

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 16, 2000

TO : Peter B. Hoffman, Regional Director
Region 34

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 512-5012-0133-5000

SUBJECT: Bayer Corporation
Case 34-CA-9028

This case was submitted for advice as to whether an Employer rule is unlawfully overbroad under Lafayette Park Hotel.¹

The facts are set out in the Region's submission. Briefly, the Region has issued a Complaint alleging Employer violations of Section 8(a)(1) and (3) in response to the Union's organizing campaign. The Complaint specifically alleges, inter alia, that the Employer suspended and terminated Union supporter James Brozyna because of his Union activities. The Employer asserts that the termination was based in part on Brozyna's violation of an Employer rule that states that employees may not:

carry out acts of violence or threaten acts of violence; or harass (sexually, racially or otherwise) or ridicule a co-worker, supervisor, or visitor; or provoke, instigate or participate in a fight on company property.

Brozyna allegedly violated this rule by leaving a message on his supervisor's voice mail, while out on medical leave, during which he called the supervisor a "piece of shit."

We conclude that the Employer's rule is facially unlawful because employees reasonably would interpret it to prohibit activities that are protected by Section 7.

In Lafayette Park Hotel, the Board found unlawfully overbroad a rule that prohibited "false, vicious, profane or malicious statements" because it would prohibit forms of labor speech, such as false but not maliciously defamatory statements, that are protected by Section 7. More recently, in Adtranz,² the Board found unlawful an employer rule

¹ 326 NLRB No. 69 (1998).

² Adtranz ADB Daimler-Benz Transportation N.A., Inc., 331 NLRB No. 40 (May 31, 2000).

prohibiting "abusive or threatening language to anyone on company premises" because "abusive language" was not defined in the rule and that term reasonably could be interpreted to include lawful union organizing propaganda or rhetoric.³ Similarly, in Flamingo Hilton,⁴ the ALJ found unlawfully overbroad a rule that prohibited "insubordination, derogatory behavior toward management personnel, refusal of job assignments, or harassment of another employee or guest." The Board reversed that finding but only because the rule was absent from the employee handbook that had been introduced into the record.

Here, as in the above-described cases, the prohibition against "harassment" and "ridicule" could incorporate protected Section 7 conduct. "Ridicule," in particular, would by definition seem to include derisive statements regarding managers or supervisors, which would be protected by Section 7. In fact, the Employer has applied the rule to Brozyna's statement "you're a piece of shit," which clearly would be protected labor speech if it had been uttered in the context of Section 7 activity.⁵ The Region has determined that, notwithstanding its conclusion that Brozyna was disciplined for discriminatory reasons, the Employer's application of the rule to him was not directed at any arguably protected activity he was engaged in when leaving that phone message. However, there is every reason to believe that the Employer would have enforced the rule against Brozyna, for stating that his supervisor was a "piece of shit," even if that statement had been made while he was engaged in Section 7 conduct such as protesting the Employer's medical leave policy or expressing other concerns

³ 331 NLRB No. 40, slip op. at 5-6, citing Linn v. United Plant Guards, 383 U.S. 53 (1966) (union campaign rhetoric is protected even when it includes "intemperate, abusive, and inaccurate statements"). See also Flamingo Hilton-Laughlin, 330 NLRB No. 34 (1999) (rule prohibiting loud, abusive or foul language" was unlawful); Great Lakes Steel, 236 NLRB 1033, 1036-37 (1978) (rule prohibiting distribution of literature which was "libelous, defamatory, scurrilous, abusive or insulting" was unlawful).

⁴ 330 NLRB No. 34, slip op. at 5, 13.

⁵ See Felix Industries, 331 NLRB No. 12 (May 17, 2000) (employee did not lose protection of the Act when he called his supervisor a "fucking kid" during telephone conversation).

regarding terms and conditions of employment. In light of the Employer's enforcement of the rule against that type of statement, employees reasonably would interpret the rule to preclude certain activities which are protected by Section 7.⁶

For that reason, this case is different from the Advice Memorandum in Mariner Post-Acute Network⁷. In that case, there was no evidence of the employer's enforcement of its rule prohibiting "harassment in any form of a resident or fellow employee" in such a way that it would be reasonable for employees to conclude that Section 7 activities were prohibited. Moreover, that rule as a whole clearly applied to job performance concerns, so that employees reasonably would conclude that the phrase in question would similarly apply only to serious job misconduct and not protected activity.

Accordingly, the Region should issue complaint absent settlement alleging that the rule violates Section 8(a)(1).

B.J.K.

⁶ See Lafayette Park Hotel, 326 NLRB No. 69, slip op. at 4.

⁷ 11-CA-18096, Advice Memorandum dated February 10, 1999.