April 18, 2014

In two recent decisions, the National Labor Relations Board (NLRB) held that non-union employer policies prohibiting negativity in the workplace are unlawful under the National Labor Relations Act (the Act). These decisions follow the NLRB's recent pattern of carefully scrutinizing non-union workplace policies for language that employees could reasonably construe as limiting their right to engage in "concerted activities for their mutual aid and protection."

In *Hill and Dales General Hospital,* 360 NLRB No. 70 (April 1, 2014), a hospital was experiencing poor employee morale and high turnover. In response, it asked a team of employees to develop a statement of Values and Standards of Employee Behavior, which included the following:

- We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.
- We will represent Hill & Dales in the community in a positive and professional manner in every opportunity.
- We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

After the hospital terminated an employee for throwing a yogurt at a supervisor, the former employee aired her grievances on Facebook. In response, a current employee posted the following comment: "Holy sh–t rock on! Way to talk about the d–bags you used to work with. I LOVE IT!" When the hospital issued the current employee a written warning for violating the Values and Standards of Behavior, the employee filed an unfair labor charge with the NLRB.

In finding the policy unlawful, the NLRB concluded that the language was overbroad and could be reasonably construed by employees to prohibit them from criticizing managers, unfair labor practices, and the terms and conditions of their employment. The hospital plans to appeal the decision to the Sixth Circuit Court of Appeals. We expect that the Sixth Circuit will address, among other things, the validity of the holding in light of the NLRB's long-standing rule against addressing de minimis violations of the Act.

In *First Transit, Inc.,* 360 NLRB No. 72 (April 2, 2014), the Board similarly ruled that a handbook provision prohibiting "discourteous or inappropriate" behavior was unlawfully overbroad. According to the NLRB, employees could reasonably construe the policy as prohibiting them from communicating about their employment because "no wording provides a context limiting the rule to legitimate business concerns such as uncooperation with supervisors." While the handbook did contain a "Freedom of Association" provision, which included a pledge from the employer not to interfere with collective employee action, the NLRB found the provision inadequate because it was neither "prominent nor proximate" to the unlawful language.

What this means for employers

Given the NLRB's continued focus in this area, both union and non-union employers should carefully examine workplace policies relating to employee communications and modify them as need. Employers should also consider consulting counsel before disciplining employees for violations of such policies.

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