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Viewpoint: The Importance of Dissent at the NLRB

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Sitting as the lone dissenter on the National Labor Relations Board (NLRB) might seem like a futile exercise. Grinding away on opinions that are critiques of the law as stated by your colleagues can be disenchanting work. But as a former NLRB member, I can attest that dissents are also valuable tools for future board members and the courts. Indeed, one of my proudest moments as a lawyer came when a court of appeals reversed the board “for the reasons stated by Member Meisburg.”

A recent NLRB decision involving an employer’s work rules illustrates the value of a powerful dissenting voice. Since late 2010, the NLRB has been on a campaign to outlaw employer rules that, the board says, may be “reasonably” read to prohibit employees from engaging in activity protected by the National Labor Relations Act (NLRA). Such activity includes protesting working conditions or making efforts to form a union. Increasingly, the test seems to have morphed into one not based on the reasonable reading of a rule, but instead on whether any conceivable reading could “chill” protected conduct.

The NLRB’s sole remaining Republican appointee, Member Philip Miscimarra, dissented in many of these cases. His dissents have focused on the board’s ongoing failure to recognize or even consider the legitimate business basis for employer rules. But in the case of *William Beaumont Hospital* (363 NLRB No. 162, April 13, 2016), Miscimarra took off the rhetorical gloves and invited his colleagues and the courts to repudiate the NLRB’s current test, laying out for adoption a more reasoned and rational one rooted in both long-standing Supreme Court precedent and the underlying purposes of the NLRA.

The case involved a tragedy—the death of an infant at a hospital. In the hospital’s ensuing investigation, it was determined that the infant’s death resulted in part from inadequate communication among hospital personnel, as well as a bullying situation among some of the hospital’s nurses.

The NLRB upheld the hospital’s discharge of the bullying nurses, but in the course of doing so, it reviewed and held unlawful two rules maintained by the hospital: one which prohibited employee conduct that “impedes harmonious interactions and relationships,” and another that prohibited employees from making “negative or disparaging comments about the ... professional capabilities of an employee or physician to employees, physicians, patients or visitors.”

The board majority held the former rule to be overbroad because, they said, it “could encompass any disagreement or conflict among employees” involving activity protected under the act. The latter rule also was deemed unlawful “because it would reasonably be construed to prohibit expressions of concerns over working conditions.”

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Miscimarra did not agree with any of that. His nearly 16-page dissent took the board majority to task for its twisting of board precedent into a single-minded focus on only whether a rule might chill protected conduct. Instead, he argued that the NLRB should adopt a balancing test rooted in Supreme Court decisions going back over half a century. This would require the NLRB to balance a rule's potential impact on protected conduct against a business's legitimate basis for the rule. In this way, an employer's interest in maintaining common sense work rules would be protected against invalidation based on supposition and conjecture about how an employee would read them, which is the linchpin of the board's current test.

The adoption of Miscimarra's test by the NLRB would be a big step toward a more rational application of the NLRA, and his dissent may indeed provide the basis for a change in the law by a future board. More immediately, however, his dissent could assist a federal court in reviewing the decision and perhaps overruling the board's current test "for the reasons stated by Member Miscimarra."

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