g., ODS Chauffeured Transportation*, 367 NLRB at 1 n.1 (posts that publicly insulted employer's client and also violated professional conduct rule retained the Act's protection); *cf. NLRB v. Elec. Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 471, 476-77 (1953) (communications unprotected where not connected to labor dispute, reasonably calculated to harm reputation and income).



Facially lawful rules applied to restrict the exercise of Section 7 rights are unlawful.<sup>26</sup> The Employer does not dispute relying on both policies as the sole basis for the discharges, and the unlawful application merits finding the violation here.

Accordingly, in sum, the Region should issue a complaint, absent settlement, as to the Employer's allegedly unlawful discharge of both Charging Parties in violation of Section 8(a)(1) of the Act, and the Employer's unlawful application of its external communications and solicitation policy in violation of Section 8(a)(1) of the Act. The Region should further urge the Board to clarify the scope of *General Motors* and limit it to abusive conduct as defined above.

/s/  
R.A.B.

ADV.19-CA-266977.Response.Amazon.com (b) (6), (b) (7)(C)

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<sup>26</sup> *GS Services Limited Partnership*, 369 NLRB No. 133, slip op. at 7 (July 24, 2020) (“*Boeing* overruled *Lutheran Heritage* only with respect to the first prong of the facially-neutral paradigm,” not as to rules promulgated in response to Section 7 activity or applied to restrict Section 7 rights).