PUBLICATION

NLRB Marches Forward With Its Prohibition on Blanket Confidentiality in HR Investigations

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Extending on National Labor Relations Board (NLRB) precedent, on July 26, 2013, Administrative Law Judge Jeffrey D. Wedekind ruled that The Boeing Company's human resources (HR) investigation confidentiality policy violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by interfering with protected rights under Section 7 of that Act. *The Boeing Co.*, No. 19–CA–089374, July 26, 2013 (Wedekind, J). Boeing, like many employers, had a policy that required employees to keep their participation in HR investigations confidential.

The charge against Boeing arose out of an HR complaint filed by employee Joanna Gamble about the conduct of her supervisor. During the investigation, Boeing had Gamble sign a confidentiality notice that specifically "directed" witnesses not to discuss an investigation or complaint with any other Boeing employee or the witness's union representative, if applicable. After Gamble received the investigation report, which concluded that her allegations were "not substantiated," Gamble emailed and discussed the findings with her coworkers, who shared her concerns about the supervisor. A few days later, Gamble was issued a written warning for violating the confidentiality notice.

Gamble responded to the warning by filing an unfair labor practices charge with the NLRB, alleging that Boeing had interfered with her rights under Section 7 of the NLRA to discuss the terms and conditions of her employment with her coworkers. Ten days after Gamble filed the charge, Boeing rescinded the written warning, and revised its confidentiality notice to state that the company "recommend[ed]" that employees refrain from discussing investigations with each other.

Judge Wedekind first took up the question of whether the original confidentiality notice violated the NLRA. Boeing argued that it had legitimate interests in keeping all HR investigations confidential, including ensuring the integrity of ongoing investigations, preventing workplace retaliation, and promoting an environment where employees could report issues. While Judge Wedekind acknowledged the persuasive weight of those arguments, he noted that he was bound by the NLRB's prior decisions in *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80 (2011), and *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012). In those decisions, the NLRB held that blanket confidentiality policies were unlawful where they failed to consider on a case-by-case basis whether confidentiality was truly necessary to protect the integrity of an investigation. In response, Boeing argued that it was impractical for it to conduct a separate evaluation of the need for confidentiality in each HR investigation, as it had conducted more than one-thousand HR investigations from September 2011 until February 2013. Judge Wedekind, while seemingly agreeing with Boeing, stated that he had no authority to depart from *Hyundai* or *Banner*. Accordingly, the judge ruled that the original "directed" policy was unlawful.

Judge Wedekind next took up the revised notice, which "recommend[ed]" that witnesses maintain confidentiality. While Boeing argued that this language was sufficient to cure the problems with its original notice, the judge disagreed, holding that the company could not even recommend confidentiality. The judge noted that the recommendation was considered a request by the Company, that Boeing clearly communicated its desire for confidentiality, and that employees signed the notice. As a result, it was less than clear that

employees were free to disregard the request for confidentiality. Thus, the judge held even the revised policy was unlawful.

Since even a recommendation of confidentiality may be construed as unlawful, what then would the Board permit? In an Advice Memorandum from the NLRB's Office of the General Counsel, dated January 29, 2013, but not released until April 2013, the General Counsel stated that the following language would likely be lawful:

[The company] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [the company] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

As a first step, then, employers must determine whether confidentiality is truly necessary to protect an investigation by considering, among other things, whether witnesses need protection, evidence may be destroyed, whether testimony may be fabricated, or whether the company may need to prevent a cover-up. Then, and only then, can employers instruct that an employee must maintain confidentiality or be disciplined.

It is apparent that the NLRB's judges have some sympathy for the resources required to make such a determination in every investigation. Still, the NLRB appears to be holding steady in prohibiting policies of blanket confidentiality in all HR investigations.