Navigating Through *Hills & Dales*: Can Employers Abide by the NLRA While Maintaining Civil Work Environments?

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Introduction

Studies show that a positive work environment increases employee morale, productivity, satisfaction, and work quality.[1] Similarly, workplace complaints, negativity, and gossip are commonly associated with low productivity and increased staff turnover.[2] It is thus no surprise that employers are increasingly implementing civil workplace policies.[3] These policies include screening out applicants more likely to be unhappy; requiring employee counseling; mandating that employees maintain a "positive attitude;" banning complaints, gossip, and negative speech in the workplace; and even terminating unhappy employees.

However, if employers are not careful, such policies may violate the National Labor Relations Act (NLRA or Act)[4] if the employee conduct the employer seeks to ban is protected concerted activity. *Hills & Dales General Hospital*,[5] a 2014 decision by the National Labor Relations Board (NLRB or Board), illustrates this risk.[6]

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1. *See, e.g.*, James K. Harter et al., *Well-Being in the Workplace and Its Relationship to Business Outcomes: A Review of the Gallup Studies*, *in* FLOURISHING: POSITIVE PSYCHOLOGY AND THE LIFE WELL-LIVED 205, 205–24 (Corey L.M. Keyes & Jonathan Haidt eds., 2003) (ebook); Andrew J. Martin, *The Role of Positive Psychology in Enhancing Satisfaction, Motivation, and Productivity in the Workplace*, 24 J. ORGANIZATIONAL BEHAV. MGMT. 113, 129 (2004).

2. *See, e.g.*, JACK H. WALTERS, POSITIVE MANAGEMENT: INCREASING EMPLOYEE PRODUCTIVITY 22–23 (Mason Carpenter ed., 2010) (ebook).

3. Employer social media policies have become more common. For a discussion of how social media policies relate to National Labor Relations Act (NLRA or Act) concerted activity, see, for example, Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 960–93 (2012).

4. 29 U.S.C. §§ 151–169 (2012).

5. 360 N.L.R.B. No. 70 (Apr. 1, 2014).

6. *See* Timothy P. Van Dyck, Sang-Yul Lee & Nathanael Nichols, *NLRB Goes Negative on Positive Behavior Work Policies*, LAW360 (May 2, 2014, 2:30 PM), http://www.law360.com/articles/530530/nlrb-goes-negative-on-positive-behavior-work-policies (*Hills*

This Note analyzes *Hills & Dales* in light of recent Board decisions. Part I describes current NLRB standards and tests for NLRA violations. Part II explores previous Board decisions involving workplace civility rules. These decisions identify when "negative" employee conduct constitutes concerted activity under federal law. Part III examines *Hills & Dales*, discusses reactions to the decision, and explains why the decision is not fatal to all employer civility policies. Part IV offers employers strategies for drafting employee policies and provides examples of policy language most likely to withstand NLRB review under current standards. Ultimately, however, the NLRB should adopt a clearer standard that better balances employee organizational rights and employer productivity needs.

I. Background

A. *The Right to Engage in Concerted Activities*

Section 7 of the NLRA[7] guarantees employees the right to engage in concerted activities for their mutual aid or protection. It provides:

> 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . .[8]

Concerted activities include, among other things, joining a union, soliciting others to join a union, attending union meetings, and serving as a union steward or official.[9] However, contrary to what some employees believe,[10] section 7 does not apply only to union workers.[11] Section 7

& Dales was "the latest salvo in a growing trend of NLRB decisions ruling certain historically uncontroversial . . . workplace policies as illegal.").

7. 29 U.S.C. § 157 (2012).

8. *Id.*

9. *See* NAT'L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD 2 (1997), http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf [hereinafter BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT].

10. *See* Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 939–40 n.93 (1992) (most workers think that the NLRA applies only to organized employees).

11. *See* NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945) (NLRA intended as a "grant of rights to the *employees* rather than as a grant of power to the union") (emphasis added); *see also* William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 264 (2002) (section 7 is an important landmark for non-union workers as an intersection between individual employee rights and labor law collective rights).

protects all employees who act with (or with the authority of) other employees and not solely on their own behalf.[12] Whether activity is considered concerted depends on its nature,[13] the extent of employee participation,[14] and whether it benefitted other employees.[15] Thus, concerted activity exists when "individual employees seek to initiate or to induce or to prepare for group action, as well as [when] individual employees bring[] truly group complaints to the attention of management."[16] In some cases, section 7 protects single-employee actions that result in discipline intended by the employer to prevent other employees from engaging in future concerted activity.[17]

B. The Test for NLRA Violations

Section 8(a)(1) of the Act[18] makes it unlawful for employers to interfere with, restrain, or coerce employees who exercise section 7 rights. This prohibits any work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights."[19] The Board has articulated a standard for determining whether an employer's work rule violates section 8(a)(1). If the work rule explicitly restricts section 7 activity, it is unlawful. If the rule does not explicitly restrict section 7 activity, it is unlawful only if:

> (1) employees would reasonably construe the language of the rule 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. In applying these principles, the Board re-

12. The Act does not define "concerted activities." *See* 29 U.S.C. § 157 (2012). The National Labor Relations Board (NLRB or Board) holds concerted activities may include non-union activities. *See* JCR Hotel, Inc., 338 N.L.R.B. 250, 252 (2002) (employee's threat of walking off the job was concerted activity); Meyers Indus., Inc., 268 N.L.R.B. 493, 496–97 (1984) (*Meyers I*) (employee's individual action may be concerted activity depending on whether the activity was "engaged with or on authority of other employees" or made "solely by and on behalf of the employee himself").

13. *See, e.g.*, NLRB v. Wash. Aluminum Co., 370 U.S. 9, 15 (1962) (employee work stoppage without demanding anything from employer may constitute concerted activity).

14. *See, e.g.*, *Meyers I*, 268 N.L.R.B. at 497 (individual action is concerted activity if other employees engage in the activity).

15. *See, e.g.*, NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 830 (1984) (single employee asserting a right may constitute concerted activity even without prior discussion with other employees).

16. Meyers Indus., Inc., 281 N.L.R.B. 882, 887 (1986) (*Meyers II*).

17. Parexel Int'l, LLC, 356 N.L.R.B. No. 82, slip op. at 2 (Jan. 28, 2011). In *Parexel*, the Board found that an employer unlawfully terminated an employee who complained about the employee's wages and demanded to know other employees' wages. *Id.* at 2–3. The Board held the employer's action was a "preemptive strike," intended to prevent future concerted activity. *Id.*

18. 29 U.S.C. § 158(a)(1) (2012); *see also* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 9, at 2–5.

19. Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998); *see also* NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 537 (6th Cir. 2000) (rule prohibiting employee discussion of wages unenforceable); Compuware Corp. v. NLRB, 134 F.3d 1285, 1290 (6th Cir. 1998) (rule discouraging employees from exercising protected rights unenforceable).

> frains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.[20]

The Board must "determine how a reasonable employee would interpret the action or statement of [the] employer . . . and such a determination appropriately takes account of the surrounding circumstances."[21] Since the Board first articulated this standard in 2004,[22] the vast majority of decisions finding section 8(a)(1) violations have found them under the test's first prong.[23]

Since Congress enacted the NLRA, the NLRB has scrutinized employer handbook policies regulating employee conduct for possible interference with employees' section 7 rights. Within the past five years, the NLRB has struck down policies prohibiting employees from releasing confidential information,[24] walking off the job,[25] and "recommending" that employees not discuss ongoing investigations.[26] The Board also has recently considered multiple cases involving social media policies in employee handbooks.[27] This Note focuses on one category of

20. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646–47 (2004). The NLRB continues to use this test. *See* Care One at Madison Ave., LLC, 361 N.L.R.B. No. 159, slip op. at 3 (Dec. 16, 2014).

21. The Roomstore, 357 N.L.R.B. No. 143, slip op. at 1 n.3 (Dec. 20, 2011) (citations omitted).

22. *Lutheran Heritage*, 343 N.L.R.B at 646–47.

23. Richard F. Griffin, Jr., Nat'l Labor Relations Bd., Memorandum GC 15-04, Report of the General Counsel 2 (2015), http://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf [hereinafter Griffin Memorandum].

24. Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127, slip op. at 1 (Sept. 11, 2012), *enforced*, 746 F.3d 205, 207–09 (5th Cir. 2014) (confidential information policy affecting "personnel information and documents" violated section 8(a)(1) because employees could interpret it as prohibiting discussion of wages and job conditions—a protected section 7 activity); *see also* Decision of Administrative Law Judge, Macy's Inc., 1-CA-123640, at 14 (N.L.R.B. May 12, 2015) (policy that unlawfully restricted employee use of confidential information not saved by clause informing employees that nothing in policy was intended to limit NLRA rights).

25. Heartland Catfish Co., 358 N.L.R.B. No. 125, slip op. at 1–2 (Sept. 11, 2012) (prohibition of walking off the job unlawful because employees could interpret it as restricting their right to strike); JCR Hotel, Inc., 338 N.L.R.B. 250, 252 (2002) (single employee's threat of walking off the job was concerted activity).

26. Banner Estrella Med. Ctr., 358 N.L.R.B. No. 93, slip op. at 2 (July 30, 2012) (employees may perceive employer's "suggestion" they maintain confidentiality during internal complaint investigation as prohibiting protected concerted activity).

27. Although closely related to workplace civility policies, social media policies are beyond the scope of this Note. For more information on the Board's interpretation of these policies, see generally William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427 (2013) (NLRB cases finding discourteous language protected under section 7); Regina Robson, *"Friending" the NLRB: The Connection Between Social Media, "Concerted Activities" and Employer Interests*, 31 HOFSTRA LAB. & EMP. L. J. 81 (2013) (discussing NLRB's challenge in balancing the need for social media policies with employees' section 7 rights); Lauren R. Younkins, *#IHATEMYBOSS: Rethinking the NLRB's Approach to Social Media Policies*, 8 BROOK. J. CORP. FIN. & COM. L. 222 (2013) (NLRB cases finding discourteous language protected under section 7).

handbook rules—those designed to promote civility in interpersonal workplace interactions.

II. Previous NLRB Decisions Regarding Workplace Civility Rules

The Board's test for analyzing workplace civility rules in employee handbooks has changed several times in recent decades. Since the late 1990s, the criteria for establishing section 8(a)(1) violations has wavered between a "pro-employee" standard, with broad interpretation of concerted activity, and a "pro-employer" standard that narrows the scope of concerted activity.[28] Adding to the confusion, the Board has not expressly overruled its prior workplace civility decisions. As a result, several seemingly contradictory tests remain in place, causing confusion about what constitutes NLRA-compliant handbook policies.

A. The "Tend to Chill" Standard (1998–2000)

In *Lafayette Park Hotel*,[29] the NLRB articulated its first modern standard for analyzing workplace civility policies. The Board's General Counsel alleged the employer violated section 8(a)(1) by maintaining two "unacceptable conduct rules" in its employee handbook.[30] The first rule banned employees from "[b]eing uncooperative with supervisors, employees, guests and/or regulatory agencies," and the second rule banned employees from "[m]aking false, vicious, profane or malicious statements."[31] The Board's General Counsel argued that the first rule could reasonably be interpreted to discourage unionization,[32] and the second rule interfered with section 7 rights because employees would be hesitant to express legitimate negative complaints if the employer banned "vicious, profane, or malicious statements."[33]

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28. Board workplace civility decisions change frequently depending on the Board's political composition. The Board has five members with staggered five-year terms. 29 U.S.C. § 153(a) (2012). The President appoints, and the Senate confirms, Board members. *Id.* In practice, three members are from the President's political party, and the remainder from the other party. *See* Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1273–74 (2000). This "flip-flopping" is not limited to decisions on workplace civility policies. *See, e.g.*, Materials Research Corp., 262 N.L.R.B. 1010, 1014, 1018 (1982) (holding the "*Weingarten* right" to union representation during investigatory interviews extends to non-union employees), *overruled by* Sears, Roebuck & Co., 274 N.L.R.B. 230 (1985) (*Weingarten* right does not extend to non-union employees), *abrogated by* E.I. DuPont de Nemours, 289 N.L.R.B. 627 (1988) (*Weingarten* right permissible for non-union employees but not mandatory), *overruled by* Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676 (2000) (restoring *Materials Research*), *aff'd in part, rev'd on other grounds* 268 F.3d 1095 (D.C. 2001), *abrogated by* IBM Corp. 341 N.L.R.B. 1288 (2004) (restoring *E.I. DuPont*).

29. 326 N.L.R.B. 824 (1998).

30. *Id.* at 824.

31. *Id.*

32. *Id.* at 825.

33. *See id.* at 828.

The Board found the first rule—essentially prohibiting uncooperative behavior—did not violate the NLRA because "employees would not reasonably conclude that the rule as written prohibits Section 7 activity," and the rule did not "tend to chill employees in the exercise of their Section 7 rights."[34] The Board found that the employer lacked union animus and had not promulgated the rule in response to protected activity.[35] However, the Board found the second rule violated section 8(a)(1) because it had "a reasonable tendency to chill protected activity."[36] Importantly, the second rule was unlawful even though the Board's General Counsel "d[id] *not* contend that the rules were initiated in response to any union and/or protected concerted activity or that any employee has been disciplined under the rules for engaging in union and/or protected concerted activity."[37]

Lafayette Park found the workplace conduct rule violated section 8(a)(1) because there was a possibility of future "chilling" of employees' NLRA rights, despite the absence of direct evidence of "chilling."[38] Although *Lafayette Park* interpreted concerted activity broadly in the context of a union workplace, it also widened section 7 protection for non-union employees.[39] Some commentators viewed *Lafayette Park* as a reinvigoration of the NLRA because it strengthened individual employee rights, making the Act more relevant in the age of declining union membership.[40] Later NLRB decisions, however, seemed to implicitly abrogate *Lafayette Park*.

B. The "Explicitly Restricts" Standard (2001–2005)

In *Adtranz, ABB Daimler-Benz Transportation, N.A., Inc.*,[41] the NLRB closely followed *Lafayette Park* in striking down employer policies.[42] The employer in *Adtranz* sought "to maintain a decorous and peaceful workplace" by prohibiting "abusive or threatening language to anyone on company premises."[43] The Board invalidated the employer's

34. *Id.* at 825.
35. *Id.* at 825–26.
36. *Id.* at 828 & n.17. The Board also held the employer's rule requiring employees leave the premises immediately upon completion of their shifts violated section 8(a)(1). *Id.* at 829.
37. *Id.* at 824.
38. *Id.* at 825.
39. It has been seemingly long-settled that non-union employees are covered under section 7, but some commentators questioned that basic proposition before *Lafayette Park*. *See generally* Corbett, *supra* note 11 (evolution of non-union employee rights under section 7 in the age of declining unions); *see also supra* text accompanying note 12.
40. *See* Corbett, *supra* note 11, at 268, 272–73.
41. 331 N.L.R.B. 291 (2000) (*Adtranz I*), *vacated*, 253 F.3d 19 (D.C. Cir. 2001) (*Adtranz II*).
42. *Adtranz I*, 331 N.L.R.B. at 291.
43. *Adtranz II*, 253 F.3d at 25 (citations omitted).

policy, finding it "could reasonably be interpreted as barring lawful union organizing propaganda."[44]

The U.S. Court of Appeals for the District of Columbia vacated the NLRB's finding that the employer's handbook policies were unfair labor practices.[45] The court reasoned that there was no section 7 violation because purported "chilling" of employee rights did not necessarily occur at the workplace, and there was no evidence that the employer applied the policy to discourage union activity.[46] Otherwise, the court noted, "every employer in the United States that has a rule or handbook barring abusive and threatening language from one employee to another is now in violation of the NLRA, irrespective of whether there has ever been any union organizing activity at the company."[47] The court also decided that "it [would be] preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language."[48] The court's *Adtranz* decision narrowed section 7 rights for non-union employees and started a new employer-friendly era favorable to civility policies.

In 2004, the Board in *Lutheran Heritage Village-Livonia Home, Inc.*[49] adopted the D.C. Circuit's *Adtranz* analysis. *Lutheran Heritage* involved three employer work rules banning (1) "abusive and profane language;" (2) "harassment;" and (3) "verbal, mental and physical abuse."[50] The Board found all three rules lawful.[51] The Board revised its "tends to chill" standard and held a work rule violates section 8(a)(1) on its face only if the rule explicitly restricts section 7 protected activities.[52] If a work rule does not explicitly restrict a section 7 activity, it is unlawful only 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."[53]

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44. *Id.* (quoting *Adtranz I*, 131 N.L.R.B. at 293).

45. *Id.* at 29.

46. *Id.* In contrast, the Board had held that "the rule against the use of abusive and threatening language in the workplace *on its face* constitutes an unfair labor practice." *Id.* at 25 (emphasis added).

47. *Id.* at 25–26.

48. *Id.* at 26. The court said of *Lafayette Park*: "Where, as here, the NLRB adopts an unreasonable position, it can find no solace in the fact that it made the same mistake in prior cases." *Id.*

49. 343 N.L.R.B. 646, 647 (2004).

50. *Id.* at 646.

51. *Id.*

52. *Id.*

53. *Id.* at 646–47. As a result of this language, it still would be possible—although more difficult—for an employer to violate NLRA rights with an "overbroad" policy. Thus, an employee could be deterred from exercising section 7 rights even if termination or discipline would be proper under a narrower policy. *Id.*

Lutheran Heritage suggested that rules restricting aggressive, hostile, or offensive speech were legal because employees would not understand them to restrict section 7 rights.[54] This narrower notion of protected concerted activity provided less protection to non-union workers, causing despair to "pro-employee" critics.[55] Indeed, after *Lutheran Heritage*, the NLRB struck down few employer rules under section 7, and some predicted it was the beginning of a new era in which the NLRA protected only unionized employees.[56] Decisions issued in the wake of *Lutheran Heritage* seemed to corroborate this prediction.[57]

C. The "Reasonably Construed" Standard (2005–2012)

Following *Lutheran Heritage*, the NLRB issued several "pro-employee" decisions that again broadened section 7 concerted activity, signaling another change in Board analysis.[58] In *Claremont Resort & Spa*,[59] the Board considered a work rule prohibiting "negative conversations" about employees or managers. The Board held the rule unlawful because it could "reasonably be construed" as prohibiting employees from discussing complaints about working conditions with co-workers, "thereby causing employees to refrain from engaging in protected activities."[60] Similarly, in *2 Sisters Food Group, Inc.*,[61] the Board struck down a work rule that permitted discipline of employees for "inability or unwillingness to work harmoniously with other employees."[62] The Board found that the rule could chill protected employee activity because it did not define what it meant by "work harmoniously."[63]

More recently in *Knauz BMW*,[64] the Board invalidated a courtesy rule as unreasonably broad.[65] The rule stated:

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54. *Id.* at 647.

55. *See* William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 26 (2006) ("I find it troubling that the agency charged with interpreting and enforcing the NLRA would read it so narrowly in order to avoid potential conflict with other laws . . . and in order to create a kinder, gentler workplace.").

56. *Id.* at 41–47.

57. *See, e.g.*, Guardsmark, LLC, 344 N.L.R.B. 809, 810 (2005) (rule banning on- and off-duty fraternization and dating lawful); Palms Hotel & Casino, 344 N.L.R.B. 1363, 1363 (2005) (upholding "a rule prohibiting employees from engaging in 'conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with' other employees"); Stanadyne Auto. Corp., 345 N.L.R.B. 85, 86 (2005) (CEO's statement that "[h]arassment of any type is not tolerated by this company and will be dealt with" found to be legal).

58. This likely resulted from a change in Board membership. *See supra* note 28 and accompanying text.

59. 344 N.L.R.B. 832 (2005).

60. *Id.* at 832. For instance, employee discussion of managers is a protected section 7 activity. *Id.* at 836.

61. 357 N.L.R.B. No. 168 (Dec. 29, 2011).

62. *Id.* at 2.

63. *Id.*

64. 358 N.L.R.B. No. 164 (Sept. 28, 2012).

65. *Id.* at 1.

> 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 [Employer].[66]

The Board observed that there was "nothing in the rule, or anywhere else in the employee handbook, that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule's broad reach."[67] The NLRB found the rule was ambiguous and explained that "ambiguous employer rules—rules that could be read to have a coercive meaning—are construed against the employer."[68] In other words, because the handbook lacked a section 7 disclaimer, the Board deemed the mere existence of the policy a section 8(a)(1) violation.

Not all decisions from this period favored employees. In *Hyundai American Shipping Agency, Inc.*,[69] the NLRB followed the spirit of *Lutheran Heritage* to uphold a rule prohibiting gossip—defined as a "rumor or report of an intimate nature or chatty talk"[70]—because "employees would not reasonably construe [the rule] to prohibit Section 7 activity."[71] Likewise, in *Costco Wholesale Corp.*,[72] the Board upheld a work rule requiring employees to use "appropriate business decorum" when communicating with others.[73] These decisions seem to conflict with contemporaneous "pro-employee" opinions in which the Board prohibited policies with similar workplace decorum rules. It became hard to predict which workplace civility rules violated section 8(a)(1). On the one hand, *Costco*'s workplace rule requiring "appropriate business decorum"[74] was seemingly unambiguous and thus valid, while *Knauz BMW*'s rule stating "no one should be disrespectful or use profanity" was ambiguous and thus a violation.[75]

III. *Hills & Dales*: What Standard?

Most recently, in 2014, the NLRB broadened the scope of prohibited employee handbook policies in *Hills & Dales General Hospital*.[76]

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66. *Id.*
67. *Id.* (citing Costco Wholesale Corp., 358 N.L.R.B. No. 106 (Sept. 7, 2012)).
68. *Id.* at 5 (citing Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127, slip op. at 2 (Sept. 11, 2012)).
69. 357 N.L.R.B. No. 80 (Aug. 26, 2011).
70. *Id.* at 2 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999)).
71. *Id.*
72. 358 N.L.R.B. No. 106 (Sept. 7, 2012).
73. *Id.* at 1. The Board did, however, strike down a rule prohibiting employees from posting statements electronically that "damage the Company . . . or damage any person's reputation." *Id.*
74. *Id.*
75. Knauz BMW, 358 N.L.R.B. No. 164, slip op. at 1 (Sept. 28, 2012).
76. 360 N.L.R.B. No. 70, at 1–2 (Apr. 1, 2014).

Hills & Dales received considerable attention from employers and employees,[77] although at first it may be hard to understand why.

On first impression, *Hills & Dales* appeared no different than previous departures from precedent that received no similar attention.[78] Perhaps the focus on *Hills & Dales* resulted from the clarity with which it rejected precedent to provide broader employee rights. *Hills & Dales* struck down handbook phrases virtually identical to language previously found acceptable.[79] It strained to differentiate prior decisions and inconsistencies and created additional uncertainty about the correct standard for assessing workplace civility policies. However, a closer look at *Hills & Dales* reveals that some of the criticism is unwarranted.

A. *The ALJ's Decision*

Hills & Dales focused on three paragraphs in the employer's "Values and Standards of Behavior Policy."[80] The Board's General Counsel claimed the policies in these paragraphs were overbroad and restricted section 7 rights.[81] These were the three provisions:

> [P]aragraph 11 states that employees will not make "negative comments about our fellow team members," including coworkers and managers; paragraph 16 states that employees will "represent [the Employer] in the community in a positive and professional manner in every opportunity;" and paragraph 21 states that employees "will not engage in or listen to negativity or gossip."[82]

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77. *See, e.g.*, Aurora V. Kaiser, *Workplace Civility Is Dead and the NLRB Killed It*, LAW360 (Sept. 23, 2014, 12:05 PM), http://www.law360.com/articles/577797/workplace-civility-is-dead-and-the-nlrb-killed-it; Manatt Phelps & Phillips LLP, *NLRB Continues Crackdown on Employer Policies*, LEXOLOGY (Apr. 30, 2014), http://www.lexology.com/library/detail.aspx?g=845a923d-a1fe-48ae-917b-d0aafd0daa61; Van Dyck, Lee & Nichols, *supra* note 6.

78. *See, e.g.*, Costco Wholesale Corp., 358 N.L.R.B. No. 106, slip op. at 2 (Sept. 7, 2012) (departing from "pro-employee" standard prevalent at the time); Hyundai Am. Shipping Agency, 357 N.L.R.B. No. 80, slip op. at 2–3 (Aug. 26, 2011) (same). Likewise, decisions after *Hills & Dales* have not received similar scrutiny. For example, just months after *Hills & Dales*, *Laurus Technical Institute* prohibited as overbroad a "no gossip" policy. 360 N.L.R.B. No. 133, at 1 (June 13, 2014). The policy banned "[c]reating, sharing, or repeating information that can injure a person's credibility or reputation[;] . . . a rumor about another person[; or] . . . a rumor that is overheard or hearsay." *Id.* at 5, 9. The ALJ explained that the gossip policy was a violation because the "[employer's] definition of 'gossip' [was] an expansive ban against any discussion about one's personal life when they are not present; professional life 'without his/her supervisor present;' or any '[n]egative . . . or disparaging comments or criticisms of another person or persons.'" *Id.* at 9 (last alteration in original) (Dawson, ALJ opinion). The Board adopted the ALJ's opinion. *Id.* at 1. There was relatively little uproar after the *Laurus* decision. *See also* Care One at Madison Ave., 361 N.L.R.B. No. 159, at 2–3 (Dec. 16, 2014) (departing from "pro-employer" standard, finding workplace memorandum regarding workplace violence violated section 8(a)(1)).

79. *Compare* Hills & Dales Gen. Hosp., 360 N.L.R.B. No. 70, slip op. at 7 (Apr. 1, 2014), *with* Tradesmen Int'l, 338 N.L.R.B. 460, 461–62 (2002).

80. *Hills & Dales*, 360 N.L.R.B. No. 70, slip op. at 1.

81. *Id.* at 4.

82. *Id.* at 1.

Paragraph 21 continued, "We will recognize that listening without acting to stop it is the same as participating."[83]

The ALJ relied on *Lutheran Heritage*'s analysis[84] and applied the test's first prong, which invalidates a work rule if employees could reasonably construe its language to prohibit section 7 activity.[85] The ALJ found that paragraphs 11 and 21 violated Section 8(a)(1) "because employees would reasonably construe them to prohibit protected Section 7 activity."[86] Relying on *Tradesmen International*,[87] a *Lutheran Heritage*-era pro-employer decision, the ALJ found that paragraph 16 was lawful.[88]

The employer policy in *Tradesmen* used language similar to that in *Hills & Dales*. *Tradesmen*'s policy stated employees were "expected to represent the company in a positive and ethical manner."[89] The Board in *Tradesmen* had held the policy did not violate section 8(a)(1) because "employees would not reasonably believe that an expectation that they represent the company in a positive and ethical manner amounted to a work rule that prohibited Section 7 activities."[90] Apparently, the ALJ believed *Hills & Dales* paragraph 16 deserved the same result because of the similarity between the "positive and ethical manner" language in *Tradesmen* and the "positive and professional manner" language in *Hills & Dales*.[91]

B. The Board's Decision

The Board rejected the ALJ's recommendation upholding paragraph 16 and held it violated section 8(a)(1).[92] The Board found that the rule—requiring employees to "represent [the employer] in the community in a positive and professional manner in every opportunity"[93]—was as "overbroad" and "ambiguous" as the other policies at issue.[94] It held employees could "reasonably view the language in paragraph 16 as proscribing them from engaging in any public activity or making any public statements (i.e., 'in the community') that are not perceived as 'positive' towards [the employer] on work-related matters."[95] According to the Board, this could "discourage employees from engaging in

83. *Id.* at 5, 7.
84. *Hills & Dales*, 360 N.L.R.B. No. 70, slip op. at 6–7 (citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646–47 (2004)).
85. *Id.* (citing *Lutheran Heritage*, 343 N.L.R.B. at 647).
86. *Id.* at 1.
87. 338 N.L.R.B. 460, 461–62 (2002).
88. *Hills & Dales*, 360 N.L.R.B. No. 70, slip op. at 1.
89. *Tradesmen*, 338 N.L.R.B. at 461–62.
90. *Hills & Dales*, 360 N.L.R.B. No. 70, slip op. at 7 (citing *Tradesmen*, 338 N.L.R.B. at 462).
91. *See id.*; *Tradesmen*, 338 N.L.R.B. at 462.
92. *Hills & Dales*, 360 N.L.R.B. No. 70, slip op. at 1–2.
93. *Id.* at 1.
94. *Id.*
95. *Id.* at 2.

protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment—activity that may not be 'positive' towards [the employer] but is clearly protected by Section 7."[96]

The Board distinguished *Tradesmen* because its workplace policy required employees to "represent the company in a positive and ethical manner" only in the context of "conflicts of interest."[97] The Board determined that the *Tradesmen* policy was "unlikely to suggest to employees that Section 7 activity might be implicated."[98] Conversely, the policy in *Hills & Dales* requiring employees to present themselves in a "positive and professional manner" could encompass protected concerted activity.[99] The Board explained that, "[r]easonably understood in context, the phrase 'positive and *ethical* manner' in *Tradesman* would likely be construed quite differently [than] the phrase 'positive and *professional* manner' at issue here" because "positive and ethical" has a much narrower meaning than "positive and professional."[100] Understandably, the Board's distinguishing *Hills & Dales* from *Tradesmen* produced confusion and criticism from scholars and employers.[101]

C. Reaction to Hills & Dales

Reaction to *Hills & Dales* was largely negative. Most of the criticism was directed at the Board's purported differentiation of *Hills & Dales* and *Tradesmen*. The critics generally thought that the two decisions should have produced the same result because the two phrases—"positive and ethical manner" and "positive and professional manner"—were so similar.[102] Critics also attacked the Board's distinction as arbitrary and vague.[103] Some critics claimed that *Hills & Dales* arbitrarily dismantled "historically uncontroversial . . . workplace policies" that had been in place for years and unjustifiably undermined employers' ability to achieve

96. *Id.*
97. *Id.*
98. *Id.* at 2.
99. *Id.*
100. *Id.*
101. *See supra* note 77 and accompanying text.
102. Member Johnson disagreed with the decision in *Hills & Dales*. In his view, ethical behavior is "in accordance with the standards for correct conduct or practice, especially the standards of a profession" and "'professional conduct' refers to conduct appropriate to a profession." *Hills & Dales*, 360 N.L.R.B. No. 70, slip op. at 2 n.6 ("Member Johnson would adopt the [ALJ]'s finding [because] . . . [c]learly . . . the two terms may address the same concept."); *see also* Michael Arnold, *Over* Hill, *Over* Dale, *The NLRB Pens Another Cautionary Tale: Board Strikes Down Work Rules Prohibiting Negativity and Gossip*, EMP. MATTERS BLOG (Apr. 11, 2014), https://www.employmentmattersblog.com/2014/04/over-hill-over-dale-the-nlrb-pens-another-cautionary-tale-board-strikes-down-work-rules-prohibiting-negativity-and-gossip/ ("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?").
103. *See, e.g.*, Kaiser, *supra* note 77, at 7.

workplace civility.[104] If employers cannot require employees to refrain from making "negative comments about [their] fellow team members," co-workers, and managers; to "represent [the employer] in the community in a positive and professional manner in every opportunity;" or to refrain from "engag[ing] in or listen[ing] to negativity or gossip,"[105] how can they maintain appropriate work environments?

Finally, critics objected that *Hills & Dales*' standard punished employers simply for having a policy, even if employers never applied the policy to deter protected activity.[106] Although the Board had previously struck down work rules because they *could* infringe employees' section 7 rights,[107] *Hills & Dales* particularly angered employers comfortable with the Board's more recent "pro-employer" policy of upholding workplace civility rules unless they facially violated section 7, and many viewed the decision as upsetting the balance between protecting employees and allowing employers to establish workplace standards.[108]

Some of the criticism *of Hills & Dales* was warranted. The Board failed to explain fully its rationale for distinguishing the language in *Hills & Dales* from previously acceptable workplace rules—especially its reasons for differentiating *Tradesmen*'s "positive and ethical manner" language from *Hills & Dales*' "positive and professional manner" language. Furthermore, *Hills & Dales* required that policies not be overbroad, yet provided few examples of acceptable rules.[109] In the absence of a clearly articulated and consistent standard, employers lack guidance necessary to draft lawful handbook policies.

On the other hand, much of the outrage is overblown. It is not the "crusade against ostensibly vanilla workplace policies," as one commentator argued.[110] Although *Hills & Dales* caused confusion, it offers an analytical framework for handbook policy restrictions that appropriately balances employer interests and employee section 7 protections.

D. Balancing Employer Interests and Employee Section 7 Rights

By expanding section 7 protected activities, *Hills & Dales* is undeniably an employee victory. Less than a decade ago, it was unclear

104. *See* Van Dyck, Lee & Nichols, *supra* note 6.

105. *See Hills & Dales*, 360 N.L.R.B. No. 70, slip op. at 1, 7.

106. In *Hills & Dales*, the Board banned handbook language because it *might* deter section 7 rights, even though there was no claim the language *actually* impaired employee rights. *Id.* at 1, 7. However, some argue that this point is irrelevant because the remedy for section 7 violations simply is to remove the objectionable policy. *See* Basic Guide to the National Labor Relations Act, *supra* note 9, at 37.

107. *See* Lafayette Park Hotel, 326 N.L.R.B. 824, 828 (1998) (rule can be unlawful if it infringes upon or prevents future concerted activity); *see also* Griffin Memorandum, *supra* note 23 ("[T]he law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act.").

108. *See* Corbett, *supra* note 55, at 43–45 (discussing a similar criticism of Lutheran Heritage Village-Livonia Home, Inc., 343 N.L.R.B. 646 (2004)).

109. *Id.* at 6–7.

110. Arnold, *supra* note 102.

whether the NLRA applied to non-union workers.[111] But, like *Lafayette Park* before it,[112] *Hills & Dales* reminds employers that section 7 protections apply to non-union employees.[113] This underscores one of the NLRA's principal objectives—"communication and expression, which then give impetus for other action to improve the workers' lot."[114] *Hills & Dales* reaffirms that the NLRA provides non-union workers the right to engage in concerted activity unprotected by other employment laws.[115]

Despite its criticisms, *Hills & Dales* does not leave employers with no protection. Employers still can prohibit undesirable workplace practices without infringing on employee rights. For instance, the Board recognized "the 'right of employers to maintain discipline in their establishments'"[116] and an employer's "legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation . . . from defamation."[117] Board decisions invalidating ambiguous language and vague handbook policies benefit both employers and employees. Unclear policies harm employees without helping employers.[118] There needs to be a proper balance.

IV. Guidelines for Employers After *Hills & Dales*

Employers have a legitimate need for handbook policies that restrict some harmful workplace conduct.[119] Unambiguous policies with specific examples of prohibited conduct reduce the risk of employer NLRA non-compliance and costly litigation.[120] Unfortunately, *Hills & Dales* and other decisions have not articulated a clear, consis-

111. *See* Corbett, *supra* note 55, at 28 ("I am concerned that a vision of the NLRA as part of the overall law of the workplace in the United States may fade and be replaced by a view that the Act is just the labor law that applies to unionized workers.").

112. Lafayette Park Hotel, 326 N.L.R.B. 824, 828 (1998).

113. *See supra* text accompanying note 12.

114. Corbett, *supra* note 11, at 287.

115. *Id.* at 279.

116. Three D, LLC, 361 N.L.R.B. No. 31, slip op. at 1, 4 (Aug. 22, 2014), *enforced*, No. 14–3284, 2015 WL 6161477 (2d Cir. Oct. 21, 2015) (quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)).

117. *Triple Play Sports Bar & Grille,* 361 N.L.R.B. at 4.

118. For instance, vague policies, such as prohibitions of "abusive language" without providing examples, might create uncertainty whether employees can use words such as "scab"—a term commonly used by union supporters. *See* Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 650–52 (2004) (Liebman and Walsh, Members, dissenting) ("Section 7 protection is not limited to amiable or decorous communications.").

119. For example, in *Hills & Dales*, the employer adopted the disputed handbook provisions—later found unlawful—to address specific workplace problems. The "[h]ospital departments were not cooperating with each other, and employee relationships were suffering due to . . . 'back-stabbing.'" Hills & Dales Gen. Hosp., 360 N.L.R.B. No. 70, slip op. at 4 (Apr. 1, 2014). This resulted in low employee satisfaction as "employees were looking for other job opportunities . . . and patients were seeking health care in other hospitals." *Id.* This clearly was a problem that the employer needed to address.

120. *See, e.g.*, Robin Shea, *Employers May Not Like NLRB General Counsel Report on Handbook Rules*, EMP. & LAB. L. INSIDER (Mar. 27, 2015), http://www.employmentand

tent standard for lawful policies. Compounding the uncertainty, *Hills & Dales* seemingly invalidated formerly acceptable policies. Employers can no longer rely on the legality of policies predating *Hills & Dales*.[121] Employers need guidance to draft NLRA-compliant handbooks.[122]

The NLRB's Office of the General Counsel in 2015 issued a report on this issue.[123] The report addresses a wide variety of handbook policies, including policies governing confidentiality,[124] employee conduct toward company supervisors,[125] employers,[126] and co-workers,[127] general employee conduct,[128] employee third-party interaction,[129] employee use of company logos,[130] and conflicts of interest.[131] However, the report itself has been criticized for creating more questions than it answered.[132] Additionally, like *Hills & Dales*, the report seemingly contradicts itself.[133] Flaws notwithstanding, the report explains the

laborinsider.com/labor-relations/employers-may-not-like-nlrb-general-counsel-report-on-handbook-rules/.

121. *See* Van Dyck, Lee & Nichols, *supra* note 6.

122. *See generally, e.g.*, *Hills & Dales*, 360 N.L.R.B. No. 70.

123. Griffin Memorandum, *supra* note 23, at 2. The General Counsel issued this report to express his "views of this evolving area of labor law, with the hope that it will help employers to review their handbooks . . . to ensure that they are lawful." *Id.* Although the General Counsel's report does not bind the Board or the courts, it nonetheless offers useful guidance. BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 9, at 1.

124. Griffin Memorandum, *supra* note 23, at 4.

125. *Id.* at 7.

126. *Id.* at 7–9.

127. *Id.* at 10–12.

128. *See id.* at 11.

129. *Id.* at 12–14.

130. *Id.* at 14–15.

131. *Id.* at 18–20.

132. *See, e.g.*, Shea, *supra* note 120; *see also* Foley & Lardner LLP, *"Guidance" That Does Not Guide: NLRB General Counsel Issues Interpretations of Common Employee Handbook Policies*, LAB & EMP. L. PERSP. (Mar. 30, 2015), https://www.laboremploymentperspectives.com/2015/03/30/guidance-that-does-not-guide-nlrb-general-counsel-issues-interpretations-of-common-employee-handbook-policies/ ("[T]he memorandum's attempts to distinguish lawful from unlawful policies appear to create more questions than they answer, and may leave employers scratching their heads on whether they can even use certain policies seemingly necessary to effectively manage a workforce.").

133. For instance, a rule banning "[d]isrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative" is unlawful, but a rule stating "[b]eing insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in discipline" is lawful. Griffin Memorandum, *supra* note 23, at 8–9. The second rule is lawful because: "Although a ban on being 'disrespectful' to management, by itself, would ordinarily be found to unlawfully chill section 7 criticism of the employer, the term here is contained in a larger provision that is clearly focused on serious misconduct, like *insubordination*, threats, and assault." *Id.* at 9 (emphasis added). The differentiation between these two types of "insubordination" rules makes little sense. One commentator also noted the General Counsel's seemingly inconsistent positions. Foley & Lardner LLP, *supra* note 132. For example, the General Counsel cited in its report a rule banning "'[d]efamatory, libelous, slanderous or discriminatory comments about [the Company], its customers and/or its competitors, its employees or management' [as] unlawfully overbroad because employees 'reasonably would construe [it] to ban protected criticism or protests regarding their supervisors, management, or the employer in general.'" *Id.* (alterations in original)

Board's rationale and provides guidance and examples of acceptable policy language absent from *Hills & Dales*.[134]

A. General Policies for Drafting Employee Handbook Rules

Employers considering adopting workplace civility policies must exercise caution. Employers with preexisting policies should carefully review their policies in light of *Hills & Dales*. The decision forbids employers from "maintaining a work rule that prohibits negative comments about fellow team members[,] . . . that prohibits employees from engaging in or listening to negativity" or that "require[s] that employees represent the employer in the community in a positive and professional manner in every opportunity."[135] Moreover, because the Board never expressly overruled *Lutheran Heritage* and *Lafayette Park*,[136] employers must take into account those standards along with *Hills & Dales*. Civility policies are still needed and can be lawful, but employers must draft rules carefully.[137] This Part presents general guidelines for drafting compliant workplace civility policies.

First, employers should consider eliminating civility language entirely. Empirical evidence shows that such employer policies can be ineffective.[138] One study found that anti-gossiping policies may not reduce workplace negativity and that gossip can even benefit the workplace.[139] Instead, employee counseling and positive workplace encouragement may better promote workplaces civility.[140]

Employers should also consider including "savings clauses" in workplace civility policies. These should be disclaimers that specifically state that none of the handbook rules are intended to limit employee

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(quoting Griffin Memorandum, *supra* note 23, at 7). However, "in other policy examples the general counsel emphasized the importance of reading the policy in context with the material around it, the fact that the employer only sought to ban what seems to be malicious activity was apparently not persuasive in this instance." *Id.*

134. *See generally id.* These examples are shown in Section IV.B below.

135. *Id.* at 3.

136. *See* Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004); Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

137. *See* Griffin Memorandum, *supra* note 23, at 8–12.

138. *See* Giuseppe "Joe" Labianca, *Defend Your Research: It's Not "Unprofessional" to Gossip at Work*, HARV. BUS. REV. (Sept. 2010), https://hbr.org/2010/09/defend-your-research-its-not-unprofessional-to-gossip-at-work.

139. *Id.* Labianca surveyed thirty employees at a U.S. employer "about their social networks in the office, whom they gossiped with and how, and how much informal influence each colleague had." *Id.* Labianca's research showed that

> [g]ossip can be very helpful to people in organizations, especially when the flow of information from the top gets choked off, as often happens when companies are in crisis or undergoing change. If a few people know what's really going on, gossip becomes the means of spreading that information to everyone else. What's more, research shows that gossip often reduces individuals' anxiety and helps them cope with uncertainty.

Id.

140. *See id.*

communications protected by NLRA section 7. A savings clause will not protect unambiguously illegal language,[141] but may help in interpreting ambiguous language.[142]

Another way to ameliorate ambiguous rules is to omit references to the employer. For example, the Board would likely uphold work rules that prohibit "inappropriate treatment of employees, customers or visitors."[143] The Board also would likely uphold work rules that prohibit rudeness or disrespect toward customers only.[144] The Board, however, would likely strike a rule prohibiting disrespect toward "*supervisors*, employees and customers."[145]

Most importantly, employers should avoid policies "so sweeping that they prohibit the kinds of activity protected by federal labor law,"[146] such as those prohibiting employee discussion of wages, working conditions, or employee termination.[147] Employers should avoid denying employees the right to complain about the company and broad language lacking explanation or examples.[148]

Finally, employers should revise existing policies to include phrases specifically approved by the NLRB, such as "represent[ing] the company in a positive and ethical manner."[149] Employers should provide specific examples of prohibited behavior to better defend against claims of "chilling" or over-breadth.

B. Suggestions for Handbook Language

This Part includes a list of approved policy language as well as language the NLRB has held violates section 8(a)(1). As demonstrated in these examples, subtle variations in language can be the difference between the Board upholding and striking down a policy.

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141. *See* Decision of Administrative Law Judge, Macy's Inc., 1-CA-123640, at 14 (N.L.R.B. May 12, 2015) (savings clause did not save an unlawful rule that restricted employee use of "confidential information"). In *Macy's Inc.*, the ALJ rejected the employer's argument that its "safe harbor," or savings, clause rescued its otherwise unlawful policies. *Id.* at 9, 14. The Board held the savings clause, which stated that the handbook was "intended to comply with all federal, state, and local laws, including, but not limited to . . . the National Labor Relations Act, and will not be applied or enforced in a manner that violates such laws" was too broad to be effective, and it ordered Macy's to rescind and revise each unlawful provision. *Id.* at 7, 14–15.

142. A savings clause was missing in *Knauz BMW* to the detriment of the employer. 358 N.L.R.B. No. 164, slip op. at 1 (Sept. 28, 2012).

143. *See generally infra* Section IV.B.

144. *See generally infra* Section IV.B.

145. *See generally infra* Section IV.B.

146. *The NLRB and Social Media*, Nat'l Labor Relations Bd., https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited Oct. 16, 2015).

147. *See id.*

148. *See id.*

149. Tradesmen Int'l, 338 N.L.R.B. 460, 461–62 (2002).

1. Unlawful Rules

The following employer handbook rules are unlawfully overbroad because employees could reasonably construe them as banning protected activity, such as criticism or protests directed toward the employer or supervisors[150]:

- Be respectful to the company, other employees, customers, partners, and competitors.[151]
- Do not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the company, or our competitors.[152]
- Be respectful of others and the company.[153]
- Do not make defamatory, libelous, slanderous, or discriminatory comments about the company, its customers and/or competitors, its employees, or management.[154]
- Don't pick fights online.[155]
- Do not make insulting, embarrassing, hurtful, or abusive comments about other company employees online, and avoid the use of offensive, derogatory, or prejudicial comments.[156]
- Show proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion.[157]
- Do not send unwanted, offensive, or inappropriate e-mails.[158]

The following insubordination bans are unlawfully overbroad because they prohibit conduct falling short of insubordination, which employees could reasonably construe to include a ban on protected activities[159]:

- Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative.[160]

150. Griffin Memorandum, *supra* note 23, at 7.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 10.
156. *Id.*
157. *Id.* at 11.
158. *Id.*
159. *Id.* at 7–8.
160. *Id.* at 8.

- Chronic resistance to legitimate work-related orders or discipline, even though not overt insubordination.[161]

The following rules are unlawfully overbroad because they could be reasonably understood to prohibit employees from publicly criticizing the employer[162]:

- Refrain from any action that would harm persons or property or cause damage to the company's business or reputation.[163]
- Practice caution and discretion when posting content on social media that could affect the employer's business operation or reputation.[164]
- Do not make statements that damage the company or the company's reputation or that disrupt or damage the company's business relationships.[165]
- Never engage in behavior that would undermine the reputation of the employer, your peers, or yourself.[166]

2. Lawful Rules

The following rules are lawful because employees would not reasonably believe that they preclude criticism of the company[167]:

- No rudeness or unprofessional behavior toward a customer or anyone in contact with the company.[168]
- Employees must not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business.[169]
- No inappropriate gestures, including staring.[170]
- Logos or graphics worn by employees must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message.[171]
- No threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors.[172]

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 9.
169. *Id.*
170. *Id.* at 11.
171. *Id.*
172. *Id.*

- No harassment of employees, patients, or facility visitors.[173]
- No use of racial slurs, derogatory comments, or insults.[174]

The following rule is lawful because employees reasonably would understand it to be a statement of legitimate employer expectations of workplace civility rather than a prohibition on protected activity[175]:

- Each employee is expected to work in a cooperative manner with management/supervision, co-workers, customers, and vendors.[176]

The following rule is lawful because employees reasonably would interpret it as requiring compliance with workplace misconduct investigations rather than with unfair labor practice investigations[177]:

- Each employee is expected to abide by company policies and to cooperate fully in any investigation that the company may undertake.[178]

Otherwise unlawful rules may be lawful based on their context. For example, the following insubordination rule is lawful because it is embedded in a provision clearly focusing on serious misconduct that an employer can lawfully prohibit[179]:

- Being insubordinate, threatening, intimidating, disrespectful, or assaulting a manager/supervisor, co-worker, customer, or vendor will result in discipline.[180]

Conclusion

Hills & Dales reaffirms section 7's protection of non-union workers and portends the demise of broad and ambiguous employer workplace civility policies. Uncertainties following the decision, however, leave its future application difficult to predict.[181] We know that employer policies now will be unlawful if they are responsive to or prohibit protected concerted activity and if they chill future protected activity. Some critics would prefer a return to the past in which the Board struck down only rules that on their face clearly violated section 8(a)(1).[182] This Note proposes an alternative standard designed

173. *Id.*
174. *Id.* at 12.
175. *Id.* at 9.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *See supra* note 28 and accompanying text.
182. *See* Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

to strike a better balance between protecting employee labor rights and legitimate employer interests in maintaining a civil workplace.[183]

The Board likely will continue to create new precedent and standards while simultaneously claiming to build only upon past decisions without overruling inconsistent precedent. However unclear these changing and often conflicting standards, the Board has expanded employer liability for workplace civility handbook policies. Employers should review their employee handbooks and revise or remove rules that risk being a target of the Board's next NLRA interpretation.

183. This proposed alternative would return to a version of the *Lutheran Heritage* "tends to chill" standard. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646 (2004); *see supra* Section II.A.