



**NLRB AND EEOC MOVING TOWARD RULINGS THAT EMPLOYERS CANNOT TELL EMPLOYEES TO KEEP INVESTIGATIONS CONFIDENTIAL**



**Edward Trent**.....

*“There have been two significant developments this year... suggesting that employers can no longer protect the integrity of their investigations by telling employees they must keep the investigations confidential.”*

There have been two significant developments this year at both the National Labor Relations Board and the Equal Employment Opportunity Commission suggesting that employers can no longer protect the integrity of their investigations by telling employees they must keep the investigations confidential. In the NLRB case, the employer routinely asked employees making a complaint not to discuss the matter with their co-workers while the employer’s investigation was ongoing. The employee claimed that this request did not comply with his statutory rights to discuss workplace conditions with other workers. The National Labor Relations Board, overruling its Administrative Law Judge, agreed. The Board found that the employer’s generalized concern with protecting the integrity of its investigations was insufficient to outweigh employees’ rights to discuss work conditions with co-workers. Rather, it is the employer’s burden “to first determine whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover-up.” In this case, the Board found that the employer’s blanket approach failed to meet those requirements, and therefore the employer violated the Labor Act by maintaining and applying a rule or policy prohibiting employees from discussing ongoing investigations of employee misconduct. *Banner Health System*, 358 NLRB No. 93 (July 30, 2012).

NLRB Member Hayes, the only Republican currently on the Board, argued that the employer did not threaten employees with discipline if they discussed matters under investigation, but only asked employees not to discuss a matter under investigation in order to protect the integrity of the investigation. As Member Hayes noted, this was merely a “suggestion” rather than any type of binding rule and no one was disciplined for not complying with the request. Furthermore the request only applied while the investigations were on-going and not after it was concluded. The NLRB majority interpreted the record, however, that the prohibition was a binding rule, noting that the prohibition was listed on the employer’s standard interview of complainant form.

On August 3, the Buffalo Office of the Equal Employment Opportunity Commission issued a letter warning an Employer that its policy prohibiting its workers from discussing an ongoing internal investigation of harassment was unlawful. The EEOC reasoned that an employee’s discussion of his or her complaints of employment discrimination “with anyone” is protected opposition to perceived unlawful employment practices. Further, the Employer’s policy could be interpreted that an employee could be disciplined for contacting the EEOC if the harassment had been subject to an internal investigation by the Employer. It is somewhat unclear from the letter whether the second point was sufficient to invalidate the policy, or whether the mere provision of not discussing the investigation with co-workers would also be violative. What is clear is that a blanket policy prohibiting the employee from discussing harassment in the work place was considered a violation of Title VII in and of itself.

*Editor’s Note - These developing policies at the NLRB and EEOC leave an employer in a dilemma as to what to do and as to what an employer can say to those interviewed as part of an internal investigation. If an employer chooses to be on the safe side, it should not have a blanket policy or rule prohibiting employee discussions of ongoing investigations. Instead, the employer should assess each situation on a case-by-case basis to determine the need to maintain confidentiality, and issue either directions or suggestions to the complaining employee or witness of the legitimate business need for the confidentiality as to protect everyone’s rights, minimize the potential for workplace gossip or even defamation claims, or the other criteria as set forth in the NLRB ruling in Banner Health. Nothing in the EEOC’s letter or NLRB’s ruling should prohibit an employer from giving strong anti-retaliation warnings to an employee accused of harassment. Employers should seek the advice of counsel before disciplining or terminating an employee for violation of any confidentiality direction given associated with such an investigation.*

*Employers should let employees know that they have a duty to investigate claims and they take that duty seriously. The complaining employee should be told that he/she should immediately report any additional forms of harassment to the* **Continued on page 4** ►►



**Kelly Campbell.....**

“While these two cases are certainly unusual, it should be noted that defendants of harassment are becoming more aggressive.”

..... she falsely accused him of sexually assaulting her. On appeal, the appellate court affirmed the jury’s verdict awarding the defendant \$1.25 million in damages.

Another case (with a different result) involved a rather extreme fact pattern, in which a plaintiff claimed that between 2002 and 2005, he was the target of more than 50 incidences of racist, xenophobic, homophobic, and anti-Semitic graffiti that appeared in or around a Chrysler plant’s paint department. The allegations also included claims that his bike and car tires were punctured, sugar was poured in the gas tanks of two of his cars, and a dead bird wrapped in toilet paper to look like a Ku Klux Klansman (including a pointy hat) was placed in a vice at one of his work stations. The plaintiff contacted the local police, the FBI, the Anti-Defamation League, and complained to Chrysler. Chrysler responded by having the head of human resources at the plant meet with two groups of skilled tradesmen, reminding them that harassment was unacceptable. In addition, a procedure was implemented to document the harassments, efforts were made to discover who was at the plant during the periods when the incidents likely occurred, and a handwriting analyst was retained and used. Unfortunately, the harasser or harassers were never caught, and the problem continued.

The plaintiff sued Chrysler early on in the process, and the case proceeded to trial on the plaintiff’s hostile work environment claim. In one of the unusual twists to the case, Chrysler argued that the plaintiff was responsible for the harassment, and actually called two witnesses at trial who argued that the plaintiff did it all to himself. A forensic document examiner testified that while he was unable to reach a conclusion, he could testify that there was more evidence that the plaintiff authored the graffiti than that he did not. A psychiatrist hired by Chrysler testified that the plaintiff had a number of personality disorders consistent with Chrysler’s argument that the plaintiff was not victimized by death threats and suffering because of Chrysler’s inaction, but that more likely, Chrysler was actually the victim of the plaintiff’s lies.

Unfortunately for the employer, after a seven-day trial, the jury rejected Chrysler’s evidence that the harm was caused by the plaintiff himself, and returned a verdict for the plaintiff in

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## HARASSMENT DEFENDANTS FIGHT BACK (BUT WITH VARYING RESULTS)

A recent California case has resulted in the California Court of Appeals affirming a jury verdict of \$1.25 million in favor of the defendant, an attorney who was accused of sexual harassment. *Moreno v. Ostly*, 2012 WL 3095344 (CA Ct. App. July 31, 2012). The plaintiff, a legal assistant, sued the individual defendant attorney and his law firm alleging sexual harassment and wrongful termination, claiming that the attorney had raped her when she was drunk and from then on made almost daily sexual advances. The defendant attorney countersued the plaintiff for defamation, intentional infliction of emotional distress, and interference with prospective economic relations. The defendant attorney contended that the allegations made by the plaintiff were not only false, but that the plaintiff was aware of the effect that her accusations would have on his reputation and professional standing. While the parties seemed to agree that there had been a sexual relationship, the plaintiff claimed that the relationship was a result of coercion and that the defendant fired her when she tried to end it. Once the accusations were revealed in the legal community, the attorney had such trouble maintaining professional relationships that he was expelled from the firm, had to take odd jobs and his health suffered.

After a three-week trial, the jury specifically found that the plaintiff was not sexually harassed or wrongfully terminated. The jury found in favor of the defendant attorney on his countersuit, and determined that the plaintiff was “acting with hatred or ill will toward” the defendant when

### WELCOME TO THE FIRM JEFFREY M. CRANFORD

The Firm would like to extend a warm welcome to Jeffrey M. Cranford. Jeff is a Senior Associate in the Morristown, Tennessee office of the Firm, which he joined as of October 1, 2012. His practice is focused primarily on civil litigation representing



small and large businesses and municipalities in employment law, workers compensation, and general liability matters. He also practices in the areas of insurance defense, real estate, and domestic relations. Jeff received his Bachelor of Arts degree in History and Sociology

from Wake Forest University in 1995, where he was a member of the varsity golf team and a three-year letterman. He received his law degree from the University of Memphis in 1999. Jeff is a member of the Tennessee and American Bar Associations. He serves on the Board of Directors for Girls, Inc. of Morristown, Tennessee, and is also active in the Hamblen County United Way and First United Methodist Church.



**Cathy Shuck**.....

**“The threshold has now dropped to \$5,000, meaning that virtually all employer settlements will be reportable.”**

An employer that fails to report a reportable claim can be subject to civil penalties of \$1,000 per day. Thus, it is critical to be aware of MMSEA requirements during the settlement process, and to ensure that the necessary information and releases are obtained. The recommended way to verify Medicare status is through the MMSEA reporting process.

Where a claim is reportable, the reporting must be completed by the end of the quarter following the quarter in which the settlement was finalized. Thus, any settlements entered into in July - September 2012 must be reported by December 31, 2012. Any settlements entered into in October through December must be reported by the end of March, 2013.

Employers who are insured for worker’s compensation and EPLI claims will generally find that their insurance carrier will handle the MMSEA reporting. However, some carriers do not. Of course, self-insured or uninsured employers are responsible for doing the reporting themselves.

MMSEA reporting can be somewhat daunting in its complexity. First, the employer must register as a reporting entity, which is a two-step process. The reporting itself is a third step. After completing each of the first two steps, the employer must wait for confirmation and feedback from CMS before proceeding. This generally takes several days.

The MMSEA reporting process is part of the Medicare Secondary Payer scheme. Unlike some obligations imposed by that law, the MMSEA reporting process does not require that affected employers do anything more than report applicable settlements and ongoing responsibility for medical payments. Again, though, Medicare’s implementation of that seemingly simple requirement is surprisingly complex.

Wimberly Lawson attorneys are available to answer your questions and help with the registration and reporting process.

## **UPDATE: EMPLOYERS ARE NOW REQUIRED TO REPORT SETTLEMENTS TO MEDICARE IN MANY CASES**

Effective October 1, 2012, all awards, judgments and settlements over \$5,000 must be reported to the Centers for Medicare & Medicaid Services (CMS) where the claim has a medical component and the settling claimant is a Medicare beneficiary.

The claim could be a worker’s compensation claim or an employment claim. Importantly, the claim need not involve bodily injury; the “medical component” requirement is satisfied if the claim includes a claim for emotional distress or other psychological damages.

The reporting requirement, enacted by Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) first took effect in 2011, with a higher threshold for reporting. The threshold has now dropped to \$5,000, meaning that virtually all employer settlements will be reportable. Additionally, where an employer assumes ongoing responsibility for medicals (ORM), that fact is also subject to the reporting requirement. In fact, ORM must be reported even if there is no lump-sum settlement accompanying the ORM.

The reporting requirement only applies where the plaintiff or claimant is a Medicare beneficiary. Importantly, however, the settling employer is responsible for verifying the claimant’s Medicare status.



**Howard Jackson**....

**“An individual’s actions can be protected if they are undertaken on behalf of a group, but... that was not the case here.”**

The National Labor Relations Board has found that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate federal labor law, because the activity was not concerted or protected.

The question came down to whether the salesman was fired exclusively for posting photos of an embarrassing and potentially dangerous accident at an adjacent Land Rover dealership, or for posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event. Both sets of photos were posted to Facebook on the same day; a week later, the salesman was fired from Knauz BMW in Lake Bluff, IL.

The Board agreed with Administrative Law Judge Joel P. Biblowitz, who found after a trial that the salesman was fired solely for the photos he posted of a Land Rover that was accidentally driven over a wall and into a pond at the adjacent dealership after a test drive. Both dealerships are owned by the same employer.

In a charge filed with the NLRB, the salesman maintained that he was principally fired for posting photos and sarcastic comments about his dealer serving hot dogs, chips and bottled water at a sales event announcing a new BMW model. “No, that’s not champagne or wine, it’s 8 oz. water.” **Continued on page 4** ▶▶

## **NLRB FINDS FACEBOOK POSTING THAT CAUSED SALESMAN’S DISCHARGE AT CHICAGO-AREA BMW DEALERSHIP WAS NOT PROTECTED**



## **“NLRB AND EEOC MOVING TOWARD RULINGS”**

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appropriate person, specifically the person in charge of the on-going investigation. Discouraging an employee from voicing opposition to harassment or discrimination or otherwise exercising his/her Section 7 rights is where the two issues of employee rights and an employer's ability to respond to complaints of harassment and discrimination can collide.

It should also be noted that neither of the cases addressed the employer's duty to maintain the confidentiality of an investigation. The EEOC Enforcement Guidance expressly provides that an employer's anti-harassment policy and complaint procedures should include "assurance that the employer will protect the confidentiality of harassment complaints to the extent possible." This Guidance clearly creates a likely conflict with the NLRB ruling in *Banner Health* and limits how far the field office letter is likely to go on influencing EEOC policy on this issue. The question of how an employer protects the integrity of an internal harassment or discrimination investigation, prevents unnecessary rumor or gossip in the workplace and avoids violating an employee's Section 7 rights will take time and will depend greatly on the make-up of the NLRB going forward. Stay tuned.

## **“HARASSMENT DEFENDANTS FIGHT BACK”**

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the amount of \$709,000 in compensatory damages and \$3.5 million in punitive damages.

On appeal, the U.S. Court of Appeals for the 7th Circuit, noted that while Chrysler had presented evidence of the plaintiff's guilt, the evidence did not demand any particular conclusion, and the issues remained for the jury to decide. The appeals court therefore upheld the verdict for the plaintiff. *May v. Chrysler Group, LLC*, 115 FEP Cas. 1409 (7th Cir. August 23, 2012).

*Editor's Note - While these two cases are certainly unusual, it should be noted that defendants of harassment are becoming more aggressive. Some individual defendants, for example, are claiming that they were discriminated against because others were treated less harshly and/or because the employer chose to believe the female or a minority in making a credibility resolution. A factor that hurt the employer in the Chrysler case is that the harassment was quite serious, and continued for a period of three years. Faced with this type of background, the jury apparently felt Chrysler should have done more than it did. For example, the plaintiff claimed that the employer did not interview the witnesses suggested by the plaintiff, did not install security cameras, and should have taken these and other steps reasonably calculated to end the harassment. Also, the jury may have not liked the fact that the plant's HR employee principally responsible for the investigation never recused herself from the investigation despite the fact that her husband was on the plaintiff's list of suspects of conducting the harassment.*

## **“FACEBOOK POSTING THAT CAUSED SALESMAN'S DISCHARGE”**

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the salesman commented under the photos. Following an investigation, the regional office issued a complaint. Judge Biblowitz found that this activity might have been protected under the National Labor Relations Act because it involved co-workers who were concerned about the effect of the low-cost food on the image of the dealership and, ultimately, their sales and commissions.

The Land Rover accident was another matter. A salesperson there had allowed a customer's 13-year-old son to sit behind the wheel following a test drive, and the boy apparently hit the gas, ran over his parent's foot, jumped the wall and drove into a pond. The salesman posted photos of the accident with sarcastic commentary, including: "OOPS".

The National Labor Relations Act protects the group actions of employees who are discussing or trying to improve their terms and conditions of employment. An individual's actions can be protected if they are undertaken on behalf of a group, but the judge found, and the Board agreed, that was not the case here.

As Judge Biblowitz wrote, "It was posted solely by [the employee], apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment. It is so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting further affects the nature of the posting." Because the posts about the marketing event did not cause the discharge, the Board found it unnecessary to pass on whether they were protected.

However, the three-member panel differed in its opinions of a "Courtesy" rule maintained by the employer regarding employee communications. Chairman Mark Gaston Pearce and Member Sharon Block found the language of the rule to be unlawful because employees would reasonably believe that it prohibits any statements of protest or criticism, even those protected by the National Labor Relations Act.

Dissenting, Member Brian E. Hayes found that the employer's rule was "nothing more than a common-sense behavioral guideline for employees" and that "nothing in the rule suggests a restriction on the content of conversations (such as a prohibition against discussion of wages)".

The Board ordered Knauz BMW to remove the unlawful rules from the employee handbook and furnish employees with inserts or new handbooks. The decision, dated September 28, 2012, but made public today, was the Board's first involving a discharge for Facebook postings; other such cases are pending before the Board.

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