# NLRB RULES FIRING KNOWN UNION SUPPORTER DOES NOT VIOLATE THE NLRA

In a 2-1 decision issued on August 2, 2019, the National Labor Relations Board (Board), held that an employer who terminated an employee it knew to be a union supporter did not violate the National Labor Relations Act ("Act"), even though the Board found that the stated reasons for the termination were pretextual. (*Electrolux Home Products, Inc.*, 368 NLRB No. 34).

In the case, the employee openly and actively supported and assisted an unsuccessful 2015 organizing drive and a successful organizing campaign in 2016. The employee was observed distributing union cards and flyers and wearing pro-union shirts. During the 2016 organizing campaign, two managers told the employee to "shut up" and "that she didn't know what she was talking about" when she spoke out against what the managers were saying in a company meeting with employees during the organizing drive. In May of 2017, the employee was terminated for "insubordination" for allegedly failing to follow her supervisor's order to complete a routine task.

Applying the Board's *Wright Line* standards, the ALJ found that the employee had openly and publicly engaged in union activity, which the employer was aware of, and that the employer harbored anti-union animus towards the employee based on the managers telling her to "shut up" and the employer's failure to explain why the employee was fired for insubordination when previous employees had received lesser discipline for the same type of behavior. The *Wright Line* test requires evidence to support the inference that protected conduct was a 'motivating factor' in the employer's decision. The burden then shifts to the employer to demonstrate that the same action would have taken place without the union conduct.

The Board reversed. While it agreed with the ALJ that the company's explanation for discharge instead of a lesser discipline was pretextual, the Board found that it was not proven that the employee's union activity was the motivating factor in the discharge. Prior Board president had held that pretext alone was sufficient to show animus. The Board in *Electrolux* refused to find anti-union animus in the comments by the mangers at the meeting for two reasons: that the company was legally allowed to hold the meeting, and saying "shut up" was rude but not anti-union animus. The Board also noted that the meeting happened eight months before the employee's discharge, thus lacking a time nexus between the two events. The Board found that the General Counsel failed to meet its *Wright Line* burden of proof, because it "failed to establish by a preponderance of the evidence that [the company] was unlawfully motivated in discharging [the employee]."

While the Board stated that this case was distinguishable from Board precedent that supported the proposition that pretext alone could satisfy the burden of proof for animus, and not overturning the *Wright Line* test, this case increases the burden to prove anti-union animus under the test.

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