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June 11, 2014

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NLRB Rules Numerous Portions of Hooters Handbook Violate the NLRA

By Matthew J. Feery

A recent decision from an administrative law judge of the National Labor Relations Board (the "Board") demonstrates the combination of a number of issues discussed in this space before and provides employers with a good example of the extent to which the Board will find many standard handbook provisions to violate the National Labor Relations Act ("Act").

The decision, *Hoot Winc LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, Joint Employers*, Cases 31-CA-104872, 31-CA-104874 (2014), has received some attention since its publication, if only for the admittedly unusual events leading up to the filing of the unfair labor practice charge.

The pertinent facts for our purposes can be distilled down as follows. In April 2011, employees of a Hooters restaurant in California learned that the restaurant's general manager had made rather rude and inappropriate comments about, among other things, the physical characteristics of certain servers (the "Hooters Girls"). After discussing the comments among themselves, some of the employees, including server Alexis Hanson, complained to management about the comments. Around this time, the restaurant held its annual bikini contest, which was a local contest that fed into a national, company-wide contest. Winners received a cash prize and other benefits. The contest was mandatory: while sign-up was

voluntary and employees could withdraw by a certain deadline, after the deadline passed any employee who signed up for but failed to participate in the contest would be considered a "no-call, no-show" and be terminated. Hanson subsequently learned that the restaurant's marketing coordinator, Pamela Noble - who organized the bikini contest and arranged for the judges - was participating in the contest. Moreover, Noble's best friend and the best friend's boyfriend were judges. Hanson and another employee repeatedly voiced their concerns of the contest being rigged to other employees and to management. After Noble won the contest, Hanson told Noble, "Congratulations, Pam, on cheating." Hanson denied using any expletives. A few days later, Hanson was informed she was being fired for cursing at another employee. When Hanson protested and denied using expletives, she was told, "OK. Well, then you are being terminated for your negative social media posts." This unfair labor practice claim followed.

An administrative law judge ("ALJ") for the Board found that Hanson's termination violated the Act because, based on the ALJ's interpretation of the facts, it appeared the restaurant took the bikini contest incident as an excuse to remove an employee (Hanson) who had complained about working conditions - namely, the inappropriate comments from the general manager about employees and the potentially rigged bikini contest, which was considered a working condition given its cash prize and mandatory nature.

And if the case stopped here then it would perhaps serve as an interesting fact pattern demonstrating that protected activity under the Act can occur anywhere, even a bikini contest. (As well as a reminder that managerial employees should not respond to an employee's denial of conduct by saying, "Okay, in that case then you are being terminated for *this* reason.") But the case did not stop there.

The ALJ went on to analyze nine separate provisions of the employee handbook, as well as the handbook's class arbitration provision and confidentiality provision, and he found that *all* of the aforementioned handbook provisions violated the Act.

As my colleague Aaron Graf recently wrote, the NLRB has continued to apply the *D.R. Horton* case despite federal appellate courts rejecting that case's analysis. The *Hooters of Ontario Mills* case provides yet another example. Indeed, even after noting that *D.R. Horton's* reasoning was rejected by every federal appellate court that had examined it, the ALJ stated, "I, however, am bound by Board precedent unless and until the Supreme Court or the Board directs otherwise." He then went on to apply *D.R. Horton* and found the class arbitration provision to violate the Act.

The ALJ then examined the nine handbook provisions, and in doing so he expressly noted the *Flex Frac* decision we recently wrote about, stating that handbook provisions must be examined not from the perspective of the employer's intent, but from the perspective of preventing the chilling of employee rights. This means that it does not matter how employees *did* interpret the provisions; it matters how they *could*. The nine provisions found in violation of the Act were as follows:

- "NEVER discuss tips with other employees or guests."
- "Insubordination to a manager or lack of respect and cooperation with fellow employees or guests."
- "Disrespect to our guests including discussing tips, profanity or negative comments or actions."
- Unauthorized disclosure of "sensitive" company information, including "any information" contained in company records.
- "Any other action or activity which Hooters reasonably believes represents a threat to the smooth operation, goodwill or profitability of the Company's business."
- "Any off-duty conduct which negatively affects, or would tend to negatively affect, the employee's ability to perform his or her job, the Company's reputation, or the smooth operation, goodwill or profitability of the Company's business."
- "Employees shall not discuss the Company's business or legal affairs with anyone outside the Company."
- "Information published on your social networking sites should comply with the company's confidentiality and disclosure of proprietary information policies." (We have written about the NLRB's focus on social media policies before.)
- "Be respectful to the Company, other employees, customers, partners, and competitors. Refrain from posting offensive language or pictures that can be viewed by co-workers and clients. Refrain from posting negative comments about Hooters or co-workers."

The main reasons each of the aforementioned provisions was found to be in violation of the Act were because the ALJ found them so broadly worded and lacking in qualification or limitation that employees *could* interpret them to prohibit the exercise of activities

protected by the Act, such as discussing or complaining about wages and working conditions. Some prohibitions, such as the prohibition on disrespect for guests or on interference with company "goodwill" and goals, were closer calls. But even there, the lack of any qualification or indication of what conduct was or was not included in the prohibition allowed the ALJ to find the provisions were overbroad and thus in violation of the Act.

And finally, consistent with additional recent NLRB actions, the ALJ found the company's confidentiality and non-disclosure provision to violate the Act. The provision prohibited disclosure of, among other things, "payroll or accounting records and practices, or the Company's personnel policies and practices, including all matters related to employees training, selection, discipline and/or discharge, which is not generally known to the public." This prohibition plainly includes discussion of wages and working conditions, and the ALJ easily found it to violate the Act.

Hooters of Ontario Mills demonstrates the combination of many of the recent Board trends, including Board action on class action arbitration provisions, confidentiality and non-disclosure provisions, social media policies, and general handbook provisions. Employers reading these decisions may rightfully wonder what, if any, policies the Board would find to comply with the Act. The main differences between compliant policies and violative policies are ones of scope and definition. Many employers understandably want to foster a positive work environment, through prohibitions on negative comments or on discussion of who gets paid what. But broad prohibitions, written without proper definition or nuance, will be found to violate the Act, at least by the Board as currently constituted. Employers should continue to review their handbooks and employment policies and work with legal counsel to find and correct any policies that may be problematic.


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