

Not April Foolin': National Labor Relations Board Finds Employer Rule Requiring Positivity And Professionalism Unlawful

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On April 1, 2014, the National Labor Relations Board (the “NLRB” or the “Board”) ruled unlawful an employer policy requiring that its employees refrain from negativity in the workplace and in the community. At issue in *Hills and Dales General Hospital* were three paragraphs in the employer’s “Values and Standards of Behavior Policy:” 1.) Paragraph 11 prohibited employees from making “negative comments about our fellow team members,” (including coworkers and managers; 2.) Paragraph 16 required employees to represent the employer “in the community in a positive and professional manner in every opportunity; and 3.) Paragraph 21 prohibited employees from engaging or listening to “negativity or gossip.” While the Board agreed with the administrative law judge (the “ALJ”) that the prohibition on negativity found in paragraphs 11 and 21 was unlawful because employees could construe the prohibition prohibiting lawful activity—in spite of no evidence that the rules were in response to any protected activity—the Board overturned the ALJ and found paragraph 16 unlawful as well. In finding paragraph 16 overbroad and ambiguous, the Board stated that “particularly when considered in context with these other unlawful paragraphs, employees would reasonably view that language . . . as proscribing them from engaging in any public activity or making any public statements . . . that are not perceived as ‘positive towards the [employer] on work-related matters.’” According to the Board, this language could discourage employees from engaging protected activity, such as protests of employer unfair labor practices or complaints to third parties regarding working conditions. Contrary to the ALJ, the Board did not find previous precedent involving extremely similar language persuasive. While the Board had previously found lawful a policy require employees “to represent the company in a positive and ethical manner,” the current NLRB distinguished “ethical manner” from “professional manner,” as used in the *Hills and Dales* policy by stating that combining “positive” with ethical was “significantly” narrower in scope than combining positive with “professional,” and that “professional” is a “broad and flexible concept as applied to employee behavior.” Thus, despite the similarity of its language to the previously permitted policy, the *Hills and Dales* language was unlawful as overbroad and ambiguous. While the *Hills and Dales General Hospital* decision will likely surprise some employers with its prohibition on seemingly rational and well-meaning policies, it serves as a strong reminder that the current NLRB remains interested in policing employer rules for potentially overbroad or ambiguous language.

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