T-Mobile USA, Inc.

363 NLRB No. 171 (2016)

By Chairman Pearce and Members Hirozawa and McFerran

Decision and Order

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The consolidated complaint alleges that numerous provisions in written work rules and policies applicable to the Respondent's employees are unlawful. An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule explicitly restricts activities protected by Section 7." If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(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."

The rules at issue before us are not alleged to explicitly restrict protected activities or to have been promulgated in response to or applied to restrict Section 7 activities. Thus, the relevant inquiry is whether employees would reasonably construe the challenged rules to prohibit Section 7 activity. In construing rules, Lutheran Heritage teaches that they are to be given a reasonable reading, and are not to be considered in isolation. Further, any ambiguity in the rule must be construed against the drafter–here, the Respondent.

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[W]e find that the Respondent […] violated Section 8(a)(1) by promulgating and maintaining rules in its employee handbook requiring employees "to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships" … .

Since at least January 16, 2014, the Respondent promulgated and has maintained a provision in its employee handbook entitled "Workplace Conduct" that provides in pertinent part:

> [The Respondent] expects all employees to behave in a professional manner that pro-

> motes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, coworkers, and management.

The General Counsel contended that the undefined phrases "positive work environment" and "communicating in a manner that is conducive to effective working relationships" are ambiguous and vague, and would reasonably chill employees in the exercise of Section 7 rights. The judge disagreed and recommended dismissal of the allegation. We reverse. We find that employees would reasonably construe the rule to restrict potentially controversial or contentious communications and discussions, including those protected by Section 7 of the Act, out of fear that the Respondent would deem them to be inconsistent with a "positive work environment."

In recommending dismissal, the judge relied on decisions in which the Board found that employers lawfully maintained rules directed at unprotected conduct that employees would have understood to lack the Act's protection. See, e.g., Copper River of Boiling Springs, LLC, 360 NLRB No. 60 (2014) (upholding rule prohibiting "insubordination to a manager or lack of respect and cooperation with fellow employees or guests," including "displaying a negative attitude that is disruptive to other staff or has a negative impact on guests").

In contrast … , the rule at issue here more broadly restricts employee communications and is not limited to conduct that would objectively be viewed as unprotected. Rather, we find that employees would reasonably understand the rule's requirement that they communicate "in a manner that is conducive to effective working relationships" with coworkers and management as prohibiting disagreements or conflicts, including protected discussions, that the Respondent subjectively deems to not be conducive to "a positive work environment." See, e.g., Hills & Dales General Hospital, 360 NLRB No. 70 (2014) (finding rule requiring employees to represent the hospital "in the community in a positive and professional manner" just as overbroad and ambiguous as unlawful proscriptions of negative comments or attitude); cf. Claremont Resort & Spa, 344 NLRB 832 (2005) (finding rule prohibiting "negative conversations" about coworkers and managers unlawful). Moreover, employees would read the rule in context with other work rules, found unlawful here, prohibiting employees from "arguing" and from making "detrimental" comments about the Respondent. Because labor disputes and union organizing efforts frequently involve controversy, criticism of the employer, arguments, and less-than-"positive" statements about terms and conditions of employment, employees reading the rule here would reasonably steer clear of a range of potentially controversial but protected communication in the workplace for fear of running afoul of the rule.

The Respondent contends that, because the rule sets out the business-related objectives of "efficiency, productivity and cooperation," employees would reasonably understand that the rule is not intended to restrict Section 7 activity. We disagree. Those terms

refer to the expectation that employees behave in a professional manner as set forth in the first sentence of the provision, which is not alleged to be unlawful. They do not provide employees with a basis for determining what communications would fail to contribute to "effective working relationships" or "maintain a positive work environment." Nor do those words shed light on how the Respondent would enforce the provision in the context of Section 7-protected discussions that the Respondent views as undermining a positive work environment. As explained in Whole Foods Market, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015), "[w]here reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity. Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Sec. 7 activity for fear of running afoul of a rule whose coverage is unclear." Accordingly, we find that employees would likely refrain from protected communications due to a reasonable concern that their statements or actions could be viewed as running afoul of the rule.

Accordingly, we reverse the judge and find that the Respondent's promulgation and maintenance of the above provision violates Section 8(a)(1) of the Act.

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Editor's Note: On appeal, the D.C. Circuit disagreed that "a reasonable employee would construe [the 'positive work environment' rule] to prohibit protected activity", and denied enforcement to that portion of the Board's order. T-Mobile USA, Inc. v. NLRB, 865 F.3d 265 (D.C. Cir. 2017).