

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 22, 2019

TO: Cornele A. Overstreet, Regional Director
Region 28

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Chipotle Mexican Grill
Case 28-CA-229134

512-5012-0125
506-6080-1700
506-6090-8000

This case was submitted for advice as to whether the Employer violated the Act by maintaining 1) a rule encouraging employees to “[b]e . . . objective” in their communications; and 2) a rule requiring employees to forward any inquiry, request for information, or subpoena from a government agency to the Employer. We conclude that the Employer’s guidance about employee communications is a lawful civility rule. We further conclude that the government investigations directive violates the Act because employees would reasonably understand it to apply to requests or subpoenas for employees to participate in Board or other government agency investigations/proceedings.

FACTS

The Employer, Chipotle Mexican Grill, is an international chain of fast casual restaurants. The Employer maintains a handbook applicable to all employees nationwide that contains the following allegedly unlawful rules (emphasis added):

ETHICAL COMMUNICATIONS

Always be fair and courteous to fellow employees, customers, suppliers or people who work on behalf of Chipotle. Also keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by using our Open Door Policy than by posting complaints to a social media outlet. Avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, co-workers or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to harm someone’s reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or Chipotle policy. Whether in your everyday work conversations, in your exchange of e-mail, or otherwise, your communications should be

thoughtful and ethical. Think before you speak and write. **Be clear and objective.**

GOVERNMENT INQUIRIES/INVESTIGATIONS

If the situation ever presents itself, Chipotle will cooperate with government agencies and authorities. **Any inquiry, request for information, or subpoena from a government agency or authority should be forwarded immediately to the Compliance Department, the Safety, Security and Risk Department or Chipotle's General Counsel or, in the case of tax audits, to the Chief Financial Officer.**

The Region does not have any evidence concerning whether or how these rules have been enforced.¹

ACTION

We conclude that the Employer's guidance about employee communications is a lawful civility rule. We further conclude that the government investigations directive violates the Act because employees would reasonably understand it to apply to requests or subpoenas for employees to participate in Board or other government agency investigations/proceedings, and the significant impact this would have on Section 7 rights is not outweighed by a legitimate Employer interest.

(1) Ethical Communications rule

The Board made clear in *Boeing* that employees may maintain work rules requiring "harmonious relationships" in the workplace and requiring employees to uphold basic standards of "civility."² Here, although the rule's admonition to "be . . . objective" is not a typical civility rule and could theoretically be read to restrict some protected, subjective speech, the entire rule in context is best understood as the sort of civility rule the Board has found lawful under *Boeing*. The rule as a whole is primarily

¹ The Employer drafted the Ethical Communications rule during the pendency of litigation in Case 4-CA-147314, where an ALJ concluded, *inter alia*, that a prior version of the rule violated the Act. Region 4 approved this revised rule for a proposed settlement of that charge and subsequently closed the case on compliance with this language in effect. Although the Government Inquiries/Investigations rule was apparently in effect at the time of the earlier case, it does not appear that the parties litigated the lawfulness of that rule.

² 365 NLRB No. 154, slip op. at 3-4, 15 (Dec. 14, 2017).

focused on the *manner* of prohibited employee speech, rather than the content of prohibited speech. Thus, the instruction to “be . . . objective” appears in a paragraph that encourages employees to ensure their communications are “fair and courteous,” “thoughtful and ethical,” and do not constitute unlawful harassment, bullying, or defamation. The portion of the rule prohibiting “disparagement” of customers, coworkers and suppliers is in part a content restriction. But that restriction is clearly lawful with regard to customers and suppliers and, with regard to coworkers, there is a distinction between rules restricting what employees can say about their coworkers (i.e., disparaging other employees), which have little to no impact on Section 7 activity, and those restricting what employees can say about their employer (i.e., disparaging the owners).³ This rule clearly is intended to restrict only the former. Finally, although the second sentence of the rule references “work related complaints,” which would ordinarily encompass Section 7 activities, the rule in fact acknowledges that such complaints may be made, and merely suggests that direct communications with co-workers and use of the Employer’s Open Door policy are the methods most likely to achieve results. Therefore, considering the entire rule in context, employees would not reasonably interpret the “be objective” provision as preventing protected concerted activity.

In contrast to the minimal impact that these types of civility rules have on Section 7 rights, employers have significant business interests in maintaining such rules. These interests include an employer’s legal responsibility to maintain a workplace free of unlawful harassment, its substantial interest in preventing violence, and its interest in avoiding unnecessary conflict or a toxic work environment that could interfere with productivity and other legitimate business goals.⁴ Here, the Employer’s legitimate interests in civility and harmonious interactions are apparent from the text of the rule. The Employer is not seeking to prevent employees from complaining about or criticizing their terms and conditions of employment; rather, the Employer is only requiring employees to be civil when they engage in any kind of communication. Thus, this provision is a lawful civility rule that belongs in Category 1.

(2) Government Inquiries/Investigations rule

We further conclude, however, that the Employer’s Government Inquiries/Investigations rule is a Category 3 rule under *Boeing* because on its face it restricts employees from cooperating in Board investigations. Employees have a Section 7 right to cooperate in Board investigations or to concertedly participate in

³ See Guideline Memorandum GC 18-04 at 4–5, 17.

⁴ *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15. See generally Guideline Memorandum GC 18-04 at 3–5.

investigations by other regulatory or law enforcement agencies.⁵ Employees would reasonably conclude that this rule prohibits them from providing evidence or otherwise cooperating in an investigation without first notifying the employer. The potential impact on Section 7 rights is significant because requiring employees to identify themselves to the employer before participating in an investigation puts employees at risk of intimidation and coercion.⁶

The Employer asserts that the rule only applies to inquiries addressed to it, rather than to inquiries made to individual employees, and further argues that it needs the rule to ensure that it is aware of charges, complaints, and government inquiries directed to it.⁷ But despite the Employer's claim that the rule does not apply to inquiries or subpoenas directed to individual employees, the rule makes no such distinction on its face. Employees would likely understand the rule to apply to any request or inquiry from a regulatory or law-enforcement agency, including the Board. Thus, the impact on Section 7 rights is significant, while the Employer could easily accommodate its legitimate business interests with a more narrowly drawn rule.⁸

Accordingly, the Region should issue a complaint, absent settlement, alleging that the Government Inquiries/Investigations rule violates Section 8(a)(1), and should

⁵ See *T & W Fashions*, 291 NLRB 137, 137 n.2 (1988) (employees' concerted participation in U.S. DOL investigation protected); *Squier Distributing Co.*, 276 NLRB 1195, 1195 n.1 (1985) (employees' concerted cooperation with sheriff investigation of alleged managerial embezzlement protected by Section 7), *enforced* 801 F.2d 238, 241 (6th Cir. 1986).

⁶ *Id.*, slip op. at 18. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-42 (1978) (noting the "special danger" of witness intimidation, particularly "with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage," if the parties engaged in pre-hearing discovery in Board proceedings).

⁷ The Employer offers as an example that it did not receive the initial docketing letter, charge, or requests for evidence in the instant case. The rule at issue would not have cured the problems with service in this case, which occurred because the Employer does not accept mail at that facility rather than because an employee received the materials and failed to forward them to the Employer.

⁸ An ALJ recently concluded that a similar rule was unlawful using a similar analysis. See *Interstate Management Co. d/b/a Residence Inn by Marriott Santa Fe All-Suites Hotel*, JD(SF)-27-18, September 11, 2018.

dismiss, absent withdrawal, the allegation regarding the Ethical Communications rule.⁹

/s/
J.L.S.

ADV.28-CA-229134.Response.Chipotle. (b) (6), (b) (7)(C)

⁹ In light of the fact that Region 4 effectively approved the language in the Governmental Inquiries/Investigations rule, the Region should merit dismiss this charge if the Employer agrees to rescind the rule.