

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERICAN CIVIL LIBERTIES UNION, INC.

and

CASES 05-CA-300367
05-CA-302762

NONPROFIT PROFESSIONAL EMPLOYEES
UNION (NPEU), INTERNATIONAL FEDERATION
OF PROFESSIONAL & TECHNICAL ENGINEERS
(IFPTE) LOCAL 70 A/W INTERNATIONAL
FEDERATION OF PROFESSIONAL & TECHNICAL
ENGINEERS, AFL-CIO, CLC

**MOTION OF RESPONDENT TO THE NATIONAL LABOR
RELATIONS BOARD FOR LEAVE TO FILE A SUPPLEMENTAL
BRIEF TO THE BOARD**

Respondent, the American Civil Liberties Union, Inc. (the “ACLU”), by its attorneys, Kauff McGuire & Margolis LLP, respectfully submits this Motion, pursuant to Section 102.24 and 102.46(e) of the Board’s Rules & Regulations, and urges the Board to grant Respondent leave to submit a supplemental brief to the Board in support of its Exceptions to the decision of the Administrative Law Judge.

Upon a Consolidated Complaint and Notice of Hearing, alleging violations of Section 8(a)(1) and (5) of the Act by the ACLU, a hearing was held over nine days between August 15, 2023 and April 5, 2024, before Administrative Law Judge Michael A. Rosas (“ALJ”).

On August 7, 2024, the ALJ issued a decision and recommended order (“ALJD”), containing his findings of fact and conclusions of law that ACLU violated Section 8(a)(1) of the National Labor Relations Act (the “Act”) by terminating the employment of and denying a transfer to Katherine Oh (“Oh”). (The ALJ dismissed the Complaint allegation

under Section 8(a)(5).) The ALJD turned in significant part on the ALJ's conclusion that certain Tweets publicly posted by Oh constituted protected concerted activity.¹ On October 6, 2024, the ACLU timely filed Exceptions and a supporting brief pursuant to section 102.46 of the Board's Rules and Regulations.

On February 14, 2025 Acting General Counsel William B. Cowen issued a Memorandum (GC Memo 25-05) expressly revoking certain initiatives of his predecessors, thereby altering the position of the General Counsel with respect to Board precedents highly relevant to this matter. Specifically, the Acting General Counsel revoked previous Memoranda issued by then-Acting General Counsel Peter Sung Ohr (GC Memo-21-03) and General Counsel Jennifer Abruzzo (GC Memo-21-04 and GC Memo-23-04); the Sung and Abruzzo Memoranda had, in pertinent part, called into question whether two Board cases, *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019) and *General Motors*, 369 NLRB No. 127 (2020) were correctly decided. *See* GC Memo 23-04, at 1 (where General Counsel Abruzzo noted that these two decisions were among those which “[she] believed were contrary to our Congressional mandate as they improperly compromised the statutory rights of workers.”). Thereafter, the General Counsel made her objection to these precedents, as presaged in these GC Memos, explicit; she did so by

¹ The Tweets in question were posted the day following a lawful warning issued to Oh instructing her to moderate the tone of language she used in criticizing her supervisors, and stated as follows:

I can't overstate just how physically repulsed I feel working under incompetent/abusive bosses. Just the waves of physical revulsion washing over me and making me nauseated....

[W]hy don't we all start doing this extremely time intensive thing that would be a total waste of our time because it sounds good to me, someone with zero expertise on those issue areas and apparently zero understanding of this process [already works.] (sic) (emphasis added).

(ALJD, at 48).

issuing several guidance Memoranda expressly calling for *Alstate Maintenance* to be overruled, *see, e.g.*, *Rotten Johnny's Wood Fire Pizza Pie*, 2022 NLRB GCM 25, n. 2 (September 21, 2022); *Huntington Ingalls Industries*, 2022 NLRB GCM 39, n. 1 (July 22, 2022), and by asking the Board, in *Miller Plastic Products*, 372 NLRB No. 134 (2023), to overrule *Alstate Maintenance*, and in *Lion Elastomers, LLC*, 372 NLRB No. 83 (2023), to overrule *General Motors*.

This advocacy by the former Acting General Counsel and General Counsel resulted in the issuance of two Board decisions that bear directly on the issues before the Board in the instant case. In *Miller Plastic Products, Inc.*, the Board accepted the position of the General Counsel and overturned *Alstate Maintenance*, resulting in a significant change in Board law by broadening the circumstances in which conduct may be considered to have engaged in for “mutual aid and protection.” In *Lion Elastomers*, , the Board overturned *General Motors*, which had applied the standard under *Wright Line* to hold that employee misconduct in the midst of protected activity was a lawful basis for discharge if the employer would have terminated the employee in any event, regardless of the protected activity.

In the instant case, before the issuance of Acting General Counsel Cowen’s Memorandum GC 25-05, Counsel for the General Counsel cited and relied heavily upon both *Miller Plastic Products* and *Lion Elastomers* in its Post-Hearing Brief to the ALJ as well as in the Answering Brief to the ACLU’s Exceptions. *See* General Counsel’s Post Hearing Brief to the ALJ, at 54, 61; General Counsel’s Answering Brief to Exceptions, at 35, 38, 40. And, the ALJ cited *Lion Elastomers* in support of his conclusion that Oh’s Tweets were protected. (ALJD 61:15-17).

The Acting General Counsel's Memorandum GC 25-05, issued subsequent to the completion of briefing on the ACLU's Exceptions, signaled a reversal of the General Counsel's position regarding *Alstate Maintenance* and *General Motors*, contradicting his predecessor's position that those cases were wrongly decided and should be overturned. Under Section 102.46(e) of the Board's Rules and Regulations, a party may by "special leave" of the Board file a further brief, beyond the brief in support of exceptions, answering brief, and reply brief provided for in Section 102.46(a)-(e). Such leave should be granted here because Acting GC Cowen's recission of GC Memos 21-03, 21-04, and 23-04 creates a conflict with positions Counsel for the General Counsel advanced in the instant case – specifically its reliance on *Miller Plastic Products* and *Lion Elastomers*. Supplemental briefing is appropriate to resolve this tension.

The ACLU respectfully submits (and, if leave for the submission of supplemental briefing is granted, the ACLU will argue) that application of the standards of *Alstate Maintenance* would require a different result in the instant case. Under *Alstate Maintenance*, Oh's Tweets would not be protected activity because, to be protected, there must be evidence that Oh was bringing a truly group complaint or she was seeking to initiate, induce or prepare for group action. *Id.*, slip op. at 7. However, Counsel for the General Counsel conceded that, before sending the Tweets, Oh had *not* discussed with any co-workers the subject of the Tweets (i.e., her objections to the competency and conduct of her supervisors and the legislation tracking proposal being discussed in the April 26, 2022 meeting during which she sent her Tweets). Absent such evidence, the General Counsel relied instead on *Miller Plastic Products* for the proposition that "Board law does not require that Oh discuss her concerns about a working condition that effects [sic] all employees with other employees in order to render her conduct protected

concerted activity under Section 8(a)(1) of the Act.” Counsel for the General Counsel’s Post-Hearing Brief to the ALJ, at 57. The application of *Alstate Maintenance* would squarely preclude that argument.

The ACLU likewise will argue that a different result would be required if the standard of *General Motors* were applied. Under *General Motors*, a termination resulting from an employee’s abusive or insubordinate conduct engaged in during the course of otherwise protected activity is not unlawful where the employer would have terminated the employee in any event, regardless of any protected aspect of the employee’s behavior. Applying that rule here, the ACLU will argue, the termination of Oh would be lawful because the ACLU would have terminated Oh for her insubordination -- her flat rejection of the ACLU’s effort to counsel her to correct her behavior -- regardless of whether her Tweets were protected. The grossly insubordinate and abusive nature of Oh’s conduct, coming immediately on the heels of her most recent warning was conduct which no employer would tolerate and establishes that the ACLU would have terminated Oh regardless of whether Oh’s Tweets were otherwise protected.²

Good cause exists for supplemental briefing because the interpretation of the Act urged by the predecessor General Counsel and Acting General Counsel, and relied upon by Counsel for the General Counsel and the ALJ, is unaligned with the most recent Acting General Counsel’s position. Supplemental briefing is necessary to address the implications of that divergence and any intervening authority.

² Indeed, the dispositive effect of the application of *General Motors* would have in the instant case is revealed by the ALJ’s express finding that the ACLU “intended to terminate Oh on the basis of the language used in the Tweets *regardless of their concertedness.*” (ALJD 62:fn 174) (emphasis added). This finding that the ACLU would have terminated Oh regardless of whether or Tweets were protected establishes that the ACLU met its burden under *Wright Line*, as incorporated in *General Motors*, and that the termination therefore was lawful.

For the foregoing reasons, the ACLU requests that its motion be granted and that the Board permit the submission of a supplemental brief in support of Exceptions.

Dated: New York, New York
January 16, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

Kenneth A. Margolis, an attorney duly admitted to practice before the courts of the State of New York, affirms that on January 16, 2026 he caused a copy of the Motion of Respondent to the National Labor Relations Board For Leave To File A Supplemental Brief, to be served by e-mail upon the following:

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