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EEOC, NLRB Differ over Confidentiality of Workplace Sexual Harassment Investigations

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The latest report and proposed guidance from the Equal Employment Opportunity Commission (EEOC) on how employers should respond to sexual harassment in the workplace have raised questions about the confidentiality of investigations. Although the EEOC recommends that employers maintain the confidentiality of internal harassment investigations to the extent possible, this recommendation may conflict with a 2012 ruling by National Labor Relations Board (NLRB). The NLRB ruling prohibits employers from routinely forbidding employees from discussing investigations of misconduct.

The EEOC's Position on Confidentiality in Investigations

In June 2016, the EEOC's Select Task Force on the Study of Harassment in the Workplace issued a report of its findings on the ongoing problems of sexual harassment and its recommendations. The EEOC's recommendations for employers included the suggestion that anti-harassment policies should ensure the confidentiality of harassment complaints to the extent possible. The EEOC's Proposed Enforcement Guidance on Unlawful Harassment, which was posted for public comment in January 2017, echoed these recommendations. The proposed guidance noted that a conflict can arise when an employee reports harassment but requests total confidentiality and that no action be taken. It may not be reasonable for an employer to honor such a request in light of its legal obligation to prevent and correct harassment, particularly where the reported harassment is severe or if other employees are at risk. Maintaining the confidentiality of a harassment complaint and investigation may also conflict with the protections of the National Labor Relations Act (NLRA).

The NLRB's Position on Employees' Protected Rights

The NLRB is the federal agency tasked with enforcing the NLRA, which gives employees various rights to organize, join labor unions, and work together to improve working conditions. Among these protections is the right to engage in "protected concerted activity," which gives employees the right to act together, with or without a union, to try to improve their pay and working conditions. The NLRA makes it unlawful for an employer to punish or retaliate against an employee for engaging in protected concerted activity.

In its 2012 decision in *Banner Estrella Medical Ctr.*, 358 N.L.R.B. 809 (2012), the NLRB found that an employer violated an employee's protected concerted activity rights by issuing a rule prohibiting an employee from discussing ongoing investigations of another employee's "misconduct." In that case, the employee reported concerns that his supervisor had instructed him to sterilize surgical equipment using water from a coffee maker during a hot water outage. During the ensuing investigation, a human resources representative asked the employee not to discuss the matter with his coworkers while the investigation was ongoing.

The NLRB held that the employee's protected right to engage in concerted activity included the ability to discuss job-related complaints with coworkers. The NLRB explained that an employer can require employees to keep such complaints confidential only if it has a "legitimate business justification" that outweighs the employee's NLRA rights, and that justification must go beyond a "generalized concern

with protecting the integrity of [the] investigations." Meeting that standard requires an individualized determination in each instance to determine whether, for example, there is a particular risk that witnesses will collude or be coerced, or that evidence will be destroyed.

It is important to note that the NLRA generally excludes supervisors from protected concerted activity rights (though they are still protected from retaliation for participating in NLRB proceedings). *See* 29 U.S.C. § 152. Under the Act, a "supervisor" includes an individual with the authority to perform any one of a number of functions – such as hiring, transfer, discharge, and discipline – where such authority requires the use of "independent judgment" and is not merely clerical. Because such managerial employees are excluded from concerted activity protections, employers likely can require them to maintain the confidentiality of complaints and investigations.

Reconciling the EEOC and NLRB Positions on Confidentiality

The EEOC Task Force report recognized this potential conflict, and recommended that the EEOC and NLRB cooperate to harmonize these rules:

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. We heard also, however, that an employer's ability to maintain confidentiality - specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential - has been limited in some instances by decisions of the [NLRB] relating to the rights of employees to engage in concerted, protected activity under the [NLRA]. In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA.

EEOC, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace*, at 42, June 2016, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

According to a recent report, the EEOC and NLRB have engaged in preliminary talks about how to reconcile their respective positions on confidentiality, though no new guidance has emerged yet. It is possible the NLRB will revisit the issue and eliminate the need for reconciliation. There are significant policy considerations on both sides of this issue. Confidentiality can not only help to protect the complaining employee from unlawful retaliation for making a complaint, but can also guard the integrity of the investigation and the reputation of the accused until the employer can make a determination. On the other hand, the protected right to engage in concerted activity allows employees to share their concerns and grievances with one another, which might be particularly important in workplaces where sexual harassment is widespread or where the harasser has multiple victims. Notably, the EEOC guidance emphasizing the importance of confidentiality was promulgated before multiple women spoke out about Harvey Weinstein's conduct and the MeToo movement exposed how silence has enabled such harassment to flourish.

For now, the inconsistency between the EEOC's and NLRB's positions on confidential investigations creates a dilemma for employers and uncertainty for employees. Companies attempting to conduct adequate sexual harassment investigations must balance honoring legitimate requests for confidentiality with respecting employees' rights under the NRLA. Employees, meanwhile, do not know whether their complaints will be confidential if they wish, nor do they know whether others have made similar complaints. Further guidance from the EEOC and NLRB on the confidentiality of investigations will provide much-needed clarity, and the hope for victims of harassment is that any resolution of the inconsistency is careful not to enable a culture of silence.

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