

# Common Rules of Decency Could Get You In Trouble With the NLRB

## Labor & Employment Law Update

By Beverly Alfon on February 3, 2015

*Treat each other with dignity and respect. Do not harass one another.* They seem innocuous enough. However, the NLRB may deem these common rules unlawful, if they are implemented or more strictly enforced following protected activity, such as a strike or an election, or in the context of unfair labor practice charges filed against an employer. In *Care One at Madison Avenue*, 361 NLRB No. 159 (Dec. 16, 2014), the board held that an employer violated the law by posting a memorandum shortly after a union election, urging employees to treat each other with “dignity and respect” and reiterating its workplace violence policy – even though the policy itself was lawful and the memorandum specifically acknowledged employees’ Section 7 rights.

The majority found that the employer failed to demonstrate a legitimate basis for issuing the memorandum because: (1) there was no evidence that threats actually occurred or that the employer attempted to investigate any alleged threats; (2) the memorandum referenced the recent union election and the “differences that arose in the workplace during the union’s campaign”; and (3) the memorandum “suggested that the employer believed that employees did not treat each other with dignity and respect when they engaged in protected union activity.” The fact that the memorandum was “posted on the heels of the union election and in the wake of several contemporaneous unfair labor practice charges,” weighed heavily for the majority. They found that the employer “promulgated and posted the memorandum in response to the employees’ union activity” and employees would reasonably construe the memorandum to prohibit Section 7 activity. The company’s acknowledgement of the employees’ right to support a union was not enough to save it because the memorandum “failed to make clear that employees also had the right to engage in protected activity in furtherance of those views.”

**BOTTOM LINE:** In the wake of protected activity or in the context of other unfair labor practice charges, expect the NLRB to closely scrutinize any employer communications to employees that may be interpreted as an attempt to silence employees in the exercise of their Section 7 rights (e.g., loyalty requirements, confidentiality restrictions, limitations on leaving one’s work area, etc.). This can be problematic for an employer who is trying to bring semblance and security back to a workplace because of a recent strike or a close representation election.

What should an employer do in light of this?

- Gather and document evidence of harassment or other threatening activity – anything that will establish that the company is motivated by legitimate workplace concerns, and not any union or other protected activity.
- Avoid referring to any protected activity or suggesting that employees generally failed to treat each other with “dignity and respect” by participating in the protected activity.
- Acknowledge the employees’ right to support a union *and engage in protected activity in furtherance of their views* on work terms and conditions.

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