Sulloway & Hollis P.L.L.C.
COUNSELORS AT LAW

CHRISTOPHER J. PYLES, ESQ.
REPLY TO: CAPITAL OFFICE
Fax number: (603) 228-0787
jpoole@sulloway.com

HRA-GC LEGAL UPDATE
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RUMOR HAS IT . . .

Pssst, did you hear? Apologies to Adele, but the National Labor Relations Board (NLRB) has whispered some words in my ear that tell a story employers won't want to hear. People may say crazy things – and the NLRB won't let a "no gossip" policy stop them.

Employers are probably now familiar with the NLRB's expanding scope of review over workplace policies, even in non-union settings. From limiting social media policies to the scope of investigation confidentiality statements, the NLRB is finding violations if conduct policies are deemed overbroad and ambiguous and could be interpreted to restrict employees from discussing or complaining about any terms and conditions of employment.

The NLRB recently applied the same analysis to a no-gossip policy. Last December, an NLRB Administrative Law Judge issued a decision and recommended order determining that the employer had violated §8(a)(1) of the National Labor Relations Act (NLRA) by maintaining an overly broad "no gossip" policy and subsequently suspending and terminating an employee for violating that policy because the "gossip" was protected concerted activity. The case involved an admissions representative, Joslyn Henderson, who started working at a technical school in 2007. In 2011, she filed an EEOC charge alleging sexual harassment and retaliation, and later the employer reprimanded Henderson for talking about work issues and complaints with a manager outside of Henderson's "chain of command." Henderson was told she could not discuss work issues with anyone except her supervisor, the HR Director or the CEO, and was told she would be terminated if she discussed work issues with other managers or any of her co-workers.

A short time later, the employer published a No Gossip policy, under which gossip would not be tolerated, and employees "gossiping" about the company, an employee or customer, would be subject to disciplinary action. The definition of gossip included talking about a person's personal life when they were not present; talking about a person's professional life without a supervisor being present; negative or untrue

or disparaging comments about other people; and creating, sharing or repeating rumors about others.

Several months later, several of the school's admissions representatives were replaced, and then the HR Director was fired. Henderson and two co-workers discussed the changes, and exchanged concerns about their job security. Henderson called a colleague at another school to see if there would be an opening for the terminated HR Director, and during the conversation she conveyed information between the other school and some co-workers about applying for jobs. There were a number of contentious issues at work in the following months. Then, Henderson went out on medical leave. While she was out, a co-worker alleged Henderson had solicited co-workers to leave their jobs, spoken negatively about the company and managers, and tried to instigate a work slowdown. When Henderson stopped by the facility to address a leave issue, she was notified that she was being suspended pending an investigation. She was terminated a short time later, for "willful breach of company policies and counter-productive behavior" including violations of the No Gossip Policy.

On review, the NLRB Judge determined that the No Gossip policy violated the NLRA because it prohibited employees from speaking to co-workers about discipline and other terms and conditions of employment:

> A thorough reading of this vague, overly-broad policy reveals that it narrowly prohibits virtually all communications about anyone, including the company or its managers. In fact, read literally, this rule would preclude both negative and positive comments about a person's personal or professional life unless that person and/or his/her supervisor are present. Such an overly no-broad, vague rule or policy on its face chills the exercise of §7 activity and violates §8(a)(1). A reasonable employee would certainly view it as doing so.

Keeping in mind that even policies banning false, vicious, profane or malicious statements have been deemed unlawful, the Judge apparently had little trouble reaching her decisions, especially since some of the underlying communications "arose out of mutual concern and real fear for job security[.]" In short, talking to co-workers about job security and other employment opportunities is "protected activity" under the NLRA.

The Bottom Line

Employers need to be aware of the expanding role of the NLRB, and its new emphasis on protecting any employee communications that have virtually anything to do with conditions of employment. Workplaces with "No Gossip" policies need to review them carefully in light of this decision. Otherwise, the NLRB may come knocking, and ask "baby, is that really what you want?"