

NLRB Reverses Itself on Two Obama-Era Pro-Employee Decisions

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Closing out 2019, the National Labor Relations Board (NLRB or the Board) issued two final opinions that will reverse employee-friendly decisions. The two opinions - *Apogee Retail LLC d/b/a Unique Thrift Store* (Apogee) and *Purple Communications, Inc.* (Purple Communications) – will have an immediate impact on employers relating to investigative confidentiality rules and the right to restrict the use of email.

Investigative Confidentiality Rules Become Employer-Friendly

Employers across the country – particularly those undergoing workplace investigations – are breathing a little easier after the NLRB issued a decision in *Apogee*, a case involving a company owning retail stores in Bellevue, Washington. In *Apogee Retail*, the issue at large was the company's investigation confidentiality rules. In its ruling the NLRB maintained the following work rule:

"Reporting persons and those who are interviewed are expected to maintain confidentiality regarding these investigations."

Apogee also published a rule explaining that employees may be disciplined to the extent they are engaged in:

"unauthorized discussion of investigation or interviews with other team members"

Prior to the *Apogee* decision, in *Banner Estrella Medical Center* (Banner Estrella) decided by the Board in 2015, every employer would have to demonstrate on a case-by-case basis whether its interests in preserving the integrity of an investigation outweigh an employee's Section 7 rights to engage in protected concerted activity by discussing the investigation with co-workers. If an employer could show that corruption of an investigation was *likely* to occur, only then could an employer lawfully require employee confidentiality; *Apogee* changes this entirely.

The Board in *Apogee* recognized that employers have a legitimate interest in investigating charges of alleged employee misconduct. At the same time, the Board saw that employees also have a substantial interest in having an effective system in place to address workplace complaints. Section 7 rights no longer dominate over an employer's interests as they did under *Banner Estrella*.

The Board's ultimate ruling in overruling *Banner Estrella* is that:

Employer rules requiring that employees maintain confidentiality during an investigation are lawful if those rules make it clear that they apply only during that particular investigation.

Key to the Board's decisions were these interesting and ironic items:

- The so-called reasonable employee does *not* view every employer policy through the prism of the National Labor Relations Act;
- Other federal agencies, such as the Equal Employment Opportunity Commission and the Occupational Safety and Health Administration, actually endorse rules requiring confidentiality during employer investigations and advocates that employers do the

same; and

- The Board itself recognizes the need for confidentiality in its own investigations of workplace wrongdoing.

Employers should review their investigation confidentiality policies to be certain that they require confidentiality only during the duration of a particular investigation in order to receive the full benefit of *Apogee*.

NLRB Restores Employer's Right to Restrict Use of Email

With its decision in *Caesars Entertainment*, and one day before its significant holding in *Apogee*, the Board overruled its earlier 2014 decision in *Purple Communications* that gave employees the right to use employer-owned equipment for non-work purposes. Since *Purple Communications* was decided, the notion of employer's property rights – even as to its IT resources and equipment – was hardly considered and collapsed under the weight of the employee's right to engage in a protected concerted activity. Employers were surprised to learn that their employees could deride management on social media using company-owned equipment, and be protected doing so.

By overruling *Purple Communications* and returning to an earlier standard, employees have no statutory right to use employer equipment, including IT equipment, for Section 7 purposes. The sole exception is for the "rare cases" where an employer's email system provides the only reasonable means for employees to communicate with one another.

With this decision, employers have regained control over its own equipment and resources and have greater latitude in prohibiting the non-work use of the same.

If you have questions or would like more information about these decisions and their effect on your business, please contact John K. Baker (bakerj@whiteandwilliams.com; 610.782.4913) or another member of the Labor and Employment Group.

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