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Shhh . . . Can I Make Her Keep a Secret? The EEOC on Confidentiality during Investigations

By Marcie B. Cornfield

The task of conducting internal investigations may have just gotten a bit more difficult. As you may have recently heard, the National Labor Relations Board ("NLRB"), in *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), held that an employer's policy instituting a blanket prohibition on an employee discussing an ongoing investigation violated the National Labor Relations Act. The EEOC seems to be agreeing with the NLRB - or at least the Buffalo, New York office does. In a letter dated August 3, 2012, the EEOC's Buffalo office notified an employer that the EEOC was expanding its investigation of a discrimination charge because the employer's policy mandated that employees keep the investigation confidential while it was ongoing. [As has been noted elsewhere](#), here is the relevant excerpt from the letter:

You have admitted to having a written policy which warns all employees who participate in one of your internal investigations of harassment that they could be subject to discipline or discharge for discussing "the matter," apparently with anyone.

EEOC guidance states that complaining to anyone, including high management, union officials, other employees, newspapers, etc. about discrimination is protected opposition. It also states that the most flagrant infringement of the rights that are conferred on an individual by Title VII's retaliation provisions is the denial of the right to oppose discrimination. So, discussing one's complaints of sexual harassment with others is protected

opposition. An employer who tries to stop an employee from talking with others about alleged discrimination is violating Title VII rights, and the violation is "flagrant" not trivial. In this case, telling the ___ women who complained of harassment that they were not to tell others about the alleged harassment is enough to constitute a harm under Title VII. There does not have to be a separate adverse action. In addition, your written policy is so broad that a reasonable employee could conclude from reading it that she could face discipline or charge for making inquiries to the EEOC about harassment if that harassment is being or has been investigated internally by your organization.

While this letter is not law, the analysis gives a glimpse of how an EEOC investigator may view policies that mandate confidentiality during an investigation. Of course, this stance makes conducting an investigation tricky. Confidentiality is important in conducting a thorough internal investigation. Where confidentiality is not maintained, employees may discuss the allegations, which could have effects ranging from spreading rumors of unsubstantiated (and perhaps unfounded) allegations to having employees coordinate stories, making it more difficult to weed out inconsistencies. What is an employer to do during a highly sensitive investigation where employees are likely to talk to each other and potentially taint the investigation?

- **Be Speedy.** Conduct a prompt investigation. The need for a very prompt and well-planned investigation in which employees are interviewed quickly is critical. Perhaps plan all interviews on one day - one after the other. Alternatively, consider minimizing any advance notice of the interviews. If this is a telephonic investigation (as investigations often are given the multiple facilities of many employers), call all employees one after the other on the same day without providing notice as to your intent to call.
- **Do Not Mandate Confidentiality. Request Confidentiality Instead.** Inform employees that they are not *required* to maintain confidentiality. However, *request* that they do so. Appeal to common sense by informing employees that the more they discuss an investigation, the more an investigation may be hampered and the more questions they will need to answer from co-workers about what is going on - they may not enjoy the constant barrage of questions.
- **Do Not Guarantee Confidentiality Yourself.** As an employer, you may think that to gain confidentiality, you must earn it by promising it yourself. The fact is, you cannot and should not guarantee confidentiality during an internal investigation. Inform your employees you will try to maintain confidentiality to every degree possible, but you cannot guarantee confidentiality.
- **Ask the Employee Who They Have Spoken to About the Allegations and What Was Said.** Nothing prohibits you as the employer from asking employees who they have discussed the

investigation with. Should you expect coordination of accounts, this may give you a glimpse as to any possible rumor mill, who may be gossiping with each other, and why stories are so consistent. This may also have the added benefit of putting the employee on some sort of alert that you are keeping track of who is discussing what. An employee who likes to gossip may not want his or her boss to know about the gossiping. Putting an employee on notice may help curb the rumor mill.

- **Review Your Policies to Ensure You Are Not Requiring Confidentiality.** In light of the EEOC's letter, employers should ensure that policies about internal investigations do not mandate confidentiality. Further, all Equal Employment Opportunity policies and anti-retaliation policies should highlight that employees will not be retaliated against for participating in both EEOC and internal investigations.
- **Conduct a Fair, Neutral, Balanced, and Thorough Investigation.** Regardless of the EEOC's investigation, make sure you can prove you have conducted a prompt and thorough investigation through solid documentation. If your investigation is tainted because of employees discussing details of an ongoing investigation, your documentation can speak for itself when informing the EEOC the various reasons for any remedial action taken - or not taken.

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