Davis Brown Employment and Labor Law Blog

Yo Momma Smack Down – Where are we on that whole civility thing? – October 18, 2019

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There are days when the workplace can feel a lot like a third-grade playground with kids running back and forth, bruised feelings, tearful meltdowns, and a real and apparent need for a nap and a snack. We also continually lament the lack of civility and professionalism in the workplace, but even governing agencies such as the EEOC and the NLRB are at odds over what this means and how it should be enforced.

EEOC

The EEOC has stated that professionalism - essentially being polite and a grown-up - is a critical element to providing a discrimination-free workplace. The EEOC has further encouraged employers to do professionalism training. In fact, EEOC training rolled out in October 2017 focused on "a respectful workplace environment." Many employers consider professionalism to be courtesy within the workplace and have drafted handbook policies and disciplinary structures to take this into account.

NLRB

However, a major stumbling block has been the impact of the National Labor Relations Board, it's associate and assistant general counsels' memos, on employers' ability to assert the need for courtesy and not run afoul of employee Section 7 rights. As you may remember, Section 7 of the NLRA applies to employers even if they are not a union employer and, specifically, prohibits policies or conduct which would impede employees' ability to potentially organize.

Prior NLRB memos have indicated that most of the policies employers use to talk about courtesy within the workplace were considered to be a violation of this Section 7 requirement. In the last few months, however, the regional directors released a 2018 memo directed to the retailer, CVS, which goes to this issue of politeness.

CVS Memo

This newer memo takes into consideration prior decisions; specifically, the *Boeing case* (365 NLRB No. 154), which provided employers with greater latitude. Based on this, the NLRB is to use a balancing task to determine the reasonable expectations of employers versus the importance of employee rights. Category 1, or clearly allowable rules, include the idea that the rule "when reasonably interpreted" does not prohibit or interfere with the use of Section 7 rights and, even if the rule does potentially impede Section 7, "the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule." See Advice Memorandum September 5, 2018; subject No. 51250120125 and 51250120133.

Category 2 rules are those that may fit within the same justification but require more individualized scrutiny. Category 3 addresses rules the Board considers to be "unlawful." The example utilized for Category 3 is the rule that we have long seen from the NLRB that you cannot prohibit employees from discussing wages or benefits. In this opinion, there was a statement in the CVS policies that employees should not " . . . be disrespectful or break the law: you should not post anything discriminatory, harassing, bullying, threatening, defamatory or unlawful. Don't post contact images or photos that you do not have the right to use."

The Board concluded that this rule of conduct was in fact lawful, including a statement relying on the *Boeing* case that employers may uphold basic standards of "civility." When read in its entirety, the memo appears to deviate substantially from prior NLRB statements which did not focus on the ability of the employer to require a civil work environment.

Profanity and Slurs

On September 5, 2019, the Board also requested briefs regarding whether or not profanity and slurs used in the workplace would be disqualifying events under the National Labor Relations Act. In a recent General Motors case, the employee used profanity, both general and specific, which the Administrative Law Judge found to be protected. General Motors requested that the NLRB reverse that finding on profane language.

Bottom Line

What does all of this mean for you as an employer? The EEOC focuses on the importance of respect, professionalism, and civility as a way to head off potential future discrimination or inappropriate workplace conduct. The NLRB has shifted back and forth sometimes holding such language to be within the realm of appropriate employee activity. The answer to this question may depend on whether or not you are currently unionized. The NLRB certainly has significantly greater control over a workplace which has a union element with only Section 7 applying to non-unionized employees.

When in doubt, basic civility is appropriate. Civility policies can be tied to anti-harassment and can also include certain types of off-work conduct which is may be directed at fellow employees or customers as well as social media conduct. Language prohibiting conduct which was discriminatory, harassing, bullying, defamatory, was affirmatively stated within the September 2018 memo to be "lawful" and clearly well within the expectations of the EEOC.

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