

## A Practice In Legal Fundamentals: Third Circuit Court Tells NLRB To Apply The Correct Legal Test

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In a recent Third Circuit opinion, the NLRB got a little lesson in legal analysis. In *MCPc, Inc. v. NLRB*, Nos. 14–1379, 14–1731, 2016 WL 559219 (3rd Cir., Feb. 12, 2016), the court instructed the Board regarding the correct legal test to be applied to an employee’s unfair labor practice claim. The Board’s *Wright Line* decision has for years been the correct standard for determining whether an employer’s decision to discharge an employee was improperly motivated by the employee’s protected activity. *Wright Line*, 251 N.L.R.B. 1083 (1980). The Board has subsequently cited *Wright Line* thousands of times, but apparently it needed a little refresher on it in *MCPc Inc.* Jason Galanter worked for MCPc, Inc., as a senior solutions architect based in Pittsburgh. During an employee lunch outing between other solutions architects and a few engineers, employees discussed how busy they were due to the company’s shortage of engineers. The company’s director of engineering was present at the lunch, and Galanter urged him to hire more engineers. Galanter further stated that the company could afford additional engineers with the \$400,000 salary it was paying a recently hired executive. Two other employees at the lunch expressed some agreement with Galanter’s statement. When the company’s CEO learned of the comment about the executive’s salary, he investigated as to how Galanter learned of the confidential salary information. Galanter was subsequently terminated. Galanter filed a complaint with the NLRB, and the Board found that MCPc, Inc., violated the Act for discharging Galanter based on his complaints about workplace conditions. The general counsel argued that such complaints were protected concerted activity, and both the ALJ and the Board agreed. The company appealed to the Third Circuit, arguing in part that Galanter’s discharge was not motivated by the protected activity, but rather it was motivated by the following rationales:

1. Improperly obtaining confidential salary information;
2. Disseminating that information; and
3. Lying to the CEO about where he had obtained the information.

Notably, the company’s argument about dissemination of confidential information failed because the Board found the company’s policy governing confidential information was overbroad and thus in violation of the Act. However, regarding the other two rationales, the Third Circuit determined that the ALJ and the Board did not apply the correct legal test – the *Wright Line* test – to either asserted rationale. The ALJ applied *Burnup & Sims* to the employer’s first rationale. In *Burnup & Sims, Inc.*, 379 U.S. 21 (1964), the U.S. Supreme Court described a slightly different test for analyzing those “special circumstances” where an employee is discharged for allegedly engaging in misconduct during his protected activities. The misconduct to which the test applies consists of misconduct “arising out of” protected activity and misconduct occurring “in the course of” protected activity. However, the Board disagreed and found that *Burnup & Sims* did not apply, since Galanter allegedly engaged in misconduct prior to the date of the lunch, not during it.

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Finally, as to the third rationale, neither the ALJ nor the Board applied any test to determine its appropriateness. In the ultimate “legal analysis whoops,” the Board then just forgot to mention or apply *Wright Line*. Before remanding the case back to the Board, the Third Circuit Court said, “Although it may be that in rejecting *Burnup & Sims*, the Board meant to invoke *Wright Line* as the appropriate test for analyzing the lawfulness of Galanter’s discharge, the Board neither noted the applicability of *Wright Line* nor applied it in this case.” *MCPc, Inc.*, 2016 WL 559219, at \*11.