

Silence is Golden in Apogee Retail: The NLRB Affirms Employers' Right to Require Confidentiality in Workplace Investigations

Working Together

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In what can be considered a triumph for common sense, the National Labor Relations Board [“NLRB” or “Board”] recently issued a decision in Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019), upholding an employer’s right to require that employees maintain confidentiality in workplace investigations. In reaching that outcome, the NLRB expressly overruled its prior decision in Banner Estrella Medical Center, 362 NLRB 1108 (2015), a case in which the Board had: 1) created a presumption that such confidentiality rules unduly infringed upon the right of employees to organize or otherwise engage in concerted activities; and 2)

imposed a rigorous case-by-case evidentiary obligation upon employers to demonstrate the need for such confidentiality. Befitting the reversal of a precedent that had been created only four years earlier, the NLRB delineated its reasoning in exhaustive and compelling detail. Along the way, it eviscerated Banner Estrella -- which, the Board wrote, “ignored the obvious need to protect employee witnesses and the integrity of sensitive workplace investigations” -- and instead applied the test for facially neutral workplace rules that it had established in Boeing Co., 365 NLRB 154 (2017).

The relevant language in Apogee was contained in two separate rules that were disseminated to all employees nationwide. The company’s Code of Business Conduct and Ethics provided in relevant part that “those who are interviewed are expected to maintain confidentiality regarding [company] investigations.” Apogee’s Loss Prevention Policy enumerated behaviors that could result in disciplinary actions, including the failure to cooperate in company investigations by engaging in an “unauthorized discussion of [an] investigation or interview with other team members.”

Apogee cited a number of practical reasons for its confidentiality requirements, including employee reluctance to cooperate in investigations due to their fear of being labeled a “rat” or “snitch” or otherwise disparaged by fellow employees, and the need to protect employees who do cooperate from threats and physical harm, as well as from retaliation by supervisors who may be involved in the wrongdoing being

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investigated. The company further noted that employees who are interviewed during investigations “almost always” ask for confidentiality, a request that employers had generally been precluded from granting under Banner Estrella. Apogee also expressed concerns about employees seeking to manipulate or otherwise undermine the integrity of investigations by openly discussing the substance of interviews in an effort to influence, or collude with, other employees, particularly when multiple employees were suspected of wrongdoing.

Given the legitimacy of these concerns, the NLRB held that “investigative confidentiality rules similar to those at issue” in Apogee were “categorically lawful” when applied to ongoing investigations. The NLRB reasoned that “the integrity of any investigation depends on the investigator’s ability to ensure that potential witnesses do not coordinate their accounts of relevant events,” and as the “full, fair, prompt, and accurate resolution of . . . complaints also benefits employees,” confidentiality plays “a key role in serving the interests of both employers and employees.” In addition to ensuring the investigation’s integrity, it encouraged the prompt reporting of workplace issues by employees without the fear of retaliation and protected employees against the “dissemination of their sensitive personal information.” Confidentiality requirements also provided employees with a defense against the importuning of colleagues who were pressing for information about the interview.

The importance of maintaining confidentiality in a workplace investigation also comported with the the Equal Employment Opportunity Commission’s directive that employers “should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible.” In fact, the NLRB referenced a June 2016 report on sexual harassment, in which an EEOC task force stated: “We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation.” This position was diametrically at odds with the NLRB’s 2015 decision in Banner Estrella, a dichotomy that Apogee has expressly eliminated.

In the course of reaching its decision, the Board did acknowledge that employees have a right under Section 7 of the National Labor Relations Act – which protects the rights of employees “to form, join, or assist labor organizations” – to discuss their own or their fellow employees’ discipline, or incidents that might result in discipline, within the scope of union-related “group action.” The NLRB held, however, that “the impact on Section 7 rights here is comparatively slight.” The Board astutely observed that Apogee’s confidentiality rules did not prohibit employees from discussing either the incident or any consequent discipline; rather, “they narrowly require the employees not discuss *investigations* of such incidents or *interviews* conducted in the course of an investigation” (emphasis in original).

Although the Board held that confidentiality requirements “are lawful as a general matter,” employers must remember that it did so within the context of open investigations. The Board took a more limited approach to investigations that had concluded. It recognized that even after an investigation has ended there may be

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reasons for prohibiting employees from discussing interviews that occurred during the investigation – such as protecting the safety of the individual whose complaint initiated the investigation or who substantiated the complaint. Nonetheless, the Board held that under Boeing, “investigative confidentiality rules that are not limited on their face to open investigations . . . require[e] individualized scrutiny in each case as to whether any post-investigation adverse impact on NLRA-protected conducted is outweighed by legitimate justifications.” This caveat aside, the NLRB’s affirmation of an employer’s right to require employee confidentiality in ongoing investigations provides a critical tool to entities that are seeking to conduct fair and thorough investigations into potential workplace misconduct. It also, as the Board noted, serves the interests of individual employees by providing them with safeguards against the intimidation or disparagement that might otherwise arise out of their good-faith participation in such investigations.

Tags: Confidentiality, National Labor Relations Board (NLRB)