

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

DATE: March 14, 2012

TO: Rhonda P. Ley, Regional Director  
Region 3

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Corning Hospital 512-5012-0125  
Case 03-CA-068201 512-5012-6762

The Region submitted this case for advice on whether a provision in the Employer's social media policy admonishing employees to "[b]e respectful and professional" to their co-workers is unlawfully overbroad. We conclude that employees would not reasonably interpret this provision to restrict Section 7 activity, given the particular context in which it appears. Accordingly, the maintenance of this provision does not violate Section 8(a)(1).

The Employer operates hospital facilities in Corning, New York and has an established collective-bargaining relationship with the Charging Party Union, 1199SEIU United Healthcare Workers East. The Union alleges that a single provision of the Employer's Social Media Usage Policy is facially unlawful. That provision, contained in the section of the policy governing employees' personal use of social media sites, reads: "Be respectful and professional to fellow employees, business partners, competitors and patients. Do not use unprofessional online personas."<sup>1</sup>

An employer violates Section 8(a)(1) of the Act through the maintenance of a rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights."<sup>2</sup> The Board has developed a two-step

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<sup>1</sup> The Union also alleges that the Employer violated Section 8(a)(1) and (5) by unilaterally implementing its Social Media Usage Policy. The Region has determined that the Section 8(a)(5) allegation is meritorious but may defer that allegation if the independent Section 8(a)(1) allegation is dismissed.

<sup>2</sup> *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

inquiry to determine if a work rule would have such an effect.<sup>3</sup> First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict protected activities, it will nevertheless violate Section 8(a)(1) upon a showing that: “(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.”<sup>4</sup> The Board will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.<sup>5</sup> Rules that are ambiguous regarding their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights, are unlawful.<sup>6</sup> In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, so that they would not reasonably be construed to cover protected activity, are not unlawful.<sup>7</sup>

The challenged provision of the Employer’s social media policy does not explicitly restrict Section 7 activity. Moreover, there is no indication that the Employer promulgated its policy in response to union activity or that the policy has been applied to restrict protected activity. Thus, the issue here is whether employees would reasonably construe the cited policy language to prohibit Section 7 activity.

The Board has found rules that prohibit “disrespectful conduct,” “negative conversations,” and “derogatory attacks” unlawful where such broad terms would reasonably be read to apply to protected criticism of the employer’s labor policies or treatment of employees.<sup>8</sup> For this reason, in

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<sup>3</sup> *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 646-47 (2004).

<sup>4</sup> *Id.* at 647.

<sup>5</sup> *Id.*

<sup>6</sup> See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001) (work rule that prohibited “disrespectful conduct” towards supervisors and other individuals unlawful because it included “no ... limiting language which removes [the rule’s] ambiguity and limits its broad scope”), *enforcement denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003).

<sup>7</sup> See *Tradesmen International*, 338 NLRB 460, 460-461 (2002) (prohibition against “disloyal, disruptive, competitive, or damaging” conduct would not be reasonably construed to cover protected activity, given the rule’s focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

<sup>8</sup> See, e.g., *University Medical Center*, 335 NLRB at 1320-21 (rule prohibiting “disrespectful conduct” toward supervisors and other individuals); *Claremont*

*Stant USA Corporation*, we similarly concluded that a social media policy provision admonishing employees to “[b]e respectful” to the Company and its employees and to refrain from engaging in “name calling, unfounded statements, or behavior that will reflect negatively” on the employer would reasonably be construed to preclude protected criticism of the employer’s labor policies or treatment of employees and therefore was unlawfully overbroad.<sup>9</sup>

We have also found rules directing employees to communicate in a professional manner to be overly broad when employees would reasonably construe such rules to prohibit robust but protected discussions. For example, in *McKesson Corporation*, we concluded that a rule that cautioned employees to not “pick fights,” to “[r]emember to communicate in a professional tone[,]” and to avoid “topics that may be considered objectionable or inflammatory – such as politics and religion” would reasonably be construed by employees to restrict discussions about working conditions or unionism, which likewise have the potential to become heated or controversial.<sup>10</sup> Similarly, in *Laboratory Corporation*, we found that employees would reasonably construe a provision stating that the employer “expected” social media communications to be “made in an honest, professional, and appropriate manner” and not contain “inflammatory comments” to preclude protected discussion about and criticism of the employer’s labor policies.<sup>11</sup> And in *Cooper University Hospital*, we concluded that a rule prohibiting employees from engaging in “unprofessional communication that could negatively impact Cooper’s reputation or interfere with Cooper’s mission or unprofessional/inappropriate communication regarding members of the Cooper community” violated

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*Resort & Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting “negative conversations” about employees and managers); *Southern Maryland Hospital*, 293 NLRB 1209, 1221-22 (1989) (rule prohibiting “derogatory attacks on fellow employees, patients, physicians or hospital representative[s]”), *enforced in pertinent part*, 916 F.2d 932 (4<sup>th</sup> Cir. 1990). *Cf. Tradesmen International*, 338 NLRB at 460-461 (prohibition against “disloyal, disruptive, competitive, or damaging” conduct would not be reasonably construed to cover protected activity, given the rule’s focus on other clearly illegal or egregious activity).

<sup>9</sup> *Stant USA Corporation*, Case 26-CA-24098, Advice Memorandum dated October 13, 2011 at 5.

<sup>10</sup> *McKesson Corporation*, Cases 06-CA-066504 & 06-CA-070189, Advice Memorandum dated March 1, 2012 at 7-8.

<sup>11</sup> *Laboratory Corporation of America*, Case 28-CA-23503, Advice Memorandum dated November 16, 2011 at 10-11.

Section 8(a)(1) because employees would reasonably read the rule to include protected statements that criticized the employer's employment practices.<sup>12</sup>

In all of these cases, however, the General Counsel's theory of violation was predicated on the fact that, given the context, employees would reasonably construe the ambiguously phrased rules to prohibit criticism of the employer or its agents or otherwise restrict employee Section 7 activity. Here, there is no such context. The rule in question admonishes employees to be respectful and professional toward their fellow employees and the Employer's business partners, competitors, and customers and does not restrain employee criticism of the Employer. Moreover, there is nothing in this provision or the remainder of the Employer's social media policy that interferes with employees' Section 7 right to discuss with one another working conditions, union representation, or other protected topics. Although employees do not lose the protection of the Act when their discussions with co-workers over terms and conditions or union representation become heated and contentious,<sup>13</sup> an admonition that employees be respectful and professional in their communications with each other does not preclude protected discussions. The fact that employees *could* interpret the rule to restrict such discussions is not sufficient to establish a violation where such an interpretation would not be reasonable.

Thus, in the narrow circumstances of this case, where there are no other provisions in the Employer's social media policy that are facially overbroad and implicate Section 7 concerns, we conclude that employees would not reasonably construe an admonition that they be respectful and professional when communicating with each other to restrict the exercise of

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<sup>12</sup> *Cooper University Hospital*, Case 04-CA-38044, Advice Memorandum dated September 12, 2011 at 5. See also *Hills and Dales General Hospital*, Cases 07-CA-53556 & 07-CA-53623, Advice Memorandum dated October 13, 2011 [FOIA Ex. 7(A)]

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<sup>13</sup> See *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 60-61 (1966) ("the Board has concluded that epithets such as 'scab,' 'unfair,' and 'liar' are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7").

their Section 7 rights. Accordingly, the Employer's social media policy is lawful on its face.

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B.J.K.