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NLRB Finds Policy Requiring Employees to Represent Employer in a "Positive and Professional" Manner is Unlawful

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In a decision issued earlier this week, the National Labor Relations Board ruled that portions of an employer's standards of conduct policy were unlawful because they could be reasonably construed to prohibit employees' right to engage in protected activity under the National Labor Relations Act. The decision can only be described as the most recent in an increasingly long series of these cases, in which the Board has consistently found that language thought by an employer to be reasonable and appropriate actually violated the Act.

In this case, *Hills and Dales General Hospital*, Case 07-CA-053556 (Apr. 1, 2014), the employer's "Values and Standards of Behavior Policy" provided, *inter alia*, that employees were to refrain from making "negative comments about [their] fellow team members" and from engaging in "negativity or gossip," and that they were to "represent [the employer] in the community in a positive and professional manner." One of the employees filed a charge with the NLRB alleging that the policy prohibited his and other employees' rights under Section 7 of the National Labor Relations Act, which guarantees employees the right to engage in concerted activity regarding their "mutual aid or protection." The Administrative Law Judge who initially heard the case agreed with the employee that the "negative comments" and "negativity or gossip" provisions were unlawful, but disagreed regarding the "positive and professional manner" requirement, finding that the latter section could only be read by employees as a "lawful call for employees to maintain a high standard of professional with potential (or actual) customers at every opportunity."

The NLRB General Counsel appealed the case to the Board. The Board's decision affirmed the ALJ's conclusion that the "negativity"-related provisions were unlawful, but reversed his ruling that the "positive and professional manner" provision was lawful. With regard to the latter provision, the Board specifically found that the latter policy was "overbroad and ambiguous." The Board note that, "[p]articularly when considered in context with" the other unlawful sections, "employees would reasonably view the language … as proscribing them from engaging in any public activity or making any public statements (i.e., 'in the community') that are not perceived as 'positive' towards the Respondent on work-related matters." Unlike similar provisions that it previously had found lawful, the Board concluded, this policy was couched among "closely related unlawful provisions" and did not address

particular subject such as “conflicts of interest” or “electronic communications.” Instead, the provision connoted a “broad and flexible concept as applied to employee behavior.”

For employers, the takeaway from this decision is yet another reminder that behavior policies drafted even with the best intentions can be found unlawful under the National Labor Relations Act if they are broad or ambiguous in any way. Any rule affecting employee conduct and communications should be carefully reviewed to ensure that it is focused and narrow enough to withstand the Board’s current level of scrutiny. For the time being at least, the days of broad “employee morale” policies are almost certainly behind us.

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