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A Return to Common Sense: Fifth Circuit Guidance on Handbooks

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***T-Mobile USA, Inc. v. National Labor Relations Board*[1] or the Case of "Woulda, Coulda, Shoulda."**

Employers are caught between a rock and a hard place.

Courts demand rules for employee conduct, but, when employers oblige and spell out what seem to most to be common sense "I-learned-that-in-kindergarten" rules, they may run into trouble under Section 7 of the National Labor Relations Act ("NLRA" or the "Act"). Aside from general confusion, this can be a bitter pill to swallow.

Welcome to the world of Section 7.

In shorthand, Section 7 allows employees (unionized or not) to participate in what's called "concerted activities" related to "collective bargaining or other mutual aid or protection."[2] Generally put, employees have the right to talk about the terms and conditions of employment and to unionize (or not, if they choose). So, handbook rules that improperly interfere with those Section 7 rights can be violations of the Act and potentially lead to litigation before the National Labor Relations Board ("NLRB" or "Board").

This was T-Mobile's problem. Its rules related to maintaining a "positive work environment," treating others with "respect," prohibiting access to certain company information, and a blanket no photography or recording rule. The Board had struck them all down.

The NLRB's decision made employers scratch their heads. It was both confusing and nonsensical. And it made us question many other typical workplace rules.

On appeal, however, the Fifth Circuit held that all the rules, except the recording ban were plainly acceptable. And the court, which governs Texas, Louisiana, and Mississippi, did so using practical wisdom, grounded in reality. *Go figure.*

How courts analyze handbook language.

Because cases like *T-Mobile* generally do not involve *explicit* restrictions on Section 7 rights, the question is: Does a rule create a "chilling effect" on employees seeking to exercise their Section 7 rights? Looking at that issue here, the most significant inquiry was the following: "Would" employees "reasonably construe the language to prohibit Section 7 activity"? [3]

In answering this question, the Fifth Circuit approved of most of T-Mobile's handbook language.

The opinion is squarely a repudiation of Board analysis. Along the way, the court made a couple of critical points (one might say instructing or perhaps chastising the NLRB): One, the Board was *not* to "presume" an "improper interference with employee rights."[4] Two, and rather pointedly, the appellate court found that most of the NLRB's conclusions were patently "unreasonable."[5] *Bam*.

Refreshingly, the court took a common-sense approach. It held, for example, that the "positive environment" rule was designed to promote good working relationships—"the rule addresses a normal workplace, on a normal workday."[6] *Who would have thought?*

"Would" is not "could."

The Board's error, the court said, was interpreting the rules as "could" rather than "would."[7]

In other words, the Fifth Circuit held that the interpretation of a workplace rule is not to be parsed to what a theoretical employee *might* interpret it as, but what the "normal" employee actually "would" see. From that straight-forward view, the "positive environment" rule did not violate Section 7.

Similarly, the appellate court approved of the rule promoting "respect" among co-workers and avoiding fights in the workplace.[8] Further, it also struck down the Board's rejection of a policy prohibiting the disclosure of non-public information.[9]

As to the across-the-board "no recording" rule, the Fifth Circuit sided with the Board because the rule was too broad and had no exceptions.[10] But court also seems to imply that proper restraints in such a policy might have worked.

Affirming common sense.

Those of us on the outside of this Board versus court fight may feel like our heads are going to explode. Who would have ever thought that having a "positive environment" is a dreadful thing or that having "respect" for each other is not an admirable employment goal (just like everywhere else)? All these findings are so obvious, it is hard to fathom now why the Board ruled otherwise. But they live, apparently, in an alternate universe.

From a cost and time viewpoint, one wonders: Why in the world must a case like this go to an administrative hearing, *then* to the NLRB, *and then* to the appellate courts to figure out this kindergarten rule? It is truly a mystery. Also, how could the Board ruling ever square with other policies—like no harassment and other "good behavior" policies? They could not because rules like this all work together or are supposed to—in the real (not Board) world.

Frankly, I also wonder what the NLRB expects in its own work environment? Is it one of chaos, negativity, and disrespect? Doubtful, but now no one, not even the Board, has to worry. The Fifth Circuit has its back (and that of all employers).

It is good to know that the Fifth Circuit has come down on the employers' side in this decision. Otherwise, we all might have to go back to kindergarten and learn new rules.

The issue of handbook language is an on-going battle of Board interpretation and court analysis, with employers caught in the middle. If you need help in drafting or reviewing acceptable employee guidance, please call us at Kane Russell Coleman Logan PC.

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[1] --- F.3d ----, 2017 WL 3138612 (5th Cir. 2017).

[2] 29 U.S.C. §157.

[3] --- F.3d ----, 2017 WL 3138612, *3.

[4] *Id.*

[5] *Id.* at *4, *8.

[6] *Id.* at *5.

[7] *Id.*

[8] *Id.* at *6.

[9] *Id.* at *8.

[10] *Id.* at *7.

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