

# EMPLOYMENT LAW COMMENTARY

Volume 26, Issue 8  
August 2014

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## THE DEATH OF COURTESY AND CIVILITY UNDER THE NATIONAL LABOR RELATIONS ACT

By [Aurora V. Kaiser](#)

In January 2013, we reported on the increasing focus of the National Labor Relations Board (NLRB or the “Board”) on employer policies and rules in non-unionized workplaces. The NLRB has continued in full force, creating more and more tension between the National Labor Relations Act (NLRA or the “Act”) and employers’ legitimate interests in maintaining and enforcing workplace guidelines in a nondiscriminatory fashion.

This Employment Law Commentary focuses on the maintenance and enforcement of courtesy and civility rules.<sup>1</sup> In these cases, the Board has taken extreme positions that increasingly ignore competing interests and obligations of employers. Among the obligations that can conflict with Section 7 in this context, employers must protect their employees from harassment, including

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on the basis of sex and race, by disciplining employees making harassing comments and engaging in harassing behavior and by maintaining civil workplaces that are not conducive to harassment.<sup>2</sup> Employers also have a legitimate interest in maintaining a civil workplace simply to promote employee productivity and job satisfaction, as well as ensuring appropriate levels of customer service.

## The Framework: Regulating Workplace Rules Under the NLRA

Employees have the right to engage in concerted activity under Section 7 of the NLRA.<sup>3</sup> Concerted activity is activity undertaken for the employees' mutual aid and protection, including, for example, discussing the terms and conditions of employment and engaging in organizing activities. Under Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."<sup>4</sup>

Under the general framework of the Act, the National Labor Relations Board regulates employer maintenance and enforcement of generally applicable workplace rules in several ways.

**First**, an employer commits an unfair labor practice, under Section 8(a)(1), if it maintains a rule that would reasonably tend to chill employees in the exercise of their Section 7 rights. If it expressly restricts Section 7 activity, the rule is unlawful.<sup>5</sup> Further, if it does not expressly restrict Section 7 activity, the rule is still 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."<sup>6</sup> In reading the rule, the Board should "refrain from reading particular phrases in isolation."<sup>7</sup> Similarly, the Board should not seek out "arguable ambiguity . . . through parsing the language of the rule, viewing [a] phrase . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights."<sup>8</sup>

**Second**, employers may not discipline employees for engaging in protected activity. In the event that "the very conduct for which employees are disciplined is itself protected concerted activity," then the discipline violates Section 8(a)(1) regardless of the employer's motive or a showing of animus.<sup>9</sup> Similarly, if an employee violates a workplace rule and is disciplined, the discipline is unlawful if the employee "violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act."<sup>10</sup>

## Workplace Conduct: Courtesy and Professionalism

The cases that likely demonstrate the biggest gap between the single-minded ideals espoused by the Board and the practicalities of managing a workforce are the Board's decisions in the areas of civility and professionalism. In these cases, the Board would hamstring employers' ability to govern basic workplace conduct, like requiring courtesy toward other employees or customers, or prohibiting or punishing profanity, threats, and abusive language. The cases create friction between the Act and employers' need to maintain civility in the workplace—which in turn makes preventing harassment and ensuring employee satisfaction and productivity more difficult.

### Drafting Courtesy Rules

The Board has invalidated a number of rules that are unquestionably implemented for the purpose of ensuring a well-managed, strife-free workplace. Importantly, it is not relevant in these cases whether the rule at issue was implemented for an improper purpose or even whether the rule has been applied to activity that is actually protected by the Act; the only question is whether an employee would read the rule as prohibiting protected conduct. Unfortunately, the Board has concluded that the aspirational language of courtesy rules is often vague and over broad—frequently noting the lack of definitions of vague terms—and therefore would be read by employees to prohibit protected conduct, such as being critical of their pay or other conditions of work, co-workers, or their employer.

In the first of a string of cases involving courtesy, the Board invalidated a "Courtesy" policy in *Karl Knauz Motors*, 358 NLRB No. 164 (2012).<sup>11</sup> Although precedent dictates that the Board read the rule as a whole, the Board here tortuously parsed this rule to find that it violated the Act.

The full policy at issue provided as follows:

Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The majority concluded that the Courtesy rule was unlawful because, notwithstanding the title or first two sentences of the rule, "employees would reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity."

For similar reasons, the Board has invalidated rules that prohibit employees from being discourteous, even to guests. In *First Transit, Inc.*, the Board invalidated a bus company's rule that prohibits "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public. Disorderly conduct during working hours."<sup>12</sup> The Board focused on the phrase relating to employees, and struck down the entire rule, finding it similar to a rule found unlawful in a previous Board decision prohibiting the "inability or unwillingness to work harmoniously with other employees."<sup>13</sup>

In another case brought by a former Hooters waitress, an administrative law judge (ALJ) of the NLRB invalidated rules that prohibited discourtesy to guests and an insubordination policy that applied to courtesy to guests.<sup>14</sup> Specifically, two rules prohibited the following disrespectful conduct:

Disrespect to our guests including discussing tips, profanity or negative comments or actions.

Insubordination to a manager or lack of respect and cooperation with fellow employees or guests

The ALJ concluded that both rules were vague and over broad. The portion of the rule prohibiting the discussion of tips violated the employees' rights to discuss wages with non-employees. The remainder of the rule ("Disrespect to our guests including . . . profanity or negative comments or actions") was "over broad and unqualified" in part because no examples of the prohibited conduct were included. The rule prohibiting insubordination was likewise over broad as it did not define "insubordination," "lack of respect," or "cooperation."

Similarly, the Board also recently invalidated several rules that prohibited gossip and negativity.<sup>15</sup> The first rule prohibited "gossip," stated that gossip "is an activity that can drain, corrupt, distract and down-shift the company's productivity, moral, and overall satisfaction," and defined gossip as follows:

1. Talking about a person's personal life when they are not present
2. Talking about a person's professional life without his/her supervisor present
3. Negative, or untrue, or disparaging comments or criticisms of another person or persons
4. Creating, sharing, or repeating information that can injure a person's credibility or reputation
5. Creating, sharing, or repeating a rumor about another person

6. Creating, sharing or repeating a rumor that is overheard or hearsay.

The second company's rule stated "We will not engage in or listen to negativity or gossip" and also had a rule that stated "We will represent Hills & Dales [General Hospital] in the community in a positive and professional manner in every opportunity."

In both cases, the Board concluded that the quoted rules were over broad and could be interpreted by reasonable employees as infringing on their right to discuss the terms and conditions of employment. In the former case, an employee was reinstated with back pay after she was terminated for, among other things, violating the rule.

In slightly better news, this May the Board has finally found a floor: Employers may, at least, prohibit employees from using "Profane or abusive language where the language is uncivil, insulting, contemptuous, vicious, or malicious."<sup>16</sup>

### Enforcing Courtesy Rules

It is not just the maintenance of courtesy rules that can get employers into trouble. If a rule is over broad and an employee is terminated for violating that rule, the Board may order reinstatement of the employee with back pay. And a few cases demonstrate that the Board is equally aggressive in cases challenging enforcement of workplace rules as in maintenance cases. These cases clearly illustrate the tension between the NLRA and other workplace laws that require a certain level of decorum be maintained in the workplace.

Even though employers can at least theoretically maintain rules prohibiting profane speech (see above), they may not be able to terminate employees who violate the rule. Repeatedly the Board has sided with employees who use profane speech or improper gestures, when it concludes the employee was engaging in protected conduct at the time. (Remember: This Board takes a very broad view of what is protected.) Two recent decisions illustrate the issue:

**First**, on remand from the Second Circuit, the Board found that Starbucks unlawfully terminated an employee after he engaged in a heated dispute with his manager in which he used many expletives—in front of customers. Originally, the Board approved of the employee's conduct, and Starbucks appealed. The Second Circuit remanded, noting "We think the analysis of [the Board] improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers." On remand, the Board did not

take this admonishment to heart, and again sided with the employee.<sup>17</sup>

**Second**, the Board likewise condoned an employee's conduct when he cursed at his supervisor, calling him a "f\*\*\*ing mother f\*\*\*er" and a "f\*\*\*ing crook," among other profanities.<sup>18</sup> He also told the supervisor that if he was terminated, the supervisor "would regret it." As a result of this meeting, the employee was terminated, and on review the Board concluded that the employer violated the Act in so doing. Although the supervisor stated he took the statement that he "would regret it" as a physical threat, the Board did not credit that testimony, since the employee did not display any physical signs of a threat. Ultimately, the Board concluded that the statements to the supervisor were not so egregious as to lose the protection of the Act. The dissent objected that the conduct was not protected, and noted "It is entirely reasonable, and to a great extent legally necessary, for many employers to insist that employees engage each other with civility rather than personally directed 'f-bombs,' even on matters where opinions differ sharply and emotions flare."

In another surprising case, the Board condoned cursing and language that had female employees submitting written complaints. In *Fresenius USA Manufacturing, Inc.*, 358 NLRB No. 138 (2012),<sup>19</sup> an employee, Kevin "Dale" Grosso, anonymously wrote "vulgar, offensive, and, in isolation, possibly threatening statements on several union newsletters left in an employee break room" with the intent of encouraging union support in an upcoming decertification election.<sup>20</sup> Specifically, Grosso wrote the following three notes on September 10, 2009:

"Dear Pussies, Please Read!"

"Hey cat food lovers, how's your income doing?"

"Warehouse workers, RIP."

Female employees complained about the statements. There were 12 employees in the warehouse unit, five of whom were female. Upon learning of the statements, several female warehouse employees complained on multiple occasions about the notes, claiming they were vulgar, offensive, and threatening. In response to the complaints, the company promised to investigate the statements and, in response to their safety concerns, the manager reminded female employees that the company maintained security cameras and he himself stayed late to ensure that they left safely. Ultimately, the female employees memorialized their complaints in written statements.

The company investigated under its anti-harassment policy, requiring management to investigate and

respond to complaints of harassment and, if harassment has occurred, to administer corrective action. After ultimately concluding that he wrote the statements, Fresenius terminated Grosso's employment.

The Board concluded that in writing those statements, Grosso was engaging in protected activity as he was seeking to encourage other employees to vote for the union. Accordingly, the termination violated the Act because he was terminated for engaging in protected concerted activity, notwithstanding the fact that he also violated the company's nondiscriminatory policy and that female employees took offense and reported the conduct in written complaints.

One Board member dissented vigorously, expressing the view—likely shared by many employers—that the majority's approach improperly insulates employees from discipline for misconduct:

I specifically dispute their implication that greater latitude must be accorded to misconduct occurring in the course of organizational activity than for other Section 7 activity, that profanity in the course of labor relations is the presumptive and permissible norm in any workplace, that remarks by one employee to another which would be unprotected on the shop floor should be protected if made in the breakroom, that comments which coworkers reasonably view as harassing and sexually insulting are not disruptive of productivity, and that threatening speech alone cannot warrant loss of statutory protection. Taken as a whole, these pronouncements confer on employees engaged in Section 7 activity a degree of insulation from discipline for misconduct that the Act neither requires nor warrants.

## Conclusion

Although it's not an easy task, employers should take some time to look over their policies to determine whether their workplace rules can be revised to minimize friction with the National Labor Relations Act, while still achieving the legitimate, nondiscriminatory purposes (and sometimes obligations) in enacting and enforcing these rules in the first place. Importantly, the Board's focus recently is on terms that it considers vague and ambiguous, so carefully crafted rules that define possibly ambiguous terms to exclude protected conduct are more likely to pass muster.

In addition, before enforcing one of these rules, take another look at the underlying conduct to determine whether it is likely to be considered protected under the Act, even if it clearly violates the workplace rule. Unfortunately, that may not end the matter as other

# Obesity and Disability Discrimination

By Caroline Stakim

Is obesity a disability and therefore a protected characteristic under EU discrimination law? Maybe, according to Advocate General Jääskinen.

The question is currently before the European Court of Justice (ECJ) in the case of *Kaltoft v Municipality of Billund*. Mr Kaltoft, a child-minder in Denmark, alleged that he was dismissed due to his obesity and that this amounted to unlawful discrimination. At over 350 pounds (160kg), he was considered morbidly obese and unable to carry out certain duties.

The Danish court referred the question of whether a person's obesity is covered under European discrimination law, and whether obesity amounts to a disability, to the ECJ.

The Advocate General's opinion on the matter is that, whilst there is no specific protection against discrimination on the basis of obesity per se, it may fall within the definition of a disability if it is "severe" to the extent that it hinders the person's full participation in professional life. In the Advocate General's view, those with a BMI of over 40 (class III obesity on the World Health Organisation's scale), known as severe, extreme, or morbid obesity, are likely to fall into that category as that level of obesity is likely to cause mobility, endurance, and mood issues. Employers need not consider the reason for or cause of the obesity in determining whether or not it amounts to a disability. Rather, it is the impact the obesity has on that person's life that is important.

Although the Advocate General's opinion is not binding on the ECJ, it is more often than not followed. Should that be the case, employers would need to consider whether any of their employees' conditions amount to a disability and, consequently, whether any reasonable adjustments are required to be made to their workspace or duties. For example, is the office furniture suitable? Should a healthy option be available in the canteen menu? And should the employee's request to work from home one day a week be accepted? These, along with decisions regarding recruitment, dismissal, and other employee-related policies, will need to be considered in light of the additional protections offered.

Case reference: *Kaltoft v Municipality of Billund* (C-354/13)

laws, including discrimination and harassment laws, should be considered before taking action.

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To view prior issues of the ELC, click [here](#).

- 1 Last January, we focused on a number of other rules and policies: arbitration agreements, policies on at-will employment, confidentiality and non-disclosure policies, and policies governing off-duty access and prohibiting "walking off" the job. As discussed in the insert, some of these cases have been invalidated by *Noel Canning*. However, we note that the Board is proceeding in the same vein in those areas, except the Board has retreated somewhat from its position in *D.R. Horton* that class-action waivers in arbitration agreements violate the Act. This retreat is signaled principally by the Board declining to appeal the Fifth Circuit's ruling in *D.R. Horton*, in which the Fifth Circuit rejected the Board's conclusion. For a fuller discussion of *D.R. Horton* and class-action waivers generally, please see our recent [Client Alert](#) on the subject. In a win for the Board, the Fifth Circuit affirmed *Flex Frac Logistics*, a case governing confidentiality rules, discussed last January.
- 2 In addition, 26 states have proposed legislation that would impose obligations on employers to prevent bullying regardless of whether it is based on a protected characteristic. See Healthy Workplace Bill, <http://www.healthyworkplacebill.org/>. These are typically entitled something along the lines of "Healthy Workplace Bill" or, as in Florida, the "Safe Work Environment Act," introduced in 2013 by Rep. Daphne Campbell, Florida HB 149. Florida's proposed legislation states that part of its purpose is the principle that "Legal protection from abusive work environments should not be limited to behavior grounded in protected class status as provided for under employment discrimination statutes" and defines "abusive conduct" as including, but not limited to, "repeated verbal abuse, such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee's work performance; or attempts to exploit an employee's known psychological or physical vulnerability."
- 3 29 U.S.C. § 157. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."
- 4 29 U.S.C. § 158.
- 5 *Lutheran Heritage Village*, 343 NLRB 646 (2004).
- 6 *Id.*
- 7 *Id.* at 646.
- 8 *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).
- 9 *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981).
- 10 *Continental Group, Inc.*, 357 NLRB No. 39 (2011).
- 11 This decision is now invalidated by *Noel Canning*, although it is likely to be treated as persuasive authority. See the insert for further discussion of *Noel Canning*. In addition, this case has been cited favorably in later decisions that were not invalidated by *Noel Canning* and thus the decision likely continues to represent the Board's approach to "courtesy" cases. See, e.g., *Latino Express, Inc.*, 360 NLRB No. 112 (2014) (citing *Karl Knauz Motors* for the proposition that a "'courtesy' rule prohibiting 'disrespectful conduct' [was] unlawful").
- 12 *First Transit, Inc.*, 360 NLRB No. 72 (2014).
- 13 *Id.* (citing *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011)).
- 14 *Hoot Wing, LLC & Ontario Wings, LLC dba Hooters of Ontario Mills*, Case Nos. 31-CA-107256, 31-CA-107259, 31-CA-104877, 31-CA-104892, 31-CA-104872, 31-CA-104874 (May 19, 2014), currently before the Board on exceptions (appeal).
- 15 *Laurus Technical Institute*, 360 NLRB No. 133 (2014) & *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014).
- 16 *First Transit, Inc.*, 360 NLRB No. 72 (2014) (reversing the administrative law judge, who had found the provision unlawful).
- 17 *Starbucks Corporation*, 360 NLRB No. 134 (2014).
- 18 *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014) (asterisks added).
- 19 This case was invalidated by *Noel Canning*, and has been remanded to the Board for the Court of Appeal. See the insert for further discussion of *Noel Canning*.
- 20 All facts are taken from the majority *Fresenius USA Mfg.* decision.

# Five Notable Workplace Rules Decisions Invalidated by *Noel Canning*: Is There a Rubber Stamp in Our Future?

By Timothy F. Ryan and Aurora V. Kaiser

On June 26, 2014, the Supreme Court invalidated 426 National Labor Relations Board (NLRB) decisions in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The effect of *Noel Canning* was to invalidate every contested Board decision between January 3, 2012, and August 4, 2013, as the Board had two or fewer properly appointed members during that time. No decisions on or after August 5, 2013, were affected.

The Board has been taking an increasing interest in common workplace policies, and has invalidated a number as violating employees' Section 7 rights to engage in concerted activity, e.g., discussing the terms and conditions of employment. We discussed some of these decisions in our January 2013 ELC, but many are no longer valid.

Here are five important workplace rules decisions that have been invalidated by *Noel Canning* that affect non-union workplaces:

1. Investigation confidentiality. *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (2012). This decision held that a blanket confidentiality rule governing employer investigations violated the National Labor Relations Act (NLRA), and the employer must show a particularized "legitimate business justification" before requiring confidentiality for any given investigation.
2. Commenting in the media. *DirectTV*, 359 NLRB No. 50 (2012). In this case, the Board invalidated rules prohibiting employees from contacting the media or commenting to the media about DirectTV and from responding to law enforcement inquiries without first contacting DirectTV's security department.
3. Restricting off-duty access. *Sodexo Am. LLC*, 358 NLRB No. 79 (2012). This decision invalidated a provision restricting off-duty access to the hospital, because it discriminatorily allowed access for "hospital-related business."
4. Prohibiting "walking off" the job. *Ambassador Services, Inc.*, 358 NLRB No. 130 (2012). Here the Board invalidated a work rule that prohibited "walking off the job" since that phrase was similar to a "walk out," which is protected, concerted activity.
5. Requiring "courtesy." *Karl Knauz Motors*, 358 NLRB No. 164 (2012). In this case, the Board found a car dealership's courtesy policy invalid, and the case has been cited by several other decisions regarding similar policies.

## So what is the Board doing about these and other cases?

None of these cases have been addressed by the Board yet, but we know the Board is moving forward. The same day *Noel Canning* was issued, the Board announced it was analyzing the impact of the case and was "committed to resolving any cases affected by" the decision.<sup>1</sup> Although the Board has issued no further formal statement, the General Counsel, Richard Griffin, has commented publicly and stated there were 98 cases in the U.S. Court of Appeals, and in 49 of those cases the Board has filed motions to have the cases remanded to the Board. In four of the above five cases the Board has sought a remand: *Banner Health*, *Sodexo*, *DirectTV*, and *Ambassador Services*. The fifth case, *Karl Knauz Motors*, was closed, meaning it was not on appeal and the Board will not reexamine the decision. *Karl Knauz Motors* no longer has precedential value. However, while affected decisions in closed cases no longer have precedential value, the General Counsel has publicly indicated the reasoning behind those decisions should be considered persuasive and adopted.

## What do we think the Board will do?

There are two reasons to believe that the Board will rubber stamp its prior decisions in these and other invalidated cases. First, the Board has been properly constituted for nearly a year, and, in that year has continued to take a broad view of Section 7 rights and their interplay with employer policies. Second, this

is not the first time the Supreme Court has invalidated a large number of Board decisions, as it invalidated nearly 600 Board rulings in 2010 with its decision in *New Process Steel, L.P. v NLRB*, 136 S.Ct. 2635 (2010).<sup>2</sup> So far, the Board has been approaching *Noel Canning* the same way it responded to *New Process Steel*. Both times, the Board first took action ratifying all of the personnel, administrative, and procurement actions

taken,<sup>3</sup> and then sought prompt remand of the cases pending in the Courts of Appeal. Most importantly, after *New Process Steel*—and perhaps in our near future—the Board rubber stamped many of the affected decisions with very brief opinions simply stating that the Board was adopting the prior decision “for the reasons stated” in the invalidated decision.<sup>4</sup>

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1 NLRB Press Release, June 26, 2014.

2 *New Process Steel* invalidated approximately 600 decisions issued between January 2008 and April 2010 on the basis that the Board, with only two members, lacked a quorum to issue lawful decisions.

3 NLRB Press Release, July 8, 2010; NLRB Press Release, August 4, 2014.

4 See, e.g., *Carambola Beach Resort*, 355 NLRB No. 69 (2010); *Galicks, Inc.*, 355 NLRB No. 28 (2010); *McCarthy Construction Co.*, 355 NLRB No. 67 (2010); *Harmon Auto Glass*, 355 NLRB No. 66 (2010).

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