

# Employment Law

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## Confidentiality Policy Barring Employee From Discussing Pending Complaint With Coworkers Found Unlawful By NLRB

By Phillip C. Bauknight, Esq.

Employers beware: blanket policies prohibiting employees from discussing ongoing investigations into employee misconduct have recently been found unlawful by the National Labor Relations Board (the "Board"). In *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, Case 28-CA-023438 (July 30, 2012), the Board found that a hospital's policy of routinely asking employees making complaints not to discuss them with their coworkers during the investigation violated Section 8(a)(1) of the National Labor Relations Act ("Act"). This determination, which was a partial reversal of the administrative law decision below, found that the hospital's "generalized concern" with protecting the integrity of its investigation was insufficient to outweigh the potential effect of the policy on an employee's rights under the Act. The Board otherwise agreed with the decision below, which found that the hospital did not unlawfully discipline the petitioner or violate his rights under the Act.

### Facts

Petitioner was a sterile technician employed by the respondent hospital. On February 19, 2011, the technician discovered that there was no hot water or steam pressure at the hospital. This concerned the technician as steam was required to sterilize the surgical equipment. As a result, he informed his senior manager that he would be unable to sterilize the surgical instruments. In response, the senior manager instructed the technician to clean the surgical instruments with a low temperature sterilizer that used hydrogen peroxide as a sterilant. This suggestion was in contrast to the normal procedure that used a large steam sterilizer to clean the instruments. The technician subsequently spoke to his lead coordinator and was instructed to use hot water from the coffee machine to clean the instruments. The technician objected on the basis that these procedures were not established protocol and somebody could get sick. Due to his concerns, the technician never cleaned the instruments, which led the senior manager to conclude that the technician was being insubordinate.

On February 21, 2011, the senior manager wrote a memorandum concerning his recent interactions with the technician. He also met with the hospital's human resources consultant to discuss the technician's behavior. At the conclusion of the meeting, it was determined that the technician would be given non-disciplinary "coaching." Notably, at the time of this meeting, the senior manager was unaware that the technician had met with the house supervisor to express his concerns.

On February 24, 2011, the technician received his evaluation, which stated that he did not meet expectations for the behavior component of his review. Notably, the evaluation was completed before the technician spoke to his house supervisor about the sterilization issues. Additionally, the behavior section was based on unrelated complaints the senior manager received from the technician's coworkers.

Believing that the "coaching" and negative evaluation were issued as a result of his efforts to engage in protected concerted activity, the technician filed his NLRB complaint against the hospital. During the action it was discovered that the hospital had a policy prohibiting employees making a complaint from discussing the matter with coworkers while the investigation was pending. Additionally, the hospital made all newly hired employees sign a confidentiality agreement that prohibited the discussion of private employee information (such as other employees' salaries and disciplinary actions) unless such information was originally disclosed by the subject employee. Failure to comply with this agreement could subject an employee to corrective action, including termination and/or legal action. As such, the complaint was amended to allege that these confidentiality actions violated the Act.

### Decision of Administrative Law Judge

First, Administrative Law Judge Pollack determined that the coaching and evaluation were not in violation of the Act. Judge Pollack explained that Section 7 of the Act protects employees who engage in concerted activities for their mutual aid and protection. Under Section 7, "concerted activity" included complaining to a coworker about unfair treatment and protest of employer instructions. However, the judge noted that if the hospital could "show that the same action would have been taken against an employee in the absence of his or her protected activity, the employer rebuts the technician's *prima facie* case." Here, Judge Pollack found that the "clear evidence" demonstrated that the senior manager wrote the coaching memorandum because he believed the technician was insubordinate and not because of any protected concerted activity. Similarly, Judge Pollack found that the performance review did not violate the Act because it was completed prior to the concerted activity and was based on previous complaints made by the technician's coworkers.

Second, Judge Pollack determined that the confidentiality agreement violated Section 8(a)(1) of the Act and ordered the hospital to stop maintaining and/or enforcing the agreement. In coming to this determination, Judge Pollack relied on *Labinal, Inc.*, 340 NLRB 203, 209-210 (2003), in which the Board noted that "[t]o prohibit one employee from discussing another employee's pay without the knowledge and permission of that employee muzzles employees who seek to engage in concerted activity for mutual aid or protection. By requiring that one employee get permission of another employee to discuss the latter's wages, would, as a practical matter deny the former the use of information innocently obtained which is the very information he or she needs to discuss with fellow employees before taking the matter to management." Finally, Judge Pollack found that the hospital's policy of asking complaining employees not to discuss the matter with other employees while an investigation was ongoing did not violate the Act.

### NLRB's Decision

Upon entry of Judge Pollack's decision, both parties filed exceptions requesting that the Board review this action. The crux of the Board's decision addressed the hospital's confidentiality policies and held that the hospital's practice of asking employees making complaints not to discuss them with their coworkers during the pendency of the investigation violated the Act. The Board explained that "to justify a prohibition on employee discussion of ongoing investigations, an employer

must show that it has a legitimate business justification that outweighs employees' Section 7 rights." Here, the Board found that the hospital's blanket prohibition was not justified by its generalized concern to protect the integrity of the investigation process and such concern was insufficient to outweigh an employee's rights under the Act. Rather, to minimize the impact of the policy on an employee's Section 7 rights, the hospital needed to determine the following before issuing such a prohibition:

- Whether any given investigation witness needed protection;
- Whether evidence was in danger of being destroyed;
- Whether testimony was in danger of being fabricated; or
- Whether there was a need to prevent a cover up.

The Board, however, affirmed the judge's ruling that the hospital did not violate the Act by issuing coaching, as it agreed that the technician failed to establish that the hospital knew of the technician's alleged protected activity (speaking to supervisors and coworkers about his concern as to the sterilization procedures) at the time he was disciplined with coaching. Similarly, the Board affirmed that the technician's evaluation did not violate the Act as it was based on unrelated complaints from his coworkers and completed before the technician engaged in any protected activity. Last, while the Board did not address the provision in the confidentiality agreement, it left in place Judge Pollack's order prohibiting the employer from maintaining and/or enforcing the agreement.

The Board made it clear that employees have an unequivocal right to engage in concerted activity. Any attempt to prohibit employee discussion of an investigation requires an exhaustive analysis of the potential harms that could result from such discussion and must be tailored to each particular incident. A blanket prohibition will not suffice. Additionally, a policy prohibiting employee discussion of a pending complaint does not have to be a documented rule or include a threat of discipline in order to be unlawful. Any proposed suggestion limiting employee discussion will violate the Act if it could be reasonably interpreted to coerce employees into an unlawful restraint of their rights.

In sum, employers should tread carefully when deciding whether to institute policies prohibiting employees from communicating with other employees about a pending complaint. As a general rule, blanket prohibitions on employee communications could result in significant penalties for an employer.

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