

## Workplace Civility Is Dead And The NLRB Killed It

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In 2012, the National Labor Relations Board found a “courtesy” policy unlawful. Since then, the NLRB has continued to create more and more tension between the National Labor Relations Act and employers’ legitimate interests in maintaining and enforcing workplace guidelines governing courtesy in a nondiscriminatory fashion.

This article focuses on the maintenance and enforcement of courtesy and civility rules. In these cases, the NLRB 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 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.[1] 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.



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### Framework: Regulating Workplace Rules Under the NLRA

Employees have the right to engage in concerted activity under Section 7 of the NLRA.[2] Concerted activity is activity undertaken for the employees’ mutual aid and protection, including, for example, discussing the terms and conditions of employment, such as wages, policies and workplace treatment. 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.”[3]

Under the general framework of the NLRA, the NLRB 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.[4] 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.”[5] In reading the rule, the NLRB should “refrain from reading particular phrases in isolation.”[6] Similarly, the NLRB 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.”[7]

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.[8] 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 [NLRA].”[9]

### **Workplace Conduct: Courtesy and Professionalism**

The cases that likely demonstrate the biggest gap between the single-minded ideals espoused by the NLRB and the practicalities of managing a workforce are the board’s decisions in the areas of civility and professionalism. In these cases, the NLRB 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 NLRA 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 NLRB 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 NLRA; the only question is whether an employee would read the rule as prohibiting protected conduct. Unfortunately, the NLRB has concluded that the aspirational language of courtesy rules is often vague and overly 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 NLRB invalidated a courtesy policy in Karl Knauz Motors, 358 NLRB No. 164 (2012).[10] Although precedent dictates that the NLRB read the rule as a whole, the board here tortuously parsed this rule to find that it violated the NLRA.

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 NLRB has invalidated rules that prohibit employees from being discourteous, even to guests. In First Transit Inc., the NLRB invalidated a bus company's rule that prohibits "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees or members of the public [and d]isorderly conduct during working hours." [11] The NLRB 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." [12]

In another case brought by a former Hooters of America LLC waitress, an administrative law judge of the NLRB invalidated two policies that included obligations to be respectful. [13] 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 overly broad. The portion of the rule prohibiting the discussion of tips violated the employees' rights to discuss wages with nonemployees. 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 overly broad as it did not define "insubordination," "lack of respect" or "cooperation."

Similarly, the NLRB also recently invalidated several rules that prohibited gossip and negativity. [14] The first rule prohibited "gossip," which 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; and
6. creating, sharing or repeating a rumor that is overheard or hearsay.

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

In both cases, the NLRB concluded that the quoted rules were overly 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 NLRB has finally found a floor: Employers may, at least, prohibit employees from using "[p]ropane or abusive language where the language is uncivil, insulting, contemptuous, vicious or malicious." [15]

## Enforcing Courtesy Rules

It is not just the maintenance of courtesy rules that can get employers into trouble. If a rule is overly broad and an employee is terminated for violating that rule, the NLRB may order reinstatement of the employee with back pay. And a few cases demonstrate that the NLRB 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 and interests that require a certain level of decorum be maintained in the workplace.

Even though employers can at least theoretically maintain rules prohibiting profane speech, they may not be able to terminate employees who violate the rule. Repeatedly the NLRB 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 NLRB takes a very broad view of what is protected.) Two recent decisions illustrate the issue:

First, on remand from the Second Circuit, the NLRB found that Starbucks Corp. 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 NLRB approved of the employee's conduct, and Starbucks appealed. The Second Circuit remanded noting, "We think the analysis of [the NLRB] improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers." On remand, the NLRB did not take this admonishment to heart, and again sided with the employee.[16]

Second, the NLRB likewise condoned an employee's conduct when he cursed at his supervisor, calling him a "fucking mother fucker" and a "fucking crook," among other profanities.[17] 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 NLRB concluded that the employer violated the NLRA in so doing. Although the supervisor stated he took the statement that he would "regret it" as a physical threat, the NLRB did not credit that testimony, since the employee did not display any physical signs of a threat. Ultimately, the NLRB concluded that the statements to the supervisor were not so egregious as to lose the protection of the NLRA. 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 NLRB condoned cursing and language that had female employees submitting written complaints. In Fresenius USA Manufacturing Inc., 358 NLRB No. 138 (2012),[18] an employee, Kevin "Dale" Grosso, anonymously wrote "vulgar, offensive, and, in isolation, possibly threatening statements on several union newsletters left in an employee breakroom" with the intent of encouraging union support in an upcoming decertification election.[19] Specifically, Grosso wrote the following three notes on Sept. 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 occurred, to administer corrective action. After ultimately concluding that he wrote the statements, Fresenius terminated Grosso's employment.

The NLRB 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 NLRA 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 NLRB 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 co-workers 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 NLRA neither requires nor warrants.

### **Employer Next Steps**

It is likely that federal appellate courts will be reviewing some of these cases and issues, so the above may not be the final word on courtesy under the NLRA. And while the decisions remain in place, some competing interests in the workplace, like preventing sexual harassment, may continue to trump the NLRB's interpretation. Accordingly, it may not be possible to fully harmonize the NLRA, as interpreted in the above cases, with other workplace obligations and interests. Should employers feel inclined, there are some steps to take to bring policies in closer alignment with the NLRA, while not ignoring other workplace obligations.

As an initial matter, employers should take some time to look over their policies to determine whether their workplace rules can be revised to minimize friction with the NLRA, while still maintaining rules that are necessary for a courteous and lawful workplace. Importantly, the NLRB's focus recently is on terms that it considers vague and ambiguous, so carefully crafted rules that define possibly ambiguous terms to give examples of prohibited conduct and to exclude protected conduct are more likely to pass muster.

In addition, there is now some authority that savings clauses, which state that the rule is not intended to interfere with Section 7 rights, can help. These clauses should be drafted with a layperson in mind, meaning that a reference to the NLRA will not be sufficient. Instead, the savings clause should describe the concerted activity that is implicated by the rule but that is not intended to be prohibited.

Finally, before enforcing one of these rules, take a another look at the underlying conduct to determine whether it is likely to be considered protected under the NLRA, even if it clearly violates the workplace rule. Unfortunately, that may not end the matter as other laws, including discrimination and harassment laws, should be considered before taking action before applying the NLRA.

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[1] 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.”

[2] 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.”

[3] 29 U.S.C. § 158.

[4] Lutheran Heritage Village, 343 NLRB 646 (2004).

[5] *Id.*

[6] *Id.* at 646.

[7] Lafayette Park Hotel, 326 NLRB 824, 825 (1998).

[8] Burnup & Sims, Inc., 256 NLRB 965, 976 (1981).

[9] Continental Group, Inc., 357 NLRB No. 39 (2011).

[10] This decision is now invalidated by Noel Canning, 135 S. Ct. 2550 (2014) (finding that from Jan. 3,

2012, through Aug. 4, 2013, the NLRB lacked a quorum and decisions issued in this time period were void. However, the decision is likely to be treated as persuasive authority for three reasons. First, the NLRB has been properly constituted for over a year and has continued to take a very broad view of Section 7 rights and their interplay with employer policies. Second, when last the U.S. Supreme Court invalidated a number of NLRB decisions, the board rubber-stamped many of them on remand. Third, the NLRB's General Counsel has publicly indicated that the reasoning behind invalidated decisions should be considered persuasive and adopted. And fourth, 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 NLRB'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").

[11] *First Transit, Inc.*, 360 NLRB No. 72 (2014).

[12] *Id.* (citing *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011)).

[13] *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 NLRB on exceptions (appeal).

[14] *Laurus Technical Institute*, 360 NLRB No. 133 (2014) & *Hills & Dales General Hospital*, 360 NLRB No. 70 (2014).

[15] *First Transit Inc.*, 360 NLRB No. 72 (2014) (reversing the ALJ, who found the provision unlawful).

[16] *Starbucks Corporation*, 360 NLRB No. 134 (2014).

[17] *Plaza Auto Center Inc.*, 360 NLRB No. 117 (2014) (asterisks added).

[18] 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.

[19] All facts are taken from the majority *Fresenius USA Mfg.* decision.