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NLRB Member Criticizes Board's Handbook Rule Review Standard

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The legality of employer work rules continues to draw ***National Labor Relations Board*** scrutiny on a regular basis.

A 2-1 Board panel majority (Members Kent Hirozawa and Lauren McFerran) has found that a hospital's rules prohibiting employee conduct that "impedes harmonious interactions and relationships" and "negative or disparaging comments about the professional capabilities of employees or physicians" violate the National Labor Relations Act. ***William Beaumont Hospital***, 363 NLRB No. 162 (Apr. 13, 2016).

The Board's standard for judging these rules also continues to be a source of consternation among employers and others, including Board Member Philip Miscimarra. In *William Beaumont Hospital*, Miscimarra called for the Board to abandon its existing analysis, announced in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), that renders policies unlawful "whenever an employee 'would reasonably construe the language to prohibit Section 7 activity.'" He further contended that if the Board does not change that standard, it should be repudiated by the courts.

Miscimarra noted that the Board's current analysis ignores an employer's justification for various work rules that are designed to promote its legitimate interests in order, discipline, and business operations – justification that courts

and prior Boards had recognized for decades . He called for the Board to "resume doing what the Supreme Court has repeatedly required, which is to carry out its 'duty to strike the *proper balance* between ... asserted business justifications and the invasions of employee rights in light of the Act and its policy.'" Miscimarra also noted that the Board's departures from the Supreme Court's requirement have given rise to uncertainty and legal disputes. In his view, the Board has its "thumb on the scale" in favor of employee rights and its present test "imposes a form of blindness on the Board," ignoring the consequences of its decisions.

Although the Board decisions generally are accorded deference by reviewing courts, Miscimarra noted that as long as fifteen years ago, the U.S. Court of Appeals for the D.C. Circuit strongly criticized the Board for its failure to consider reasons for employer policies: "We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue here [prohibiting 'abusive and threatening language']. ... To bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a 'catch 22.'" Miscimarra also quoted the D.C. Circuit as saying, "Yet the Board's position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous. It defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace." [Quoting *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 27-28 (D.C. Cir. 2001).]

As convincing as Miscimarra's arguments are, the Board's views on employer policies may not change until the composition of the Board changes, which is likely to depend on the outcome of the Presidential election. The Board currently has four members, three Democratics and one Republican. Although he has been renominated by President Obama, Hirozawa's term ends in August of this year and the Senate may not act on his renomination by the end of Obama's presidency.