No Such Thing as “No Harm, No Foul”?

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Everybody knows that an activist National Labor Relations Board (NLRB) expects a lot of all employers nowadays, union and non-union. One of the areas under the greatest NLRB scrutiny are time-honored, well-worn policies that have existed in employee handbooks for years: don’t disparage your employer; don’t say anything damaging about the company; don’t harm the business’s reputation or goodwill in the marketplace.

The reason for these kinds of policies is obvious and intuitive: if you work here, you owe your employer a common law duty of loyalty. And loyalty means, in part, not publicly slamming your employer.

Most everyone also knows that the NLRB has taken aim at these kinds of policies because they arguably discourage employees from exercising their rights under Section 7 of the National Labor Relations Act. Section 7, broadly speaking, protects employees’ rights to organize and to work for their “mutual aid and protection,” which necessarily means being able to talk about working conditions. The NLRB (and administrative law judges applying NLRB rules) has held over and over in the past several years that employment policies prohibiting employee speech that is “damaging” to or “disparaging” of a business are overbroad – sure, the policy would prohibit some things that are clearly unlawful, like true defamation, but it would also prohibit publicizing a legitimate beef. If you don’t like your pay and you want to post “my employer is cheap” on Facebook, that statement is probably damaging to a company’s reputation – but it’s also clearly protected speech under the NLRA.

The fact is, many employers still have these kinds of policies in place. So what happens if you’re one of those employers, you read this blog, and you remove the offending policy from your employee handbook before anybody complains or notices? It’s like a tort suit without damages – no harm, no foul, right?

Wrong, at least according to one NLRB administrative law judge in Chicago a couple of days ago. A private bus company, Latino Express, maintained an employee disciplinary policy from July 2012 through April 2014 that made certain offenses immediate cause for termination. On the “don’ts” list were “[a]ny action that jeopardizes company contracts or loss of revenues” and “[a]ny activity which causes harm to the operations or reputation of Latino Express Bus Company.” The company removed those rules from its handbook in April 2014 “once the rules were brought to [its] attention,” and it even posted the revised policy on employee bulletin boards. A union representing workers at the company filed an unfair labor practice charge over the fact that the company had maintained allegedly unlawful policies (the ones that had already been rescinded), and the case went to an administrative trial.

The judge found that the policies in question could be reasonably read by employees to prohibit lots of legally protected things, like striking, or complaining about wages, or even negotiating a collective bargaining agreement, on the theory that all of these things could have an impact on revenues or affect the employer's operations or reputation.

But what about the fact that the bus company rescinded the policies and went out of its way to let employees know the policies no longer applied? Not good enough, said the judge: "[M]aintaining unlawful rules for almost two years makes their silent withdrawal untimely." But the withdrawal wasn't "silent," was it? What about posting the new policies on the bulletin boards? Not good enough, said the judge: the bus company "made no assurances to employees that it will not interfere with the exercise of their Section 7 rights under the Act in the future and that at no time did [the company] expressly admit that these rules were unlawful."

In other words, the company didn't go out of its way to say, "hey, we think we're violating the law, and that's why we're changing the rules, and we promise we won't do it again."

This case doesn't mean that an employer has to immediately issue a *mea culpa* to all employees if it still maintains a questionable policy. This is just one administrative judge in one city, and I would never recommend that an employer publicize to employees that it thinks it has been breaking the law. But the decision does stand as a good measure of just how unforgiving the NLRB is prepared to be – so rescind potentially unlawful policies, let employees know about policy changes – and cross your fingers.

The case is Latino Express Inc., NLRB Case No. 13–CA–122006 (Mar. 17, 2015).