

NLRB's Confidentiality Shift May Hinder Workplace Probes

By **Ben James**

Law360, New York (January 04, 2013, 6:25 PM ET) -- The National Labor Relations Board recently struck down a 34-year-old rule that shielded companies from having to give unions witness statements underpinning decisions to discipline workers, opting instead for a test lawyers say creates uncertainty for employers and will likely chill employee cooperation with worker misconduct probes.

In its 3-1 decision in a dispute between a union and continuing-care facility Piedmont Gardens over a worker who was fired for allegedly sleeping on duty, the NLRB on Dec. 15 dispensed with the "categorical exemption" that had protected the confidentiality of witness statements taken in internal disciplinary investigations. It replaced the exemption with a balancing test that leaves companies without a bright-line rule on whether they have to hand over such documents to unions.

"You had a very clear, certain standard that now is replaced by a fact-intensive, case-by-case analysis that may have inconsistent and unpredictable results," said Tom Davis, head of Ogletree Deakins Nash Smoak & Stewart PC's labor practice group. "Employers really aren't going to know with any certainty whether they can substantiate a confidentiality claim."

The Piedmont Gardens decision overruled the NLRB's 1978 holding in *Anheuser-Busch Inc.*, which established a bright-line exemption that put witness statements outside of employers' general obligation to provide unions with relevant information necessary to perform their duties as collective-bargaining representatives.

Instead, the board should apply the balancing test articulated in the U.S. Supreme Court's 1979 ruling in *Detroit Edison Co. v. NLRB*, and weigh a union's need for information against the employer's "legitimate and substantial" confidentiality interests, the majority said.

Anheuser-Busch's bright-line exemption meant that companies could offer to keep witness statements confidential as a means of getting employees to cooperate with investigations and protecting them from harassment, but the recent ruling stripped employers of that tool.

"Ultimately, it could have a chilling effect on witnesses' willingness to come forward," Morgan Lewis & Bockius LLP's Joe Ragaglia said of the Piedmont Gardens decision.

In fact, some employers are still going to feel the need to make and stand by confidentiality assurances in order to secure workers' help when looking into on-the-job misconduct, which sets up a potential "explosion" in NLRB charges brought by unions against companies seeking to keep statements under wraps, Fisher & Phillips LLP's Jim Walters said.

"It's safe to say that in every arbitration involving union member discipline from now on, employers are going to get a request for witness statements. Then the employer has to make a hard decision as to whether they can win the balancing test," Walters said.

Those confidentiality fights will delay the resolution of arbitration proceedings that unions and employers bound by collective bargaining agreements utilize to hash out disputes, a consequence that Brian Hayes, whose term as an NLRB member ended on Dec. 16, cited in his dissent.

"This test substitutes doubt for certainty, fettering the ability of employers to effectively conduct investigations of workplace misconduct," Hayes said. "It also raises the prospect that expeditious resolution of misconduct issues through the grievance-arbitration process will be denied in instances where an employer refuses to provide witness statement on confidentiality ground and the parties must then take an extended detour through the board's processes to resolve the dispute."

In its decision, the NLRB upheld a judge's finding that the employer violated labor law by failing to fork over witness names and job titles. It also affirmed the decision that two witnesses' statements were exempt from disclosure, but disagreed with the judge with respect to statements from a charge nurse, ruling that they were not subject to the Anheuser-Busch exemption because she was not assured that they would stay confidential.

Hayes and some attorneys would have liked to see the NLRB not only refrain from overturning the Anheuser-Busch, but also extend it to cover witness names. In addition to possibly making workers less likely to report misconduct, lawyers said, the Piedmont Gardens ruling may also increase the chance that employees who provide witness statements may be pressured — either subtly, or through outright intimidation or coercion — into altering their version of events.

Though the names and job titles of an employer's witnesses were fair game even before the Piedmont Gardens ruling, access to the statements and the details they include can provide ammunition to someone who wants to persuade witnesses to change their tune, according to attorneys.

"The biggest concern I have is getting testimony at an arbitration hearing that's consistent with the good-faith investigation that supported the conclusion to discipline," Davis said.

While the NLRB's decision may have given management-side lawyers reasons to worry, the labor board decided to stave off "manifest injustice" to employers by applying its decision to nix the Anheuser-Busch rule and adopt the Detroit Edison balancing test only prospectively, and not retroactively.

That means that the old rule still applied for Piedmont Gardens, and covers other cases in which the employer's refusal to furnish witness statements occurred before Dec. 15. Applying the new approach retroactively to employers that had previously withheld witness statements relying on existing NLRB law would be wrong, the labor board majority said.

"It's probably the only fair and equitable piece of the ruling," Ragaglia said. "It's a limited silver lining in that all it really does is protect employers that have already gone through the process."

Piedmont Gardens is represented in this matter by David Durham of Arnold & Porter LLP.

Charging party SEIU United Healthcare Workers West is represented by Bruce Harland, Manuel Boigues and Yuri Gottesman of Weinberg Roger & Rosenfeld.

The case is American Baptist Homes of the West d/b/a Piedmont Gardens, case number 32-CA-063475, at the National Labor Relations Board.

--Editing by Elizabeth Bowen and Katherine Rautenberg.

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