360 NLRB No. 70 (N.L.R.B.), 2014 WL 1309713

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

HILLS AND DALES GENERAL HOSPITAL
AND
DANIELLE CORLIS

Case 07-CA-053556
April 1, 2014

DECISION AND ORDER

***1** BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On February 17, 2012, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel and the Respondent each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs [1] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this decision, and to adopt the recommended Order as modified and set forth in full below. [2]

This case presents a challenge to the facial validity of three paragraphs in the Respondent's Values and Standards of Behavior Policy. In relevant part, paragraph 11 states that employees will not make "negative comments about our fellow team members," including coworkers and managers; paragraph 16 states that employees will "represent [the Respondent] in the community in a positive and professional manner in every opportunity;" and paragraph 21 states that employees "will not engage in or listen to negativity or gossip."

Applying the Board's standard for analyzing workplace rules set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, at 646-647 (2004), the judge found that paragraphs 11 and 21 violate Section 8(a)(1) of the Act because employees would reasonably construe them to prohibit protected Section 7 activity. With respect to paragraph 16, however, he found no violation, relying in principal part on the Board's analysis of a work rule in *Tradesmen International*, 338 NLRB 460, 461-462 (2002).

Lutheran Heritage states that if a work rule does not explicitly restrict Section 7 activity, it will still be found unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. For each of the three paragraphs at issue here, the only question before the Board is whether they violate Section 8(a)(1) under prong (1) of this test.

As explained below, we adopt the judge's findings concerning paragraphs 11 and 21, and we reverse his finding concerning paragraph 16.

1. We agree with the judge that the prohibitions of "negative comments" and ""negativity" in paragraphs 11 and 21, respectively, are unlawful. [3] We find no merit in the Respondent's argument that the judge erred by finding these prohibitions overbroad and ambiguous by their own terms. To the extent that the Respondent argues that these work rules cannot be found facially unlawful

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in the absence of evidence of surrounding circumstances suggesting a linkage between the rules' restrictions and protected concerted activity, the judge correctly cited and relied on controlling Board precedent to the contrary. E.g., *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting negative conversations about associates or managers unlawful on its face), *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011) (rule unlawful that subjected employees to discipline for the "inability or unwillingness to work harmoniously with other employees.") Thus, *Claremont Resort* and *2 Sisters* make clear that extrinsic evidence is not required to find that a work rule is unlawfully overbroad and ambiguous by its terms. [4]

***2** We also reject the Respondent's argument that the evidence of employee involvement in developing the rules removes any impermissible ambiguity as to the meaning and purpose of these paragraphs (or to paragraph 16 discussed below). As a general matter, such employee involvement is no guarantee that work rules will not infringe on Section 7 rights; employees might well endorse an unlawful rule, knowingly or not, but their consent or acquiescence cannot validate the rule. Here, in any case, the record is unclear as to the extent of employee involvement. There is no evidence that any employees who may have been involved in creating the subject work rules were assured or reasonably believed that the final adopted versions would not interfere with the exercise of protected Section 7 rights. Nor would the prior involvement of some employees have determined how other employees reasonably construed the rules, even if they were fully informed of the rules' origins.

2. Contrary to the judge, we find that paragraph 16 also violates Section 8(a)(1). The requirement that employees "represent [the Respondent] in the community in a positive and professional manner" is just as overbroad and ambiguous as the proscription of "negative comments" and "negativity" in paragraphs 11 and 21. Particularly when considered in context with these other unlawful paragraphs, employees would reasonably view the language in paragraph 16 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. This would, for example, discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment--activity that may not be "positive" towards the Respondent but is clearly protected by Section 7. See generally *Claremont Resort & Spa*, supra; *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 2 (2012) (rule stating that any communication posted electronically that damaged the Company, defamed any individual, or damaged any person's reputation could result in discipline, including termination, found unlawful).

We also reject the judge's reliance on *Tradesmen International,* supra, in which a "conflicts of interest" work rule that required employees "to represent the company in a positive and ethical manner" was found lawful. We find the rule in *Tradesmen* distinguishable from paragraph 16. [5] The context of the provision in *Tradesmen--* in contrast to paragraph 16 here--did not include closely related unlawful provisions. [6] Rather, it was part of a rule addressing a subject, "conflicts of interest," unlikely to suggest to employees that Section 7 activity might be implicated. Reasonably understood in context, the phrase "positive and *ethical* manner" in *Tradesman* would likely be construed quite differently that the phrase "positive and *professional* manner" at issue here. Coupled with the word "ethical" in a rule addressing conflicts of interests, the term "positive" has a significantly narrower scope of meaning than the same term coupled with the word "professional," a broad and flexible concept as applied to employee behavior.

***3** Accordingly, we find that paragraph 16's requirement that employees represent the Respondent "in the community in a positive and professional manner in every opportunity" violates Section 8(a)(1) of the Act as alleged.

AMENDED REMEDY

The Order requires the Respondent to revise or rescind paragraphs 11, 16, and 21 of the Hospital's Values and Standards of Behavior Policy. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to an unlawful rule. See *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated there, the Respondent may comply with our order of rescission by reprinting the Values and Standards of Behavior Policy without the unlawful language or, in order to save the expense of reprinting the whole policy, it may supply its employees with handbook inserts stating that the unlawful rules have been rescinded or with lawfully worded rules on adhesive

backing that will correct or cover the unlawfully broad rules, until it republishes the policy without the unlawful provisions. Any copies of the policy that include the unlawful rules must include the inserts before being distributed to employees. Id. at 812 fn. 8. See also *Design Technology Group LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96, slip op. at 2-3 (2013). We shall modify the judge's recommended Order and substitute a new notice with language more specifically addressing this remedy.

ORDER

The National Labor Relations Board orders that the Respondent, Hills and Dales General Hospital, Cass City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a work rule that prohibits negative comments about fellow team members.

(b) Maintaining a work rule that prohibits employees from engaging in or listening to negativity.

(c) Maintaining a work rule requiring that employees represent the employer in the community in a positive and professional manner in every opportunity.

(d) In any like or related manner interfering with, restraining, coercing and employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, revise or rescind the rules stated in paragraphs 11, 16, and 21 of its Values and Standards of Behavior Policy.

(b) Furnish all current employees with inserts for the current Values and Standards of Behavior Policy that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of a lawful rule; or publish and distribute a revised Values and Standards of Behavior Policy that (1) does not contain the unlawful rules, or (2) provides the language of lawful rules.

***4** (c) Within 14 days after service by the Region, post at its facility in Cass City, Michigan, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 2010 (6 months before the original charge in this proceeding was filed).

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 1, 2014

Mark Gaston Pearce
Chairman
Harry I. Johnson, III
Member
Nancy Schiffer
Member

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

***5** The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the following rule stated in paragraph 11 of our Values and Standards of Behavior Policy: “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 NOT maintain the following rule stated in paragraph 21 of our Values and Standards of Behavior Policy: “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.”

WE WILL NOT maintain the following rule stated in paragraph 16 of our Values and Standards of Behavior Policy: “We will represent Hills & Dales in the community in a positive and professional manner in every opportunity.”

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days of the Board's Order, revise or rescind paragraphs 11, 16 and 21 of our Values and Standards of Behavior Policy, and WE WILL advise employees in writing that we have done so and that the unlawful rules will no longer be enforced.

WE WILL furnish you with inserts for the current Values and Standards of Behavior Policy MBEA that (1) advise that the unlawful paragraphs in the rules have been rescinded, or (2) provide the language of lawful rules; or WE WILL publish and distribute a revised Values and Standards of Behavior Policy that (1) does not contain the unlawful paragraphs, or (2) provides the language of lawful rules.

HILLS AND DALES GENERAL HOSPITAL

Jennifer Brazeal, Esq., for the Acting General Counsel.

Timothy Ryan, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge.

This case was tried in Saginaw, Michigan on January 9, 2012. Daniel Corlis filed the original charge in this case on March 16, 2011, and filed an amended charge on April 14, 2011.[1] The Acting General Counsel issued the complaint on November 15, 2011.

The complaint alleges that Hills and Dales General Hospital (the Respondent or the Hospital) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a Values and Standards of Behavior policy that includes overbroad provisions that restrict employee rights under Section 7 of the Act. (General Counsel (GC) Exh. 1(e), pars. 6-7)

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

***6** The Respondent, a corporation, provides acute hospital care at its facility in Cass City, Michigan, where it annually derives gross revenues in excess of $250,000, and purchases and receives at its Michigan facilities goods valued in excess of $5,000 directly from points outside the state of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exhs. 1(e), pars. 3-4; 1(f), pars. 3-4).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Hospital's Culture in 2005

In 2005, the Hospital was struggling with a poor work environment. Among other problems, Hospital departments were not cooperating with each other, and employee relationships were suffering due to “back-biting and back stabbing.” As a result, employee satisfaction was low, employees were looking for other job opportunities (outside of the Hospital), and patients were seeking health care in other hospitals. (Transcript (Tr.) 26.)

B. The Hospital Develops and Adopts its Values and Standards of Behavior Policy

In 2006, the Hospital decided to begin working on changing its culture, and to that end began implementing measures that had been used successfully by another hospital that had faced similar problems. (Tr. 26-27, 31.) Among other measures, the Hospital set up employee teams to address issues such as standards and performance, employee recognition, continuous improvement, communication, and service recovery. (Tr. 27, 31.)

As its first project, the Hospital's standards and performance team took on the task of developing a statement of values and standards. (Tr. 31.) Using the values and standards statement of another hospital as a template, the standards and performance team distributed a draft set of standards to all employees for review and comment. After editing the draft standards based on

the first round of employee feedback, the standards and performance team circulated two additional drafts to employees before settling on a final Values and Standards of Behavior Policy for the Hospital. (Tr. 32-35; see also Jt. Exh. 5.)

The Hospital's Values and Standards of Behavior policy covers a wide range of topics, including customer service, respect, teamwork, attitude, continuous improvement and fun. (Jt. Exh. 4.) In this case, the following paragraphs from the Respondent's Values and Standards of Behavior policy are at issue:

Teamwork

. . . .

11. We will not make negative comments about our fellow team members [3] and we will take every opportunity to speak well of each other.

. . . .

16. We will represent Hills & Dales in the community in a positive and professional manner in every opportunity.

Attitude

. . . .

21. 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.

(Jt. Exh. 4 at pp. 2-3; see also GC Exh. 1(e), pars. 6-7.) The Hospital has never given employees specific examples of what conduct would be considered ""negative" or "positive and professional." (Tr. 41.)

C. How the Hospital Uses its Values and Standards of Behavior Policy

***7** As a public declaration of its new culture, the Hospital asked employees to sign (on a voluntary basis) poster-sized copies of the Values and Standards of Behavior policy. The Hospital then framed the posters and placed them in the lobby (as well as other locations) to enable patients to see them. (Tr. 35-36.) The Hospital also asked employees to sign individual copies of the policy (which were then placed in the employees' personnel files), and has included the policy in its human resources policy manual. (Tr. 36-37); Jt. Exh. 6 at pp. 6-8 (including a form that employees sign to acknowledge receipt of the human resources policy manual).)

The Hospital has also used the Values and Standards of Behavior policy as a basis for employee discipline. For example, on March 4, 2011, the Hospital cited paragraph 16 of the policy when it issued Danielle Corlis a written warning for posting the following comment on Facebook:

Holy shit rock on [S!]. Way to talk about the douchebags you used to work with. I LOVE IT!!!

(Jt. Exh. 3; see also Tr. 15-16; Jt. Exh. 2 (Corlis was responding to remarks by a former Hospital employee who was discharged for, as the employee described it, "playfully throwing a yogurt cup at [her] boss").) [4]

The Hospital's Values and Standards of Behavior policy remains in effect. (Tr. 17-18, 29.) Since beginning its efforts to change its culture in 2006, the Hospital has noted improvements in employee and patient satisfaction, and the Hospital has improved its ability to attract and retain personnel. (Tr. 28-29.)

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all or nothing propositions--indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

***8** In this case, credibility is generally not at issue because all three witnesses provided unrebutted testimony and came across as poised and forthright in their testimony. The Findings of Fact are accordingly based on the testimony of all three witnesses who testified at trial.

B. The Validity of Paragraphs 11, 16 and 21 of the Hospital's Values and Standards of Behavior Policy

1. Applicable legal standards

The Acting General Counsel alleges that by maintaining paragraphs 11, 16 and 21 of its Values and Standards of Behavior policy, the Hospital is violating Section 8(a)(1) of the Act because those paragraphs of the policy constitute overbroad restrictions of employee rights protected under Section 7 of the Act. (GC Exh. 1(e), pars. 6-7.)

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. See *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009).

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The Board has articulated the following standard that specifically applies when it is alleged that an employer's work rule violates Section 8(a)(1):

If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

NLS Group, 352 NLRB 744, 745 (2008) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004)), adopted in 355 NLRB No. 169 (2010), enfd. 645 F.3d 475 (1st Cir. 2011). As with all alleged Section 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer . . ., and such a determination appropriately takes account of the surrounding circumstances." *The Roomstore*, 357 NLRB No. 143, slip op. at 1 fn. 3 (2011).

***9** The Board has issued two decisions that are instructive on how the *Lutheran Heritage Village-Livonia* standard should apply to work rules such as the ones at issue in this case. In *Claremont Resort & Spa*, the Board was presented with a work rule that prohibited "negative conversations" about employees or managers and warned employees that such conversations were in violation of the employer's standards of conduct and could result in disciplinary action. 344 NLRB 832, 832, 836 (2005). Applying the test set forth in *Lutheran Heritage Village-Livonia*, supra, the Board found that the rule was unlawful because its "prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities." *Claremont Resort & Spa*, 344 NLRB at 832.

In *Hyundai America Shipping Agency*, the Board was presented with a number of work rules that the Acting General Counsel challenged as unlawful. 357 NLRB No. 80, slip op. at 1 (2011). The Board agreed that the employer violated Section 8(a)(1) of the Act by maintaining work rules that threatened employees with discipline if they disclosed information from their personnel files, or if they complained to their coworkers instead of voicing complaints directly to their supervisor or the human resources office. Id. However, the Board also held that it was lawful for the employer to threaten employees with discipline for "indulging in harmful gossip" and "exhibiting a negative attitude toward or losing interest in your work assignment." Id., slip op. at 2. Regarding the ""harmful gossip" rule, the Board held that employees could not reasonably construe the rule as prohibiting Section 7 activity because the rule did not prohibit discussions about managers, and was only directed at gossip, which was commonly defined as chatty talk or rumors or reports of an intimate nature. Id. (distinguishing the work rule at issue in *Claremont,* which referred to any negative conversations about employees or managers, and thus implicitly extended to protected activity). Similarly, in finding that the rule prohibiting a "negative attitude toward your work assignment" was lawful, the Board explained that the wording of the rule only applied to an employee's attitude toward his or her work assignment and did not expressly prohibit employee conversations, and thus was less likely to be construed as prohibiting protected concerted activities. Id., slip op. at 2-3.

2. Analysis

***10** The Acting General Counsel takes issue with paragraphs 11, 16 and 21 of the Hospital's Values and Standards of Behavior Policy because they state work rules that either prohibit "negative comments about our fellow team members" or "negativity or gossip" (pars. 11 and 21) or direct employees to be "positive and professional" (par. 16). In the Acting General Counsel's view, those work rules are overbroad because a reasonable employee would conclude that the rules prohibit protected activity such as employee discussions about the terms and conditions of their employment. (Tr. 9-10; GC Br. at 5) In its defense, the Respondent maintains that the work rules cannot be reasonably interpreted as restricting employee activities that are protected by Section 7 of the Act. (Tr. 11; R. Br. at 5)

In presenting its case, the Acting General Counsel essentially argued that the text of the work rules themselves establishes that the rules are unlawful. There is no evidence that the Hospital made statements or engaged in conduct that affirmatively linked its rules to protected activity, [5] and thus the merits of the Acting General Counsel's challenges to the Hospital's work rules turn solely on the language of the rules themselves.

a. Values and Standards of Behavior Policy--paragraph 11

Paragraph 11 of the Hospital's Values and Standards of Behavior Policy states that "[w]e will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other." The term "team member" includes everyone who works at the Hospital, including managers and employees. (See Findings of Fact (FOF) Section II(B).)

I agree with the Acting General Counsel that paragraph 11 of the Hospital's Policy is unlawful because employees would reasonably construe the language of the rule to prohibit Section 7 activity. Although the rule does not explicitly restrict Section 7 activity and the Acting General Counsel did not offer evidence that the Hospital made statements or engaged in

conduct that linked the rule to such activity, paragraph 11 implicitly includes protected activities because it prohibits negative comments about managers. Indeed, the Board's decision in *Claremont Resort & Spa* is directly on point, as the Board found that the respondent's rule prohibiting “negative conversations” about managers “would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities.” *Claremont Resort & Spa*, 344 NLRB at 832; see also *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 2 (explaining that the work rule at issue in *Claremont Resort & Spa* implicitly included protected activity). The Hospital's work rule prohibiting “negative comments” about fellow team members is virtually identical to the work rule that the Board found unlawful in *Claremont Resort & Spa*, and thus by its terms also would reasonably be construed by employees as implicitly prohibiting protected activity.

***11** Accordingly, I find that the Hospital violated Section 8(a)(1) of the Act by maintaining the work rule stated in paragraph 11 of the Hospital's Values and Standards of Behavior Policy.

b. Values and Standards of Behavior Policy--paragraph 16

Paragraph 16 of the Hospital's Values and Standards of Behavior Policy states that “[w]e will represent Hills & Dales in the community in a positive and professional manner in every opportunity.” (FOF Section II(B).) The Acting General Counsel asserts that the work rule is unlawful because employees could conceivably violate the rule by engaging in protected activities that the Hospital would not view as “positive.” (See Tr. 10.)

The Acting General Counsel's challenge to the rule in paragraph 16 fails, as I do not find that an employee would reasonably interpret the Hospital's directive to represent the Hospital “in the community in a positive and professional manner” as a rule that prohibits Section 7 activities. Paragraph 16 does not explicitly or implicitly prohibit Section 7 activity. To the contrary, the surrounding circumstances indicate that the Hospital adopted the rule for the more narrow (and lawful) purpose of encouraging employees to assist with improving the Hospital's reputation in the community by maintaining a positive and professional attitude when interacting with the community. (FOF, Section II(A)-(B) (noting that the Hospital developed the rule in paragraph 16 in connection with its efforts in 2006 to improve its culture).)

The Board's decision in *Tradesmen International* is applicable here, as in that case, the Board held that a work rule that stated that employees were “expected to represent the company in a positive and ethical manner” did not violate Section 8(a)(1). 338 NLRB 460, 461-462 (2002). The Board declined to read the word “positive” in isolation, and found that employees would not reasonably believe that an expectation that they represent the company in a positive and ethical manner amounted to a work rule that prohibited Section 7 activities, given the context of the employer's efforts to prohibit conflicts of interest and the lack of any actions by the employer that established a link between the rule and protected activities. [6] Id. at 462.

I find similar deficiencies in the Acting General Counsel's challenge to the rule in paragraph 16 that employees represent the Hospital in the community in a positive and professional manner. Although the Acting General Counsel asserts that the word “positive” is ambiguous, like the Board in *Tradesmen International* I find that the term “positive” cannot be read in isolation. Rather, in the context of the Hospital's efforts to improve its reputation in the community, paragraph 16's call for employees to represent the hospital in a positive and professional manner is a lawful call for employees to maintain a high standard of professionalism with potential (or actual) customers at every opportunity. Since the terms of paragraph 16 are clear and serve a lawful purpose, and since there is no evidence that the Hospital made statements or engaged in conduct that linked paragraph 16 to protected activity, the Acting General Counsel did not meet its burden of proving that the rule is unlawful.

c. Values and Standards of Behavior Policy--paragraph 21

***12** Finally, paragraph 21 of the Hospital's Values and Standards of Behavior Policy states that “[w]e 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.” (FOF

Section II(B).) The Acting General Counsel maintains that the work rule violates the Act because a reasonable employee would construe the term "negativity" as including protected activity. (Tr. 10.)

Paragraph 21 would arguably be on solid ground if it was limited only to prohibiting gossip. Indeed, in *Hyundai America Shipping Agency*, the Board explained that because gossip is defined as "rumor or report of an intimate nature" or "chatty talk," a work rule prohibiting gossip could not be reasonably construed as prohibiting Section 7 activity. 357 NLRB No. 80, slip op. at 2; see also *Southern Maryland Hospital*, 293 NLRB 1209, 1221-1222 (1989) (explaining that an employer may lawfully maintain a work rule that prohibits "malicious gossip"), enfd. in pertinent part, 916 F.2d 932 (4th Cir. 1990).

What makes paragraph 21 problematic, however, is that it also prohibits employees from engaging in or listening to "negativity." The Board has found work rules that prohibit negativity to violate Section 8(a)(1) on multiple occasions, usually in cases where the record has included evidence that the employer made statements or engaged in conduct that linked the negativity rule to protected activity. See, e.g., *The Roomstore*, 357 NLRB No. 143, slip op. at 1 fn. 3 (finding that an employer's work rule prohibiting "any type of negative energy or attitudes" was unlawful because the evidentiary record showed that the employer made statements that linked the rule to protected activity); *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69, slip op. at 14-15 (2010) (employer's negativity policy was unlawful because the evidentiary record showed that the policy proscribed protected activity in the form of complaints about management's conduct and other working conditions). That line of cases does not help the Acting General Counsel's cause here, because the Acting General Counsel did not present any evidence that the Hospital made remarks that linked paragraph 21 to protected activity, and the surrounding circumstances show that the Hospital adopted paragraph 21 to address a work environment that by all accounts was marred with a history of back biting and back stabbing.

However, the Board has also found fault with work rules that are overbroad and ambiguous by their terms. For example, in *2 Sisters Food Group*, the Board found that it was unlawful for an employer to maintain a work rule that subjected employees to discipline for an "inability or unwillingness to work harmoniously with other employees," because the rule was patently ambiguous and so imprecise that employees would reasonably construe the rule as prohibiting discussions and disagreements between employees that related to protected Section 7 activities. 357 NLRB No. 168, slip op. at 2 (2011); see also *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 2 (explaining that the Board found that the work rule at issue in *Claremont Resort and Spa*, 344 NLRB 832 violated the Act because the rule prohibited negative employee conversations generally). It is here that the Acting General Counsel's challenge to paragraph 21 gains traction, because like the work rule that the Board found unlawful in *2 Sisters Group*, the Hospital's prohibition of ""negativity" is so patently ambiguous, imprecise and overbroad that a reasonable employee would construe it as prohibiting protected discussions about working conditions and the terms and conditions of employment. I therefore find that the Hospital violated Section 8(a)(1) of the Act by maintaining the work rule stated in paragraph 21 of the Hospital's Values and Standards of Behavior Policy.

CONCLUSIONS OF LAW

***13** 1. By maintaining a work rule (par. 11 of its Values and Standards of Behavior Policy) that proscribes making "negative comments about our fellow team members," the Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thus violated Section 8(a)(1) of the Act.

2. By maintaining a work rule (par. 21 of its Values and Standards of Behavior Policy) that proscribes engaging in or listening to negativity, the Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thus violated Section 8(a)(1) of the Act.

3. By committing the unfair labor practices stated in Conclusions of Law 1-2 above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. I recommend dismissing the allegation in the complaint that asserts that the Respondent violated the Act by maintaining the work rule stated in paragraph 16 of the Respondent's Values and Standards of Behavior Policy.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by maintaining a work rule that prohibits negative comments about fellow team members (defined as including employees and managers), and by maintaining a work rule that prohibits engaging in or listening to negativity, I shall recommend that the Respondent be ordered to revise or rescind those rules (paragraphs 11 and 21 of the Values and Standards of Behavior Policy).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [7]

ORDER

The Respondent, Hills and Dales General Hospital, Cass City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a work rule that prohibits negative comments about fellow team members.

(b) Maintaining a work rule that prohibits employees from engaging in or listening to negativity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's order, revise or rescind the rules stated in paragraphs 11 and 21 of the Hospital's Values and Standards of Behavior Policy.

(b) Within 14 days after service by the Region, post at its facility in Cass City, Michigan, copies of the attached notice marked "Appendix." [8] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 2010 (6 months before the original charge in this proceeding was filed).

***14** (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 17, 2012

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

***15** FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the following rule stated in paragraph 11 of our Values and Standards of Behavior Policy: "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 NOT maintain the following rule stated in paragraph 21 of our Values and Standards of Behavior Policy: "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."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revise or rescind the rules stated in paragraphs 11 and 21 of our Values and Standards of Behavior Policy.

HILLS AND DALES GENERAL HOSPITAL

Footnotes

1 By unpublished Order issued on March 21, 2013, the Board granted the General Counsel's motion to strike the Respondent's untimely filed amended exceptions.

2 We shall modify the judge's recommended Order to reflect the additional 8(a)(1) violation found here and, as explained in the Amended Remedy Section, to include the standard remedial language for the violations found. We shall also substitute a new notice to conform to the Order as modified.

3 The General Counsel did not allege that the prohibition of gossip in paragraph 21 was unlawful. Citing the majority opinion in *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 2 (2011), the judge observed that this paragraph "would arguably be on solid ground" if limited to this prohibition. For the reasons set forth in his dissent in *Hyundai,* slip op. at 2 fn. 4, Chairman Pearce disagrees with the judge's observation.

4 We thus do not rely on any contrary implication in the judge's observation that the Board has "usually" found work rules prohibiting employee negativity to be unlawful where the record includes evidence of surrounding circumstances indicating that the employer has by word or deed linked the challenged rule to protected activity.

5 Chairman Pearce and Member Schiffer did not participate in *Tradesmen* and express no view as to whether it was correctly decided.

6 For the reasons stated above, we disagree with our colleague's view that paragraph 16 is analogous to the rule found lawful in *Tradesmen*. Nor are we persuaded to analogize paragraph 16 to the "appropriate business decorum" rule found lawful in *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 1 (2012). That rule appeared in the context of an "Electronic Communications

and Technology Policy" and expressly focused on electronic communications "for business use," thus making clear that the rule concerned how employees communicated with others while carrying out their duties for the employer. By contrast, paragraph 16 broadly applies to employees' activities in the community at large, which clearly could encompass protected activities engaged in on employees' own time.

Member Johnson would adopt the judge's finding that paragraph 16 was lawful, essentially for the reasons stated by the judge. He disagrees that there is a meaningful distinction between a rule requiring "positive and ethical" public behavior and one requiring "positive and professional" behavior. Ethical behavior is behavior that is in accordance with the standards for correct conduct or practice, especially the standards of a profession. The term ""professional conduct" refers to conduct appropriate to a profession. Clearly then the two terms may address the same concept. Here, in a hospital setting, the term "professional conduct" was used appropriately. Further, the rule at issue here is more akin to the rule found lawful in *Costco Wholesale Corp.*, supra requiring "appropriate business decorum" in communicating with others, than to the rule found unlawful in the same case and relied on by his colleagues.

7 If this Order is enforced by a judgment of a United State court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."

1 All dates are in 2011 unless otherwise indicated.

2 The Acting General Counsel's motion to strike a seven-page transcript that was inadvertently included in GC Exhibit 1 is hereby denied as moot. (See GC Br. at 1 fn. 2 (noting that the transcript in question is from an immigration proceeding that is unrelated to this case).) The materials that the Acting General Counsel identified were not included in my copy of the trial exhibits, nor were they included in the electronic copy of the trial exhibits that is stored in the electronic files for this case.

3 The term "team member" covers everyone who works at the Hospital, ranging from the CEO to employees in entry level positions. (Tr. 40.)

4 The complaint does not allege that the Hospital violated the Act by terminating the employee based on the yogurt cup incident or by disciplining Corlis based on her Facebook posting. Only the Hospital's maintenance of the work rules stated in paragraphs 11, 16 and 21 of the Hospital's Values and Standards of Behavior policy is at issue. (See GC Exh. 1(e).)

5 Although the Acting General Counsel called Danielle Corlis to testify about the warning that the hospital issued to her on March 4, the Acting General Counsel only presented that testimony to show that the rules remain in effect and can be used to discipline employees. (Tr. 22.) There is no evidence (or argument by the Acting General Counsel) that the remarks that Corlis made on Facebook were protected by the Act.

6 The Acting General Counsel argued that I should adopt the reasoning set forth in the dissent in *Tradesmen International* (see GC Br. at 6 fn. 3), but I am bound to follow the majority opinion in that decision.

7 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

8 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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