

# Over Hill, Over Dale, the NLRB Pens Another Cautionary Tale: Board Strikes Down Work Rules Prohibiting Negativity and Gossip

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By David Katz

The NLRB is back at it, finding last week in *Hills and Dales General Hospital*, that seemingly innocuous policies prohibiting negativity and gossip in the workplace and requiring employees to represent their employer in a positive and professional manner violates the National Labor Relations Act.

We have previously written about the NLRB's recent crusade against ostensibly vanilla workplace policies that employees may "reasonably" construe, in the Board's estimation, as prohibiting activity protected by the NLRA (see [here](#), [here](#), [here](#), and [here](#)). At issue in *Hills and Dales* were the following provisions in the Hospital's Values and Standards of Behavior policy, a policy jointly developed by management and Hospital employees:

### Teamwork

11. We will not make negative comments about our fellow team members 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.

The Hospital had used the Values and Standards of Behavior policy as a basis for employee discipline. For example, the Hospital cited paragraph 16 of the policy in issuing an employee a written warning for posting, in response to remarks by a former Hospital employee who was discharged for "playfully" throwing a yogurt cup at her boss, the following eloquent comment on Facebook:

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

However, it was not the Hospital's application of the policy that landed it in hot water. Rather, it was the language of the policy on its face. In that regard, the Board found that the prohibitions on "negative comments" and "negativity or gossip" as well as the requirement that employees represent the Hospital in the community in a "positive and professional" manner were overbroad and ambiguous, and that employees could reasonably construe such language as discouraging them from engaging in protected activity (e.g., protesting unfair labor practices or complaining about working conditions). Interestingly, one of the three Board Members on the panel disagreed that the "positive and professional" language in paragraph 16 of the policy was unlawful, citing a 2002 Board decision finding lawful a similar policy requiring employees to represent the employer in a "positive and ethical" manner. The other two Board Members on the panel, however, distinguished "ethical manner" from "professional manner" by maintaining that combining "positive" with "ethical" was "significantly narrower" in scope than combining "positive" with "professional." The Board found that the word "professional" indicates "a broad and flexible concept as applied to employee behavior."

So to recap: phrases such as “negative comments” and “negativity or gossip” will not pass muster under the current Board, the phrase “positive and ethical” is fine, and yet the phrase “positive and professional” is unlawful. Got all that?

So where does that leave us (besides frustrated)? In short, it is highly unpredictable how the current Board will view well-meaning workplace conduct and “good behavior” policies that may have been in place for decades. It may well come down to which way the wind is blowing on any given day. That being said, there is a clear and unmistakable trend toward striking down what the Board considers overbroad and ambiguous rules that could conceivably be construed as discouraging employees from engaging in protected speech. Employers should therefore carefully review all such policies, whether they are found in a handbook, code of conduct or elsewhere, to ensure (as best they can) that the policies are narrowly-tailored and do not restrict protected activity.

## Authors