

# NLRB Revisits Employee Handbook Issues

By Hope Eastman

?By former Associate Jack Blum

We have written before about the NLRB's attacks on handbook provisions and other restrictions on employee communications, with warnings about restrictions on confidentiality of investigations, on using the company's email system, on social media and policies about reporting complaints (Restrictions on Employee Communication Could Lead to Unfair Labor Practice Charges - Jack Blum Dec. 4, 2015).

In an April 13, 2016 decision in *William Beaumont Hospital and Jeri Antilla* (NLRB Case No. 07-CA-093885), the NLRB returned again to handbook policies, but this time triggering a blistering dissent by Board Member, Philip Miscimarra, which the majority discounted in a pointed way. Some commentators have suggested that this case will trigger a debate on the entire issue.

***Advice for employers: It is a good idea to respond to these NLRB decisions as they come out because it seems to be a moving target and it is relatively simple, although an administrative burden. Employers should review their handbook provisions and code of conduct rules and be sure to include rules that are focused on particular conduct rather than general statements about teamwork and harmonious relationships. The other option, of course, is to include a general Section 7 disclaimer so that employees know that these rules will not be applied to Section 7 protected activity related to working conditions. Our recommendation is that you do some form of both. Let us know if we can help.***

This case is interesting because the underlying termination of two employees was upheld because they had engaged in bullying and similar conduct. The Board took the opportunity to try to explain its distinction between impermissible bullying and permissible conduct. In this case, the Michigan hospital had a "Code of Conduct" which the NLRB General Counsel had argued was unlawful in its entirety. The Board rejected that view and found that only selective phrases were unlawful.

## Lawful Rules

- No willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients or visitors
- No profane and abusive language directed at employees, physicians, patients or visitors
- No behavior that is rude, condescending or otherwise socially unacceptable
- No intentional misrepresentation of information
- No behavior that is disruptive to maintaining a safe and healing environment

## Unlawful Rules

- No conduct that impedes harmonious interactions and relationships
- No verbal comments or physical gestures directed at others that exceed the bounds of fair criticism
- No behavior that is counter to promoting teamwork
- No negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients or visitors

The Board interpreted the rules they deemed unlawful to be overbroad in that they could apply to protected Section 7 conduct which allows discussion of wages and the terms and conditions of employment and, therefore, unlawful because they could chill protected activities. The dissent makes the

point that an employee reading this and thinking about raising issues about the workforce will not really know that they can and cannot do. The majority may have given employers some help. In a footnote, the majority reiterated that discipline imposed pursuant to even an unlawfully broad policy will not be a violation of the NLRA if the employee's actual conduct, in fact, was not protected by the Act.

As usual, stay tuned.