

NLRB: Hospital's Practice of Asking Employees not to Discuss Ongoing Investigations of Misconduct Interfered with Employees' Rights

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The National Labor Relations Board has ordered an Arizona hospital to end its practice of asking employees not to discuss alleged employee misconduct with co-workers while the hospital is investigating the alleged misconduct. With one member dissenting, the Board made clear that it will allow an employer to limit employees' discussion of an ongoing disciplinary investigation only if a unique justification arises during the investigation.

The case, *Banner Health Sys. d/b/a Banner Estrella Med. Ctr.*, 358 NLRB No. 93 (July 30, 2012), arose when a sterile technician refused to follow his supervisor's orders to clean surgical instruments with hot water from a coffee machine while a steam pipe was broken at the hospital. The technician was investigated for his actions and subsequently disciplined for insubordination. He then filed an unfair labor practice charge against the hospital, alleging *inter alia* that the hospital's human resources representative had asked him during an investigation interview not to discuss the situation with his co-workers while the investigation was ongoing. The technician alleged that this informal request, which the hospital made in all of its disciplinary investigations, violated his and other employees' right to "engage in concerted activities for their mutual aid and protection" under Section 7 of the National Labor Relations Act.

A majority of the Board agreed with the technician, finding that the human resource representative's requests violated employees' rights under the Act. "[T]o 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," the majority stated. In this case, the majority held, the hospital's "generalized concern with protecting the integrity of its investigations" did not meet that standard. The majority admonished the hospital that it could limit employee discussion only if it first determined, during a specific investigation, that "witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover-up." In this case, the majority concluded, "[t]he [hospital's] blanket approach clearly failed to meet those requirements."

Notably, one member dissented from the majority’s finding, arguing that the HR representative had “merely asked,” as a “suggestion,” that employees not discuss matters under investigation. The majority rejected that dissenting opinion, finding that it relied on a distinction without a difference: “[h]owever characterized, [the HR representative’s] statement, viewed in context, had a reasonable tendency to coerce employees” and the Act “does not require that a rule contain a direct or specific threat of discipline in order to be found unlawful.”

Employers should review their policies and practices during disciplinary investigations to ensure that employees are not asked, or even informally encouraged, not to discuss the ongoing investigation. Any suggestion from the employer that an employee should keep silent regarding an alleged disciplinary situation can be viewed as interference with that employee’s Section 7 right to “engage in concerted activities for their mutual aid and protection.”

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Topics

National Labor Relations Act (NLRA), National Labor Relations Board (NLRB)