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Work Rules Hanging in the Balance? NLRB Dissenter Proposes Balancing Test Blueprint for Work Rule Challenges, a Significant Departure from Board Precedent

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Earlier this month, the NLRB struck down a couple of facially-neutral workplace civility rules in an employer's Code of Conduct. Ho hum, business as usual. (We have written extensively about the Board's crusade against what it considers overbroad work rules. See, for example, our posts **here**, **here** and **here**) What is fascinating, however, about this otherwise unremarkable **decision** is the spirited dissent penned by Member Philip A. Miscimarra, calling for the NLRB to overrule Board precedent which renders unlawful all employment policies, work rules and handbook provisions whenever employees could "reasonably construe" the language to prohibit the exercise of rights afforded by National Labor Relations Act Section 7, which protects "concerted" activities that employees engage in for the purpose of "mutual aid or protection." Rather, as detailed below, Member Miscimarra proposes a balancing test, which would take into consideration, at minimum, (i) the potential adverse impact of the rule on NLRA-protected activity, and (ii) the legitimate justifications an employer may have for maintaining the rule.

Background

The *Beaumont Hosp.* matter arises from a heart-wrenching set of circumstances related to the death of a newborn baby at a hospital. A hospital investigation concluded that the infant's death resulted in part from a lack of communication among hospital personnel. A subsequent investigation led to the discharge of two nurses for engaging in intimidating and bullying behavior. Member Miscimarra and the majority agree that the discharges were lawful. They disagree, however, on work rules.

The hospital's Code of Conduct identifies the following justifications for the two rules at issue:

> It is the intention of [the hospital] to foster effective working relationships among all hospital employees and physicians in order to provide and maintain high quality and safe patient care. Such relationships must be based upon mutual respect to avoid disruption of patient care or to hospital operations.
>
> It is the expectation of hospital management that employees and physicians promote and maintain a professional environment in which all individual[s] are treated with dignity and respect.

After this introduction, the Code of Conduct sets forth the several rules, including the following two provisions that the majority found unlawful:

1. Conduct on the part of [an] employee or physician … that impedes harmonious interactions and relationships will not be tolerated.
2. Improper conduct or inappropriate behavior … includes … [n]egative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.

Under the NLRB's 2004 *Lutheran Heritage* decision, employment policies, work rules and handbook provisions are rendered unlawful whenever employees could "reasonably construe" the language to prohibit Section 7 activity. The majority here applied *Lutheran Heritage* in invalidating the two above-

quoted rules, and in so doing, downplayed the importance of the decision. The majority characterized its decision as follows:

> The practical impact of our decision today is modest--an order requiring modification of a few provisions of an extensive employer handbook, the vast majority of which was either unchallenged or upheld. In short, this case is (or at least should be) a relatively unremarkable application of well-established law to uncontroverted fact.

The Dissent

In his dissent, however, Member Miscimarra saw things quite differently, characterizing *Lutheran Heritage* 's flaws in more colorful terms. He stated:

> Under *Lutheran Heritage*, reasonable work requirements have become like Lord Voldemort in Harry Potter: they are ever-present but must not be identified by name. Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. … Yet, in the world created by *Lutheran Heritage*, it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.

Describing it as "too simplistic at the same time it is too difficult to apply," Member Miscimarra identified "multiple defects" in *Lutheran Heritage*'s "reasonably construe" standard, including:

- The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions.
- The *Lutheran Heritage* standard stems from several false premises that are contrary to the NLRA, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks.
- In many cases, *Lutheran Heritage* invalidates facially neutral work rules *solely* because they are ambiguous in some respect, and this requirement of linguistic precision stands in sharp contrast to the Board's treatment of "just cause" provisions, benefit plans and other types of employment documents.
- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's own discretion by rendering unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity.
- *Lutheran Heritage* does not permit the Board to differentiate between and among different industries and work settings.
- The *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results, as it has been exceptionally difficult to apply, creating enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

On this last point, the dissent created a chart summarizing the inconsistencies and arbitrary results yielded through application of the *Lutheran Heritage* test to one subset of work rules: The following represents a small sampling of civility rules in cases parsed by the administrative law judge who initially presided over this case:

Lawful Rule

- no "abusive or threatening language to anyone on Company premises"
- no "verbal abuse," "abusive or profane language," or "harassment"
- no "conduct which is ... injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees
- prohibiting "conduct that does not support the … Hotel's goals and objectives"

Unlawful Rule

- no "loud, abusive, or foul language"
- no "false, vicious, profane or malicious statements toward or concerning the ... Hotel or any of its employees"
- no "inability or unwillingness to work harmoniously with other employees"
- no "negative energy or attitudes"
- no "[n]egative conversations about associates and/or managers"

In evaluating these results, Member Miscimarra rhetorically asked: "Do these [examples] permit one to understand what the 'lawful' rules do correctly and what the 'unlawful' rules do incorrectly? I believe the rather obvious answer is no." He continued: "Would an employee 'reasonably construe' a difference between [the rules in the first column and those in the second column]? ... Here as well, I believe the rather obvious answer is no."

Most significant to the dissent, in concluding that the Board should overrule *Lutheran Heritage* and find that the hospital did not violate the NLRA merely by maintaining the disputed Code of Conduct provisions, Member Miscimarra articulated an alternative, "balancing test" approach. Specifically, he proposed that "when evaluating a facially neutral policy, rule or handbook provision, … the Board [should] evaluate at

least two things: (i) the potential adverse impact of the rule on NLRA-protected activity, and (ii) the legitimate justifications an employer may have for maintaining the rule." In other words, "[t]he Board must engage in a meaningful balancing of these competing interests, and a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity."

Takeaway

It remains to be seen whether this balancing test, taking into consideration both the impact of the work rule and the employer's justifications behind it, gains any traction either at the Board-level or in the courts. Odds are, Member Miscimarra's dissent provides a blueprint for a Circuit Court test case aimed at toppling *Lutheran Heritage*, which employers (and frankly employees and unions) can agree makes it nearly impossible to confidently determine which work rules (including workplace civility rules) are lawful and which are not.

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