Banner Health System d/b/a Banner Estrella Medical Center *and* James A. Navarro. Case 28–CA–023438

June 26, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On July 30, 2012, the National Labor Relations Board issued a Decision and Order in this proceeding, reported at 358 NLRB No. 93. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550, holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order, and remanded this proceeding to the Board for further proceedings.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, above, we have considered de novo the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs.[1] We have also considered the now-vacated Decision and Order reported at 358 NLRB No. 93. We have decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[3]

1. We agree with the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by issuing a "coaching" to technician James Navarro on February 21, 2011,[4] for failing to follow the directions of a supervisor.[5] Navarro testified that prior to being disciplined, he expressed concerns to supervisors and coworkers regarding the manner in which he was being instructed to clean obstetric and surgical instruments for use that day. Normal procedures could not be followed on the day in question because of a broken steam pipe and lack of hot water. Specifically, Navarro's concern was that the procedures that he was being directed to follow (including the use of hot water from a breakroom coffee machine) were not proper and could endanger patients. During the course of his shift on February 19, and during part of his shift the following day, Navarro refused to follow his supervisor's instructions, citing the concerns described above. Based on that refusal, the Respondent issued Navarro a coaching. The judge concluded that the coaching was not unlawful. The judge relied on his finding that the Respondent issued the coaching based on its belief that Navarro was insubordinate and not because of any protected concerted activity.

We agree with the judge's finding that the Respondent issued the coaching because it believed that Navarro had engaged in insubordination by refusing to follow his supervisor's instructions, and not because of any protected activity. Thus, even assuming that the General Counsel established that Navarro's protected activity was a motivating factor in the coaching, we conclude that the Respondent has met its burden of proving that it would have taken the same action even in the absence of that protected activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.

[1] On October 31, 2011, Administrative Law Judge Jay R. Pollack issued his decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief, and the Respondent filed an answering brief to the cross-exceptions.

[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[3] The General Counsel has cross-excepted to the judge's failure to include in his recommended Order a provision that the notice to employees be posted on a corporatewide basis. We find merit to this cross-exception. The record shows that the Respondent utilizes its Confidentiality Agreement at all of its facilities. We have consistently held that "where an employer's overbroad rule is maintained as companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369, 372 (D.C. Cir. 2007). Accordingly, we shall modify the recommended Order to provide that the notice be posted at all facilities where the Respondent utilizes its confidentiality agreement.

We shall also modify the recommended Order and notice to conform to our findings regarding the Respondent's prohibition of the discussion of ongoing employee investigations, and we shall further modify the notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[4] All dates hereafter are in 2011, unless otherwise noted.

[5] The coaching was documented in writing on a form entitled "Performance Recognition and Corrective Action Log" and was placed in Navarro's employment record. Several months later, in June, the Respondent notified Navarro that the coaching had been removed from his record.

989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).[6]

2. The judge also found that the Respondent did not violate Section 8(a)(1) when, on February 24, it gave Navarro an annual performance review containing negative comments, based on complaints from his coworkers, in a "behaviors" category. After Navarro objected to the evaluation, it was revised and his rating in the "behaviors" category was changed to "fully meets expectations." The judge found that the evaluation was completed before Navarro engaged in any protected concerted activity and, therefore, could not have been an unlawful reprisal. We find no reason to reverse the judge's finding. In addition, because the revisions were favorable to Navarro, we find no merit to the General Counsel's argument that the revised evaluation somehow violated Section 8(a)(1).[7]

3. Finally, contrary to the judge and our dissenting colleague, we find that Human Resources Consultant JoAnn Odell unlawfully requested employees who were involved in a workplace investigation not to discuss the matter with their coworkers while the investigation was ongoing. Odell made these requests pursuant to an "Interview of Complainant" form bearing the title and logo of the Respondent's corporate parent, Banner Health System. The form, which bears the subheading "Confidential Investigation," prescribes a standard "Introduction for all Interviews." That introduction directs the investigator to instruct all interviewees that "[t]his is a confidential interview," to explain that the investigator "will keep [the] conversation confidential," and to request the interviewee "not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors." The prescribed introduction further directs the investigator to inform the interviewee that the "[m]atter under investigation is serious, and the company has a commitment/obligation to investigate this claim." Finally, the introductory language warns interviewees that "[a]ny attempt to influence the outcome of the investigation . . . can be the basis for corrective action up to and including termination."

Odell acknowledged that in at least six investigations during her 13 months of employment with the Respondent she in fact requested confidentiality from interviewees pursuant to the "Interview of Complainant" form. Odell testified that she made those requests based on the type of investigation she was conducting. She identified sexual harassment investigations as a common example, but also acknowledged that she would request confidentiality in other categories of investigations that might present "sensitive situations," such as investigations into hostile work environment claims or allegations of abuse. Odell did not claim, and there is no evidence, that she made any individualized determinations that confidentiality was necessary to maintain the integrity of any particular investigation or any particular interview.

On those facts, the judge found that the Respondent's maintenance and application of its policy to request confidentiality in certain types of investigations did not violate Section 8(a)(1). He reasoned that such requests were made for the purpose of protecting the integrity of the Respondent's investigations. In the judge's view, this purpose constituted a legitimate business justification for the policy, and so he found no violation of the Act. Notably, the judge did not appear to weigh the Respondent's general interest in the integrity of its investigations, however legitimate it might be, against employees' equally legitimate interest, grounded in their Section 7 rights, in discussing workplace investigations potentially affecting their terms and conditions of employment. Instead, the judge apparently concluded that the Respondent's interest, because it was legitimate, necessarily outweighed any interference with those rights. That was error.

Employees have a Section 7 right to discuss discipline or ongoing disciplinary investigations involving themselves or coworkers. Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer. See generally *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5–6 (2014). Accordingly, an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights. *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011). In *Hyundai*, the Board reaffirmed that it is the employer's "responsibility 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, and there is a need to prevent a cover up. Only if the [employer] determines that such a corruption of its investi-

[6] Given our finding that the Respondent carried its *Wright Line* rebuttal burden, we find it unnecessary to pass on the Board's prior finding that the General Counsel failed to establish that the Respondent had knowledge of Navarro's alleged protected concerted activity when it disciplined him with the coaching. We also find it unnecessary to determine whether Navarro was, in fact, insubordinate.

[7] Because we affirm the judge's finding that the Respondent completed the evaluation before Navarro engaged in any protected concerted activity, we find it unnecessary to pass on the General Counsel's cross-exception to the judge's refusal to admit into the record GC Exh. 11 ("Colleague Feedback Forms"), which contains positive assessments of Navarro by his colleagues.

gation would likely occur without confidentiality is the [employer] then free to prohibit its employees from discussing these matters among themselves." Id. Applying that standard, the Board found that the employer unlawfully promulgated, maintained, and routinely enforced an oral rule prohibiting employees from discussing with other persons any matters under investigation by its human resources department, without any individualized preliminary review to determine whether such confidentiality was objectively necessary. Id.

We reaffirm the standard applied in *Hyundai*. That standard is rooted in well-established Board precedent, and is not, as the dissent argues, an instance where the Board is abdicating its responsibility to apply the Act to the complexities of industrial life. Instead it fully and fairly accommodates the competing interests at stake, and it provides the Board—and employers—with structured guidance to deal with the wide variety of investigative situations that arise in today's workplaces. We address each of these points in turn.

First, the standard applied in *Hyundai*, as the Board explained there, is grounded in a series of cases involving similar employer instructions to employees not to discuss ongoing investigations. In *Caesar's Palace,* 336 NLRB 271 (2001), the Board found that the employer lawfully maintained and applied a confidentiality rule during an ongoing investigation of allegations that employees and managers were engaged in illegal drug and drug-related activity in the workplace, including threats of violence. The Board emphasized that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. The Board also recognized that the employer's instruction adversely affected employees' exercise of that right. Nevertheless, as the Board explained, the employer had specific reasons for its actions: "Because the investigation involved allegations of a management coverup and possible management retaliation, as well as threats of violence, the [employer's] investigating officials sought to impose a confidentiality rule to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." Id. at 272. In those circumstances, the Board concluded not only that the employer had established a "legitimate and substantial justification" for its rule, but also that this justification outweighed the employees' Section 7 right in the circumstances. Id.[8]

The Board reached a different conclusion in *Phoenix Transit Systems,* 337 NLRB 510 (2002). In that case, the Board found unlawful the employer's maintenance and enforcement of a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. Although the employer had promulgated the rule during a prior investigation of sexual harassment by a supervisor,[9] the Board observed that the employer had closed that investigation long before the events then at issue. Id. at 510. Whatever need for confidentiality the employer initially might have had, it had long passed. In those circumstances, the Board found that the employer's maintenance of the rule was unlawful. Id. Notably, the Board distinguished the facts presented in that case from those presented in *Caesar's Palace*, above, where, as described, the employer had presented an immediate, compelling need for confidentiality. Id.; see also *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176, 178–179 (1997) (employer unlawfully instructed employee to keep confidential employer's investigation of another employee where the latter already was aware of the investigation).[10]

The standard applied in *Hyundai* plainly derives from, and is fully consistent with, *Caesar's Palace* and *Phoenix Transit Systems*.[11] Both of those cases make clear that it is the employer's burden to justify a prohibition on employees discussing a particular ongoing investigation. In addition, both cases demonstrate that the employer's burden comprises two related components. First, the employer must proceed on a case-by-case basis. The employer cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type. Second, a determination that confidentiality *is* necessary in a particular case must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality. These are the same requirements that the Board applied in *Hyundai*. See 357 NLRB No. 80, slip op. at 15 (the employer must show in each case that "corruption of its investigation *would likely occur* without confidentiality" (emphasis added)).

Second, we are persuaded that those requirements are appropriate because they fully and fairly accommodate the competing interests at stake: on one hand, employees' Section 7 right to discuss potential discipline (whether from the perspective of the employee facing

[8] Significantly, although in *Caesar's Palace* the Board found the heightened risks presented there *sufficient* to justify the employer's demand for confidentiality, the Board did not hold that such grave threats were *necessary* in all cases.

[9] It does not appear that the lawfulness of the employer's promulgation of the rule was before the Board.

[10] As in *Caesar's Palace* itself, the Board again did not suggest that *Caesar's Palace* represented any kind of a threshold to finding employer requests for confidentiality permissible.

[11] Indeed, the judge in *Hyundai* relied on both cases.

possible discipline or from that of his coworkers) and, on the other hand, employers' legitimate need for confidentiality in certain circumstances to protect the integrity of their workplace investigations. As illustrated by *Hyundai*, *Phoenix Transit Systems*, and *Caesar's Palace*, these competing interests form the foundation of the Board's analysis of employer rules and instructions requiring employees to keep investigations confidential. Further, given that we are dealing with a statutory right guaranteed to employees, it is appropriate to place the burden on the employer to demonstrate that some infringement of that right is justified. As the Third Circuit explained in the context of a rule prohibiting employees from discussing their wage rates, "[o]nce it is established that the employer's conduct adversely affects employees' protected rights, the burden falls on the employer to demonstrate 'legitimate and substantial business justifications' for his conduct." *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976) (citations omitted). Moreover, as a practical matter, the employer is best positioned to make that showing because its knowledge of both the shop floor and scope of the investigation allows it to weigh whether confidentiality is justified in a particular instance. And, as shown by *Caesar's Palace*, where an employer actually demonstrates objectively reasonable grounds for believing that confidentiality is necessary to protect the integrity of a particular investigation, the Board has found that it lawfully may restrict disclosure.

Finally, the standard endorsed in *Hyundai* permits the Board—and employers—to consider the relevant circumstances in particular cases as they arise. To be sure, the *Hyundai* Board focused on situations in which "witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up." Nevertheless, we do not exclude the possibility that there may be other comparably serious threats to the integrity of an employer investigation that would be sufficient to justify a confidentiality requirement. We need not speculate today on what those threats might be, however, for in this case the Respondent has not offered *any* legitimate and substantial justification for Odell's requests to employees to keep investigations confidential.[12]

As described, the judge found that the Respondent's requests for confidentiality in certain types of investigations were justified generally by its concern over protecting the integrity of those investigations. Contrary to the judge, however, we find that the Respondent's generalized concern was insufficient to outweigh employees' Section 7 rights. Rather, it was the Respondent's burden to demonstrate that, in connection with a particular investigation, there was an objectively reasonable basis for seeking confidentiality, such as where "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." *Hyundai*, supra, slip op. at 15. The Respondent's approach clearly failed to meet those requirements. Accordingly, we find that the Respondent, by maintaining and applying a policy of requesting employees not to discuss ongoing investigations of employee misconduct, violated Section 8(a)(1) of the Act.

In making that finding, we have given due consideration to our dissenting colleague's extended explication of his views, but those views are unpersuasive. Initially, much of the dissent rests on interpretations of the record that simply cannot withstand scrutiny. The dissent insists, for example, that Odell's requests for confidentiality were never made routinely, but only "after an individualized inquiry regarding the need for non-disclosure in relation to a particular interview during a particular investigation." To the contrary, as discussed, Odell's own testimony establishes that she took a more categorical approach, requesting confidentiality in any investigation into alleged sexual harassment, hostile work environment claim, charge of abuse, or similar alleged misconduct. At no point did Odell claim that she made any individualized determination that confidentiality was necessary to protect the integrity of a particular investigation.[13] Moreover, the fact that Odell made confidentiality requests in connection with at least six investigations during her 13 months of employment with the Respondent demonstrates that she sought confidentiality far more frequently than the dissent suggests.

The dissent nevertheless maintains that, even if such requests were made routinely, those requests were narrowly tailored because they were only "requests," were applicable only while the investigation was ongoing,

[12] We note, in particular, that there is no evidence that the Respondent's request for confidentiality was necessary to satisfy another statutory mandate, which we recognize may be a consideration in other cases.

[13] To find that Odell did make such individualized determinations, the dissent reads her testimony as indicating only that she "might" or "may" request confidentiality in the types of investigations. The dissent thus suggests, for example, that Odell may have requested confidentiality in some sexual harassment investigations, but not other sexual harassment investigations. In our view, when read as a whole, the relevant testimony shows that Odell was giving examples of *types* of investigations that, in her view, were the "more sensitive situations," Tr. 260, and thus warranted confidentiality requests, relative to other *types* of investigations that did not.

In this respect, moreover, the record establishes that Odell—pursuant to the instructions given by Banner Health System's "Interview of Complainant" form—did maintain a "policy" of requesting confidentiality in certain categories of investigations.

were limited to the substance of an interviewee's "conversation" with Odell, and were not accompanied by any threat of discipline. As explained in the prior decision in this case, the dissent's reliance on the supposedly suggestive nature of Odell's request is misplaced.[14] Likewise, we find unpersuasive the dissent's emphasis on the fact that Odell's request for confidentiality may have applied only while an investigation was ongoing. The investigative period—before the Respondent had reached any conclusions—would seem to be the period when employees likely would be most interested in, and most likely to benefit from, discussion with their coworkers and union representatives.

Relatedly, the dissent erroneously concludes that Odell's requests for confidentiality were limited to her "conversation" with an interviewee. The dissent derives this conclusion in part from the portion of the "Interview of Complainant" form directing the investigator to explain that "[t]his is a confidential interview," and to ask the interviewee "not to discuss *this* with your coworkers" (emphasis added), and in part from Odell's testimony that she viewed her requests as being limited to her "conversation" with employees. The dissent's reading of "this" divorces it from the context of the "Interview of Complainant" form as a whole. The form's instruction to the investigator to request the employee not to discuss "this" is immediately followed by instructions to admonish the employee that the *"[m]atter* under investigation is serious," that the Respondent "has a commitment/obligation to investigate this *claim*," and that "[a]ny attempt to influence the outcome of the *investigation* . . . can be the basis for corrective action up to and including termination." In that context, any reasonable employee would readily conclude that "this" means the entire matter being investigated, not just the employee's conversation with the investigator. Moreover, even if Odell intended her request to be so limited, there is no evidence that she ever communicated that more limited intention to any interviewee.

For similar reasons, there is no merit to the dissent's view that Odell's requests were wholly unaccompanied by any threat or even suggestion of discipline. The "Interview of Complainant" form prescribes warning interviewees that "[a]ny attempt to influence the outcome of the investigation . . . can be the basis for corrective action up to and including termination." Conceivably, the Respondent intended this warning, which appears in a sentence prohibiting retaliation and the giving of false testimony, to apply only to coercive or other improper influence. But, from an employee's standpoint, the disciplinary warning could just as reasonably be read to suggest that any discussion in violation of the Respondent's confidentiality request might be deemed an "attempt to influence the outcome of the investigation." At the very least, the dissent too readily dismisses the possibility that employees would so understand that warning in the context of the Respondent's prescribed statements as a whole.

Indeed, the dissent's failure to recognize that possibility is reflected more broadly in the test it articulates, which would focus largely on whether a request for confidentiality targeted or penalized Section 7 activity "that has actually occurred," and on whether "discipline was imposed based on disclosures involving actual protected concerted activity." The orientation of this proposed analysis toward actual interference with actual protected activity ignores completely the potential chilling effect of requests for confidentiality like the ones made by Odell.[15] Coupled with the possibility of discipline for "[a]ny attempt to influence the outcome of [an] investigation," a reasonable employee may well conclude that any discussion of his complaint, even if not his "conversation" with Odell, simply is not worth the risk.[16]

[14] See, e.g., *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994) ("It makes no difference whether employees were 'asked' not to discuss their wage rates or ordered not do so . . . [i]n the absence of any business justification for the rule, it was an unlawful restraint on rights protected by Section 7 of the Act and violated Section 8(a)(1)."), enfd. 83 F.3d 156 (6th Cir. 1996). In any event, as discussed below, the "Interview of Complainant" form demonstrates that Odell's requests arguably were accompanied by a threat of discipline.

[15] As the judge noted, the General Counsel amended the complaint to challenge the "Interview of Complainant" form itself, asserting a facial challenge resting on its potential chilling effect on employees' exercise of their Sec. 7 rights.

[16] The dissent insists that "many if not most workplace investigation meetings do not implicate NLRA-protected activity," and it offers a series of hypothetical examples as supposed evidence that the statutory interest implicated in cases like this one is negligible. Our colleague's claim gives far too little weight to the potential chilling effect of confidentiality requirements on Sec. 7 activity, which the Act is intended to protect. Employees may well wish to discuss investigations—and even the content of a particular interview—for reasons that implicate legitimate Sec. 7 activity. Indeed, each of our colleague's hypothetical examples actually illustrates how confidentiality requirements can interfere with protected concerted activity. The potential for interference with Sec. 7 rights is obvious in the case of a disciplinary investigation—employees may well wish to discuss disciplinary investigations with each other in order to take steps to protect themselves either from unfairly (or even unlawfully) imposed discipline or, conversely, to protect themselves from the employer's failure to impose discipline on supervisors or coworkers who adversely affect their lives at work. Other types of investigations implicate legitimate Sec. 7 concerns as well, insofar as they involve—directly or indirectly—employees' terms and conditions of work and employees' possible desire to improve them by acting together, whether by making demands on their employer, by appealing to the public for support, or by taking their

By contrast, the *Hyundai* framework tends to minimize this potential chilling effect. To the extent an employer establishes an objectively reasonable basis for seeking confidentiality during a particular investigation, employees will better understand not only why nondisclosure is being requested, but also what matters are and are not appropriate for conversation. This is in addition to the previously discussed sound policy and practical reasons to require employers to make this showing on a case-by-case basis. The dissent nevertheless charges that we are leaving employers without any guidance to make the necessary determinations; that we are leaving employers to make "just-in-time" guesses whether a request for confidentiality is warranted, and that employers and employees alike will suffer the consequences. These charges are unfounded.

As discussed, the *Hyundai* framework recognizes that employers, relative to the Board and any other third party, have far superior access to information regarding the nature of the employment matters under investigation and the employees, supervisors, and/or managers potentially implicated in those matters. *Hyundai* and the cases preceding it, moreover, provide employers and their human resources representatives with a framework to analyze that information. That framework instructs employers to consider in each of their investigations the overarching question whether confidentiality is objectively necessary to prevent corruption of the investigation. More specifically, the *Hyundai* standard identifies types of threats that, if established, will justify a requirement of confidentiality (e.g., witnesses need protection or testimony is in danger of being tampered with), and yet leaves open the possibility that employers will face comparable threats that also will warrant requiring nondisclosure.[17]

Further, the relevant cases provide illustrative examples of circumstances in which confidentiality requests have and have not been justified. Again, compare *Caesar's Palace,* 336 NLRB 271 (2001) (finding that the employer lawfully applied a confidentiality rule during an ongoing investigation of allegations that employees and managers were engaged in illegal drug and drug-related activity in the workplace based on the employer's determination that there was the possibility of a management coverup and management retaliation), with *Phoenix Transit Systems,* 337 NLRB 510 (2002) (finding unlawful the employer's enforcement of a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves where the rule originated in a sexual harassment investigation that had closed long before and any need for confidentiality had long expired). For those reasons, we remain confident that the dissent's dire predictions of harm to employer investigations and concerned employees will not come to pass.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3.

"3. The Respondent violated Section 8(a)(1) maintaining and applying a policy of requesting employees not to discuss ongoing investigations of employee misconduct."

ORDER

The National Labor Relations Board orders that the Respondent, Banner Health System d/b/a Banner Estrella Medical Center, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing the provision in its confidentiality agreement that contains the following language: "private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

(b) Maintaining or enforcing a policy of requesting employees not to discuss ongoing investigations of employee misconduct.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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concerns to a government agency. Our point is not that Sec. 7 activity will always, or even regularly, be a response to a workplace investigation, but instead to demonstrate the realistic possibility that it might be. The Act aims to create and preserve the space in which employees may act together to improve their terms and conditions at work. Employer restrictions that narrow that space, that diminish the opportunity for protected concerted activity, clearly implicate Sec. 7.

[17] The dissent contends that our decision denies employers the benefit of developing standard policies to guide their human resources representatives in determining whether to request confidentiality in a particular investigation. To the contrary, there is nothing in today's decision that would preclude employers from developing standard guidance for human resources professionals, so long as those policies are consistent with the framework described here and the considerations it entails.

The dissent also advocates permitting employers to adopt preexisting standard requests for nondisclosure in certain types of cases, asserting that "confidentiality is *predictably* necessary in certain types of investigations." If, in fact, there are objectively reasonable grounds for requiring confidentiality, employers should have little difficulty applying and satisfying the requirements we have set out.

(a) Rescind the provision in the confidentiality agreement described above, and advise employees in writing that the provision is no longer being maintained.

(b) Within 14 days after service by the Region, post at all of its facilities where it utilizes its confidentiality agreement, copies of the attached notice marked "Appendix B."[18] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense a copy of the notice to all current employees employed by the Respondent at any time since November 7, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 26, 2015

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In today's decision, my colleagues find that an employer violated the National Labor Relations Act (NLRA or the Act) by making a narrowly tailored "request" that an employee refrain, "while this investigation is going on," from repeating what was discussed during an investigative meeting. The employee in this case, James Navarro, never received such a request. However, if *any* employees did, the judge found the request for nondisclosure was only a "suggestion," and it only encompassed the actual conversation that took place in the meeting. Moreover, the record shows such a request was made only after an individualized inquiry regarding the need for nondisclosure in relation to a particular interview and a particular investigation.

This case represents a disappointing extension of the Board's treatment of workplace investigations in *Piedmont Gardens*,[1] where a Board majority changed existing law and held that employers have an 8(a)(5) obligation to disclose employee witness statements, and in *Fresh & Easy Neighborhood Market*,[2] where a Board majority found that a single employee's individual complaint—involving a statute unrelated to the NLRA—subjected a workplace investigation to the full panoply of NLRA restrictions and requirements applicable to NLRA-protected concerted activity. In *Fresh & Easy*, above, years of NLRB litigation were required to resolve NLRA issues arising from two comments made by a manager during a single meeting regarding alleged sex harassment. After a detailed analysis with an array of qualifications, the Board concluded that the manager's two comments were lawful. In the instant case, the Respondent and other employers are not so fortunate: my colleagues find that any request for nondisclosure during a workplace investigative meeting violates Federal law, even if the request is unaccompanied by a threat of discipline, with the narrowest of exceptions involving three requirements: (i) it is "the employer's burden" to justify the request; (ii) this burden must be satisfied regarding each "particular ongoing investigation," and "the employer must proceed on a case-by-case basis'" and (iii) the employer's stated justification must involve "objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality."

The only alleged basis for a violation here arises from an internal "Interview of Complainant" form that was never provided to employees. One point listed on that form prompts a human resources (HR) consultant to

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 362 NLRB No. 139 (2015). As stated in my partial dissenting opinion in *Piedmont Gardens*, I believe that *Piedmont Gardens*, *Fresh & Easy*, and the instant case constitute a "trilogy of recent decisions . . . where the Board is substantially undermining workforce investigations, to the detriment of employers and employees alike." *Piedmont Gardens*, 362 NLRB No. 139, slip op. at 8 (Member Miscimarra, dissenting in part).

[2] 361 NLRB No. 12 (2014).

state: "I will keep our discussion confidential . . . and I *ask* that you not discuss *this* with your coworkers *while this investigation is going on*, for this reason, *when people are talking it is difficult to do a fair investigation and separate facts from rumors*."[3] An HR consultant, JoAnn Odell, used the form to take notes while meeting with employee Navarro. Odell testified she did not make any nondisclosure request to Navarro, but she described "maybe half a dozen" investigative meetings with other employees where she made a nondisclosure request. The General Counsel elicited no details regarding these situations, but Odell was asked about situations when she "may" or "might" request nondisclosure, and Odell indicated she conducted an individualized assessment of the need for confidentiality.

I agree with the judge's conclusion that a narrowly tailored nondisclosure request like the one at issue here, even if made routinely, is lawful under our statute. Many workplace investigations relate to legal requirements unrelated to the NLRA that benefit all employees. Such investigations also address serious problems that are all too common in the workplace, including fatalities, accidents and injuries; workplace violence, sexual assaults, or other criminal conduct; unlawful harassment or employment discrimination; or business issues that may be important to employees, employers, and unions alike. In all of these situations, nondisclosure requests serve the legitimate and substantial interest of enhancing the investigation's integrity and effectiveness, and the great majority of workplace investigations do not involve or give rise to NLRA-protected activity.

Therefore, I respectfully dissent from my colleagues' finding that the nondisclosure request at issue here violates Federal law.[4] The Board routinely imposes more onerous disclosure restrictions in its own investigations and hearings. Nor do I believe it is reasonable to find this type of request unreasonably interferes with NLRA-protected rights, especially where, as here, (1) the employee is not restricted from discussing anything with union representatives and there is no denial of *Weingarten* representation in the investigative meeting;[5] (2) the request does not target, prevent, or penalize specific NLRA-protected concerted activity that has actually occurred; and (3) no discipline was imposed based on disclosures involving actual protected concerted activity.

Finally, I believe our statute requires *the Board* to balance the importance of a request for confidentiality—made to protect the integrity of workplace investigations—against the possibility that such requests might affect the exercise of rights afforded under our statute. My colleagues relegate this balancing to employers, with a requirement that they conduct a case-by-case appraisal of the need for nondisclosure. The majority finds that employers cannot even adopt internal guidelines identifying particular *types* of investigations when employee-participants can or should be asked not to disclose details regarding investigative-meeting conversations. Consequently, every manager and supervisor has the near-hopeless task of guessing whether a majority of NLRB Members or a reviewing court, after years of litigation, may agree that a request for confidentiality was warranted at a particular time, regarding a particular interviewee, in a particular investigation. This type of case-by-case balancing can never produce reasonable certainty or predictability in practice. Moreover, by requiring *employers* to perform this case-by-case balancing, I believe my colleagues improperly disregard *the Board's* "responsibility" to apply the Act "'to the complexities of industrial life.'"[6]

The Board has the job of balancing the interests associated with the type of request for confidentiality at issue in the instant case. In my view, the only outcome consistent with our statute and other competing interests is to permit the narrow request for confidentiality at issue here regarding matters discussed in a workplace investigative meeting.

Facts

Employee James Navarro was concerned about temporary instrument-sterilizing procedures he was advised to

[3] GC Exh. 12, at 1 (emphasis added).

[4] I concur with my colleagues' finding, in agreement with the judge, that Respondent did not violate Sec. 8(a)(1) by issuing a nondisciplinary "coaching" to Navarro on February 21, 2011, or a February 24, 2011 review of Navarro's performance containing negative comments under "behaviors" based on complaints from his coworkers. Also, I find that Respondent's written "Employee Confidentiality Agreement," which prohibits disclosure (among other things) of "[p]rivate employee information" including "salaries" and "disciplinary actions" unless "shared by the employee," unduly interferes with protected employee communications without countervailing important business justifications in violation of Sec. 8(a)(1), and I agree that remedial notice posting should be ordered at all of the Respondent's facilities where the "Employee Confidentiality Agreement" is in force—but in the event that the Respondent has closed its Phoenix facility or gone out of business, I would not require the Respondent to mail the notice to former employees other than those employees formerly employed at its Phoenix location. Issues relating to the Respondent's "Employee Confidentiality Agreement" are separate and independent from the "Interview of Complainant" form containing the talking point, used by managers on a case-by-case basis, requesting employees to keep confidential, "while this investigation is going on," the matters discussed during the investigative meeting.

[5] *NLRB v. J. Weingarten,* 420 U.S. 251 (1975) (regarding employee right to representation by a union representative during investigative meetings reasonably likely to result in discipline).

[6] *Weingarten*, supra, 420 U.S. at 266 (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

follow when the normal equipment could not be utilized.[7] At his initiative, Navarro went to the office of the Respondent's HR Consultant, JoAnn Odell. Navarro informed Odell he was uncomfortable with the temporary sterilizing procedures and, as the judge found, Navarro "expressed concern for his job." Navarro had not been summoned to meet with HR Consultant Odell. Rather, Odell indicated he just showed up and, in her words, "[h]e just wanted me to be aware of an incident that had occurred over the weekend."[8]

HR Consultant Odell's responsibilities encompassed "many things," including "investigations" and "complaints of employees."[9] During the Navarro meeting, Odell typed notes into an internal "Interview of Complainant" form, which was captioned "For Human Resources Use Only."[10] The form contains an "Introduction" with the following points, written from the perspective of the HR consultant conducting the interview:

- Explain purpose of the investigation. Example: "I am investigating a (your) complaint or inappropriate behavior."
- This is a confidential interview and I will keep our discussion confidential except as require[d] by law, or Banner policy or as necessary to conduct this investigation. I ask you not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.
- Matter under investigation is serious, and the company has a commitment/obligation to investigate this claim.
- No conclusion/recommendation will be made until all of the facts have been gathered and analyzed.
- Any attempt to influence the outcome of the investigation, any retaliation against anyone who participates, any provision of false information or failure to be forthcoming can be the basis for corrective action up to and including termination.
- Please remember there is no tolerance for retaliation. If you or anyone else feels they experience retaliation as a result of this investigation you should tell your HR dept. or myself immediately.

Several points are important to understand about the record evidence regarding the above form.

First, the "Interview of Complainant" form was never given to Navarro or any other employee of the Respondent. Odell testified that employees *never* received the "Interview of Complainant" form, nor is there evidence that any employee was shown the form.[11]

Second, the Introduction points are written in a general manner that makes clear particular points might or might not be used by an HR consultant in a given meeting. The first point, for example, covers three different potential situations: (i) an investigation of "your" complaint (where, as in the instant case, the employee went to the HR consultant to make a complaint); (ii) an investigation of "a" complaint (i.e., someone else's complaint); or (iii) an investigation of "inappropriate behavior" (i.e., not necessarily arising from anyone's complaint).[12]

Third, the Introduction is designed in part to help and reassure the employee. The listed points instruct the HR consultant to explain the meeting's "purpose," to state that the employer has "no tolerance for retaliation," and to reassure the employee that the HR representative "will keep our discussion confidential." The Board requires similar assurances in employee meetings conducted in preparation for NLRB proceedings. See *Johnnie's Poultry Co*., 146 NLRB 770, 775 (1964) (requiring, among other things, that "the employer . . . communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis").

Fourth, the record establishes that employees were *not* routinely asked to keep matters discussed in investigative meetings confidential, and the record reveals that a request for nondisclosure was never made to employee Navarro. Odell testified that she typed notes on the "Interview of Complainant" form when Navarro showed up in her office on February 21.[13] However, when Odell was examined by the General Counsel regarding the re-

[7] At some point, Navarro received a nondisciplinary "coaching" and a performance evaluation that contained a negative rating (based on complaints the Respondent had received from Navarro's coworkers). The Board finds, unanimously, that the "coaching" and performance evaluation received by Navarro were entirely lawful. See supra, fn. 4.

[8] Hearing transcript (Tr.) 234–235.

[9] Tr. 230–231.

[10] Tr. 242. The text of the entire "Interview of Complainant" form (without Odell's notes specific to Navarro) is attached to this opinion as an App. A.

[11] Tr. 193. The judge likewise found: "The interview of complainant form is not given to employees." *Banner Estrella Medical Center*, 358 NLRB No. 93, slip op. at 6 (2012).

[12] As another example, the third point distinguishes between complaints that give rise to a legal employer "obligation" to investigate (for example, sex harassment complaints), and those investigations undertaken based on an employer "commitment" not necessarily required by law.

[13] Tr. 192; GC Exh. 12.

quest "not to discuss this with your coworkers while this investigation is going on," Odell was asked: "In every interview that you conduct, you say that to the complainants, correct?" Odell responded: "Not necessarily. *I did not in this case*."[14] Odell explained there were roughly half-a-dozen "other cases" where, unlike the Navarro meeting, she asked the employee to refrain from disclosing what was discussed during the investigative meeting.[15] When Odell was recalled as a witness by the Respondent, she elaborated as follows:

> Q. Ms. Odell, going back to GC Exhibit 12, . . . the request to keep information confidential, you testified earlier this morning you relay that request [to] . . . employees maybe half a dozen times?
>
> A. During *investigations only*.
>
> Q. Right . . . *what would you term as an investigation*?
>
> A. Investigation would be *something that I would need to speak to at least more than one person*.
>
> Q. Okay. A conversation you had with Mr. Navarro on February 21st, *do you consider that an investigation*?
>
> A. *No*.[16]

Fifth, as noted above, the record establishes that nondisclosure was *not* routinely requested regarding matters discussed in employee meetings. Rather, Odell refrained from mentioning nondisclosure unless she determined, based on an individualized inquiry, that a need existed for nondisclosure in relation to a particular investigation. Indeed, across the Respondent's entire business, the record establishes that only one HR consultant (Odell) requested employee nondisclosure "maybe half a dozen times."[17] These instances were limited, for starters, to "investigation" meetings (i.e., only when a need existed "to speak to . . . more than one person"). Even in investigations, as reflected in the following exchange, Odell applied further scrutiny when evaluating whether she "may" or "might" request nondisclosure:

> Q. Okay. Are there *particular types of investigations* that you have *particular sensitivity issues* where you *may ask* someone to keep things confidential? For example, such as sexual harassment investigation?
>
> A. Well, *sexual harassment,* you know, those are common—
>
> Q. Typical for sensitivity—any other *examples of sensitivity issues* where you *might make this request* to keep your—
>
> A. *Hostile work environment also*.
>
> Q. Okay.
>
> A. *Suspicion of abuse or something like that*.
>
> Q. Okay. And again, maybe, you've made this request *maybe a half a dozen times*?
>
> A. Uh-huh.
>
> Q. *Just in the more sensitive situations*.
>
> A. *Right*.[18]

Sixth, even if a nondisclosure request was conveyed in *every* investigation meeting (which is not established by the record), the request was narrowly tailored in other respects:

- The HR consultant only makes a "*request.*" According to the "Interview of Complainant" form, the HR consultant states: "I *ask* you not to discuss this with your coworkers . . . ." Odell, when asked whether "that [is] an *instruction* or *requirement* or simply a *request*," responded, "It's a *request*."[19] To the same effect, the judge found that, when requesting nondisclosure, "Odell *asks* employees not to discuss the matter with their coworkers while the investigation is ongoing," and he found

[14] Tr. 193–194 (emphasis added).

[15] Tr. 194.

[16] Tr. 258–259 (emphasis added). In addition, Navarro did not testify he received a nondisclosure request from Odell, and the judge did not find that Odell made such a request during the Navarro meeting.

[17] Tr. 194, 258, 260.

[18] Tr. 259–260 (emphasis added). The majority erroneously concludes, based on Odell's testimony quoted in the text, that she did *not* undertake an individualized inquiry before determining whether to request nondisclosure. Rather, my colleagues insist the record shows Odell "took a more categorical approach" and requested confidentiality "in *any* investigation into alleged sexual harassment, hostile work environment, charge of abuse, or similar alleged misconduct" (emphasis added). It bears emphasis that the General Counsel has the burden of proof regarding this issue, and I believe my colleagues' findings are unsupported by a "preponderance" of the evidence. See Sec. 10(c) (unfair labor practice findings must be supported by a "preponderance of the testimony taken"). The record reveals, at most, that Odell gave some hypothetical "examples" of "investigations" or "types of investigations" involving "particular sensitivity issues" where she "*might*" or "*may*" make a request for nondisclosure. Id. (emphasis added). Odell also indicated she requested confidentiality only "in the more sensitive situations." Id. Significantly, this testimony does not establish that the hypothetical "examples" described by Odell (where she "might" or "may" request nondisclosure) corresponded to *any* of the "maybe half a dozen times" when, in the past, she actually requested nondisclosure. Nor did the General Counsel elicit from Odell any details regarding her actual nondisclosure requests. For these reasons, in my view, the majority's description of the Respondent's alleged "categorical approach" amounts to "mere speculation without a jot of evidentiary support in the record." *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011).

[19] Tr. 196 (emphasis added).

the request was a "*suggestion*" (emphasis added).

- The *duration* of the request is limited to the pendency of the investigation. According to the "Interview of Complainant" form, the HR consultant states: "I *ask* you not to discuss this with your coworkers *while this investigation is going on*" (emphasis added).
- The *scope of the nondisclosure request* is also limited. The form instructs the HR consultant to ask the employee to refrain from discussing with coworkers only "this," which Odell described as "our conversation."[20] Odell further testified that, apart from asking that "this" conversation remain confidential "while [the] investigation is going on," she does not prohibit employees from discussing "their own complaints" or any other issues with coworkers, *even if* the same complaints or issues were the subject of the meeting with Odell.[21]
- The record establishes that the nondisclosure request was *unaccompanied by a threat of discipline*. In addition to the fact that nondisclosure was only requested, other talking points state there was protection against "retaliation." The only reference to potential discipline is contained in point 5, which describes obvious misconduct such as giving "false information" or engaging in "retaliation" against others, among other examples. Moreover, the record establishes that Odell interceded to *prevent* any imposition of discipline against Navarro.[22]
- The only commitment of confidentiality was *imposed on the employer*. According to the "Interview of Complainant" form, the HR consultant would state: "This is a confidential interview and *I will keep our discussion confidential* except as require[d] by law, or Banner policy or as necessary to conduct this investigation" (emphasis added). The record also shows that Odell treated employee meetings with a high degree of confidentiality.[23]

Finally, there is no doubt here about the Respondent's legitimate, substantial business justification in the limited instances when Odell may have "asked" or made a "suggestion" that an employee not discuss the specifics of an investigative meeting "while [the] investigation [was] still going on."[24] According to the "Interview of Complainant" form, the HR consultant explains the "reason" for this request or suggestion—namely, "when people are talking it is difficult to do a fair investigation and separate facts from rumors."[25] And Odell testified that "[t]he purpose of that statement is to keep the investigation . . . as pure as possible"[26] so "there's not . . . what did you say, what did I say . . . comparing notes" regarding "opinions or facts."[27] Thus, the record provides no basis for overturning the judge's following findings:

> The interview of complainant form is not given to employees. During interviews of employees making a complaint, Odell asks employees not to discuss the matter with their coworkers while the investigation is ongoing. *I find that suggestion is for the purpose of protecting the integrity of the investigation. It is analogous to the sequestration rule so that employees give*

[20] Tr. 259.

[21] Tr. 259. Odell responded as follows to questioning about the scope of her nondisclosure request:

> Q. When you ask someone to keep something confidential—
> A. Yes.
> Q. —during your investigation, are you telling someone who brought the complaint to you not to discuss their complaint with their co-workers?
> A. Not necessarily. Just the—our discussion, from complaint to, a complainant to investigator, our conversation. Because, the purpose is to keep the investigation as pure as possible, so there's not, you know, what did you say, what did I say and kind of comparing notes, 'cause I'm trying to keep opinions as pure as possible, opinions or facts, if you will.
> Q. Okay. So that in no way limits a co-worker's right to discuss their own complaints?
> A. No.
> Q. Even if they brought them to you to discuss them also with their co-workers?
> A. No.

Id.

[22] Odell testified, and the judge found, that Manager Ken Fellenz "wanted to put Navarro on corrective action" for failing to follow the temporary sterilizing procedures, and Navarro instead received a nondisciplinary "coaching" after "Odell advised against corrective action" given there was "no procedure in place . . . as suggested by Fellenz." *Banner Estrella Medical Center*, 358 NLRB No. 93, slip op. at 5. See also Tr. 244–245.

[23] Odell testified that she regarded every interview as "confidential" and she did not share her meeting notes on the "Interview of Complainant" form with "anyone else that I interview," Tr. 193, and "not even [with] managers," Tr. 194. Odell testified that, even though she later had a meeting about Navarro with two supervisors—Senior Manager Ken Fellenz and Director of Peri-Operative Services Joan McKisson—she "did not mention James coming to my office or what we discussed at all," Tr. 245–246.

[24] GC Exh. 12.

[25] Id.

[26] Tr. 193, 259.

[27] Tr. 259.

> *their own version of the facts and not what they heard another state*. I find that *Respondent has a legitimate business reason for making this suggestion*. Accordingly, I find no violation.[28]

In short, what we have here is an internal document, never shown to employees, about which HR Consultant Odell testified, in precise, specific terms, regarding her assessment of whether particular investigations presented a need for confidentiality. Only in certain investigations—"maybe half a dozen" total[29]—Odell made what the judge described (twice) as a "suggestion"[30] that an employee refrain from discussing with coworkers specifics *about the investigative-meeting conversation itself*, with the additional caveat that the request applied only "while this investigation is going on," and explaining that the "reason" was "when people are talking it is difficult to do a fair investigation and separate facts from rumors."[31] Odell testified she *never* made this request unless, for starters, she needed "to speak to at least more than one person."[32] The General Counsel did not elicit details regarding the half-dozen employee meetings in which Odell made non-disclosure requests. However, when asked about hypothetical situations when she "may" or "might" request non-disclosure, Odell indicated these would involve only "the more sensitive situations," such as "sexual harassment," "[h]ostile work environment" or "[s]uspicion of abuse or something like that."[33]

Discussion

My colleagues find that Section 8(a)(1) prohibits supervisors from requesting employees, while a workplace investigation remains ongoing, not to disclose details about their investigative meeting conversation. My colleagues reason that this type of nondisclosure request is unlawful even though (1) no employee was restricted from discussing anything with union representatives, and there was no denial of *Weingarten* representation; (2) the request did not target, prevent or penalize specific NLRA-protected concerted activity that actually occurred; and (3) no discipline was imposed based on disclosures involving actual protected concerted activity.[34]

I believe my colleagues' conclusion that our statute prohibits reasonable nondisclosure requests about matters discussed during workplace investigation meetings is erroneous and ill-advised in three respects.

1. *The Majority's Finding of Illegality is Misplaced Given the Particular Facts in this Case*. I believe my colleagues make a broad pronouncement of illegality that has little or nothing to do with the facts of the instant case. The record establishes that employee Navarro never received a nondisclosure request from HR Consultant Odell, and my colleagues make no finding to the contrary (notwithstanding the prior Board decision's indication that Navarro received such a request).

Additionally, I believe the Respondent engaged in precisely the type of conduct that, according to the majority, should render *lawful* the "maybe half a dozen" requests for nondisclosure that were described by Odell. As noted previously, the General Counsel did not elicit details from Odell regarding any of the *actual* situations when she requested nondisclosure. Rather, the record indicates Odell testified about some hypothetical "examples" or "types of investigations" where, based on "particular sensitivity issues" or "in the *more sensitive situations,*" she "*might*" or "*may*" make a request for nondisclosure.[35] In this context, Odell mentioned three types of cases—sex harassment, hostile work environment, or charges of abuse—as examples where she "might" or "may" request nondisclosure.[36] Nothing in Odell's testimony suggests she adopted, as my colleagues claim, a "categorical approach" involving nondisclosure requests "in *any* investigation into alleged sexual harassment, hostile work environment claim, charge of abuse, or similar alleged misconduct." The record does not even establish that the "maybe half a dozen" situations when Odell *actually* requested nondisclosure involved sex harassment, hostile environment, or abuse allegations. In any event, given that the majority finds a violation on the facts presented

[28] *Banner Estrella Medical Center*, 358 NLRB No. 93, slip op. at 6 (emphasis added).

[29] Tr. 258–259. See also Tr. 194, 196.

[30] *Banner Estrella Medical Center*, 358 NLRB No. 93, slip op. at 6.

[31] GC Exh. 12 at 1.

[32] Tr. 258.

[33] Tr. 260. As indicated in fn.18 and the accompanying text, supra, I believe the record falls far short of satisfying the General Counsel's burden to prove what the majority describes as a "categorical approach" in which Odell requested confidentiality "in any investigation into alleged sexual harassment, hostile work environment claim, charge of abuse, or similar alleged misconduct." Moreover, in my view, the type of narrow request at issue in the instant case should be considered lawful even if it were part of a "categorical approach" or was routinely utilized in all workplace investigations. See part 3, infra.

[34] For ease of reference, I use the term "nondisclosure request" to describe requests like the one described in the Respondent's "Interview of Complainant" form that do not involve any of the three categories described in the text. Conduct involving any of these three categories would involve a far more substantial potential impact on NLRA-protected rights than exists in the instant case. However, because none of these three categories is at issue here, I do not pass on the extent to which such conduct would violate the Act. This would most appropriately be addressed based on the actual facts presented in a particular case.

[35] Tr. 259–260 (emphasis added). See also fn. 18. and accompanying text, supra.

[36] Id.

here, I do not understand how any employer can lawfully make a nondisclosure request during an investigative meeting with confidence that it will pass muster with the Board.

It is also hard to envision how the "Interview of Complainant" form could be characterized as a "policy" because Odell's testimony established the form was *never* given to employees, and Odell testified she did not even give it to other managers.[37] Nor can the form reasonably be interpreted as a policy that prohibited discussions about "ongoing investigations of employee misconduct." Odell's testimony contradicts such an interpretation: she stated that her infrequent nondisclosure requests were limited in scope to the actual "conversation" that took place during the investigative meetings, and employees remained free to discuss with coworkers "their own complaints," *even if* such complaints were the subject of the meeting with Odell.[38]

My colleagues maintain that, for a nondisclosure request to be lawful, the employer bears the "burden to justify a prohibition on employees discussing a particular ongoing investigation," the employer "must proceed on a case-by-case basis," and the employer's stated justification "must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." As explained below, I disagree with this standard. However, even applying it, the record shows that Odell refrained from making any nondisclosure requests in any workplace investigation meetings except when she determined it was justified by a "particular ongoing investigation," and her unrebutted testimony establishes that, when evaluating the potential need to request nondisclosure, she made an individualized determination that reasonable grounds existed for believing the integrity of the investigation would be compromised without confidentiality. Again, she indicated she "may" or "might" request confidentiality only when investigations involved "particular sensitivity issues" or "the more sensitive situations."[39]

Contrary to my colleagues' finding that the employer bears the burden of justifying any nondisclosure request, our statute requires that the *General Counsel* bear the burden of proving violations of the Act based on a "preponderance" of the testimony.[40] I believe the judge correctly found, based on the record and his evaluation of witness credibility, that an employer does not violate Federal law by doing what occurred here (a half-dozen times or so): asking an employee not to disclose, while the investigation remains ongoing, what was said during conversations that take place in a workplace investigative meeting.

2. *The Majority Test does not Appropriately Balance any Interference with Section 7 Rights Against the Reasons Favoring Nondisclosure of Conversations that Occur in Workplace Investigations*. I believe my colleagues also fail to adequately balance employee rights under our statute against the importance of workplace investigations, most of which do not concern NLRA-protected concerted activity; and the majority improperly disregards the predictable need to avoid contemporaneous disclosure of specific matters discussed in an investigative meeting, a need the Board itself recognizes and enforces in its own proceedings.

In *NLRB v. Great Dane Trailers, Inc*.,[41] the Supreme Court referred to the Board's "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy" (emphasis added).[42] Similarly, in *NLRB v. Erie Resistor Corp*.,[43] the Supreme Court stated that actions that undermine or discriminate against NLRA-protected rights may be justified on the basis that they "were taken in the pursuit of legitimate business ends and . . . to accomplish business objectives acceptable under the Act." The Supreme Court described the "teaching of the Court's prior cases dealing with this problem," and stated:

> As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of *weighing the interests of employees in concerted activity* against the *interest of the employer in operating his business in a particular manner* and of *balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct*.[44]

As noted above, I believe *the Board* has the responsibility here to discharge the "delicate task" of "weighing

[37] Tr. 193–194 (Odell indicates employees "never receive a copy" of the interview form, she did not "share it with anyone else that I interview," and "not even managers would get a copy of this document").

[38] See fns. 20 And 21, supra, and accompanying text.

[39] Supra, fn.18.

[40] Sec. 10(c).

[41] 388 U.S. 26, 33–34 (1967).

[42] In the context of addressing alleged violations of Sec. 8(a)(3), which require proof of unlawful motivation, the Supreme Court in *Great Dane* held that where there were "legitimate and substantial business justifications for the [employer's] conduct," and where "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,'" "an antiunion motivation must be proved to sustain the charge." Id. (citations omitted).

[43] 373 U.S. 221, 229 (1963).

[44] Id. at 228–229 (emphasis added; footnote omitted).

the interests of employees in concerted activity" against the "interests of the employer" and "the business ends to be served by the employer's conduct."[45] One problem in my colleagues' approach—though certainly not the biggest problem—is they effectively shift to employers the burden of engaging in a case-by-case "weighing" and "balancing," without acknowledging that, in the great majority of cases, a nondisclosure request will produce no adverse effect on Section 7 rights or the risk will be "comparatively slight," especially in the absence of the three categories of more serious conduct described previously.[46]

(a) *Narrow Nondisclosure Requests in Investigative Meetings do not Significantly Interfere with NLRA-Protected Conduct*. The first "delicate task" described above is to weigh the "interests of employees in concerted activity" that may be affected by a nondisclosure request in an investigative meeting.[47]

My colleagues find the Respondent's confidentiality "policy" regarding ongoing misconduct investigations violates Section 8(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[48] Section 7 (as relevant here) gives employees the right to engage in "*concerted* activities for the purpose of collective bargaining or *other mutual aid or protection*" (emphasis added). I have described Section 7 as the "cornerstone of the Act" that "unquestionably confers protection regarding a range of activities."[49]

However, the great majority of workplace investigative meetings do not involve NLRA-protected conduct. Section 7 protects employee activities only if they are "*concerted*," and only if motivated by the "purpose" of "collective bargaining or other *mutual aid or protection*." Under *Meyers Industries*,[50] the first prerequisite—"concerted" activity—is satisfied in circumstances involving "'a speaker and a listener'" only where the conversation was "'engaged in with the object of *initiating or inducing or preparing for group action* or . . . had *some relation to group action* in the interest of the employees.'"[51] "[M]ere talk" or "griping" that does not "look[ ] toward group action" does not amount to concerted activity.[52] As I observed in *Fresh & Easy*:

> If one person is a witness to somebody else's car crash, and if they both have a shared interest in avoiding such accidents, *this does not mean they have engaged in "concerted" activity*. Rather, our cases establish that "concerted" activity takes place, within the meaning of Section 7, only if the conduct involves or contemplates *a joint endeavor to be "done or performed together or in cooperation*."[53]

Even if conduct involving two or more employees is "concerted," Section 7 confers protection only if the second prerequisite is met: the conduct must also be undertaken for the "purpose" of "collective bargaining or *other mutual aid or protection*."[54] Therefore, and setting aside other types of Section 7 activity not at issue here, employees engage in NLRA-protected conduct only if the conduct is "concerted" and has a "purpose" that involves "mutual" aid or protection.[55]

Given the above parameters, it is unsurprising that many or most workplace investigation meetings do not involve or give rise to NLRA-protected activity. This is illustrated by the following examples:

1. *Discipline Investigations—No Automatic NLRA-Protected Conduct*. Even though an employee complaint followed by investigative interviews may lead to discipline or discharge, *there is no per se rule that such investigations involve conduct protected by Section 7*. The same prerequisites apply: employee discussions or interaction will not have Section 7 protection unless two or more employees engage in "concerted" activity with a "purpose" of "mutual aid or protection." And *even if* employees honor a non-disclosure request regarding the investigative-meeting conversation, *the complainant and other employees can still have NLRA-protected discussions regarding the employee complaint, the subject matter of the investigation, and other matters*.

[45] Id.

[46] *Great Dane*, 388 U.S. at 34 (quoting *NLRB v. Brown*, 280 U.S. 278, 289 (1965); *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311–313 (1965)). For the three categories of conduct described previously, see fn. 34 and the accompanying text, supra.

[47] *Erie Resistor*, 373 U.S. at 228–229.

[48] The factual flaws in the majority's finding have already been discussed. There was no policy, and any nondisclosure request was limited in scope to the actual conversation that took place during the investigative meetings.

[49] *Fresh & Easy*, 361 NLRB No. 12, slip op. at 13 (Member Miscimarra, dissenting in part).

[50] *Meyers Industries*, 268 NLRB 493 (1984) *(Meyers I),* remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[51] *Meyers II*, 281 NLRB at 887 (emphasis added) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir 1964)).

[52] *Mushroom Transportation*, 330 F.2d at 685.

[53] *Fresh & Easy*, 361 NLRB No. 12, slip op. at 16 (Member Miscimarra, dissenting in part).

[54] Sec. 7 (emphasis added).

[55] See generally *Fresh & Easy*, 361 NLRB No. 12, slip op. at 16–19 (Member Miscimarra, dissenting in part).

Example 1—Workplace Fatalities / Safety Investigation. Two maintenance employees assigned to clean a railway tank car are discovered dead from asphyxiation, and more than 350 other employees perform the same cleaning operation every week. The Company conducts investigative interviews with 17 employees who had some involvement with the tank car and cleaning operation during the week in question, and the employer and any responsible employees face potential criminal liability. Some of the 17 employees talk among themselves and with others about the accident, but with no thought of group action. *There is no NLRA-protected conduct in this situation because concerted activity is absent and there is no purpose of mutual aid or protection.* Moreover, even if all 17 employees complied with a request not to discuss their interview conversations, *the employees are free to engage in NLRA-protected discussions regarding safety, employee complaints, and other matters*.

2. *No "Concerted" Activity by Employees*. Other investigations will bear no relation to activity protected under the Act because none of the employee-participants engage in "concerted" activity.

   Example 2—Sex Harassment Investigation. A sex harassment investigation involves meetings with 7 people: the employee who complained, the alleged co-employee harasser, and five potential employee-witnesses. There would be no NLRA-protected activity if these employees engage in no concerted activity. And they would not engage in concerted activity by discussing the incident or the complaint unless their discussion sought to initiate, induce, or prepare for group action. As noted above, mere "griping" or "talk" between employees does not constitute concerted activity, even if it relates to the complaint being investigated.[56]

3. *No "Mutual Aid or Protection*." Even if two or more employees engage in concerted activity, this will still be unprotected under Section 7, as noted above, unless it also has the "purpose" of "mutual aid or protection."

   Example 3—Defective Product Investigation. A "defective product" investigation involves meetings with 5 employees: the employee who discovered a defect, two other employees who worked the same shift, and two employees who work other shifts. Before the Company started its investigation, one employee took it upon herself to meet with the other 4 employees, following which she wrote a joint memo summarizing the number of defects each person encountered in the prior three months. This involves concerted activity but no NLRA-protected purpose of mutual aid or protection. (Their purpose is to protect consumers of the employer's products.)

4. *Employer-Sponsored Activities*. Employers nearly always have meetings, programs or focus groups, during or outside of work, in which employee-participants discuss and address particular issues or problems. The activities of employees at such employer-sponsored events do not necessarily constitute NLRA-protected conduct.

   Example 4—Violent Crime Investigation. Over a 10-month period, 7 night-shift employees are physically assaulted after leaving the company's premises at the end of their shifts, and the employer receives an anonymous report that the unnamed assailant works on the second shift. The Company conducts an investigation involving meetings with the 7 employees who were assaulted and 13 second-shift employees who worked on days when the assaults occurred. The Company also sponsors "safety-first" meetings for all employees and helps arrange a "buddy system" whereby all night-shift employees leave in groups of two or more people.

5. *Investigation Unrelated to Employment*. Many investigations and meetings relate to business matters with no direct impact on wages, hours, benefits, discipline or other employment matters. These investigations and meetings normally will not involve any NLRA-protected activity even though many employees may participate in them.

   Example 5—Production Capacity Investigation. The employer is contacted by a potential customer about new business that may require more than the employer's current production capacity. The employer conducts an investigation, involving separate meetings with production employees, to discuss capacity constraints and ways to increase production.

Several aspects of the above examples illustrate why, in my view, a narrowly tailored nondisclosure request either leaves NLRA-protected activity unaffected or,

[56] *Mushroom Transportation*, 330 F.2d at 685.

borrowing the Supreme Court's language in *Great Dane*, at most has an impact that is "comparatively slight."[57]

First, none of the examples involves NLRA-protected activity. The majority opinion leaves the impression that, after every investigative interview, every employee runs out to exercise his or her "Section 7 right to discuss discipline or ongoing disciplinary investigations." There is no support for such a proposition in the record. I agree employees have the Section 7 right described by my colleagues (assuming the employees' discussion constitutes concerted activity and is not mere talk, and further assuming that the employees engaged in the discussion have a purpose of mutual aid or protection),[58] and certainly, if and when employees choose to exercise this right,[59] I agree such discussions are "vital to employees' ability to aid one another in addressing employment terms and conditions with their employer." But my colleagues fail to acknowledge that, in the contemporary workplace, the overwhelming majority of matters that are the subject of workplace investigations never reach the door of the NLRB,[60] and I believe the great majority of workplace investigations do not involve or give rise to protected concerted activity. Consistent with the "weighing" and "balancing" that is required of the Board,[61] which has the "responsibility to adapt the Act to changing patterns of industrial life,"[62] I believe the majority improperly assumes that the most important consideration in all investigations, and for employees affected by investigations, is the possibility that employees may engage in NLRA-protected activity.

Second, even if employees *exercise* their right to engage in NLRA-protected conduct in relation to a workplace investigation, the above examples demonstrate that the employees' Section 7 rights would be unaffected by the limited nondisclosure request at issue here, or any adverse effect would, at most, be extremely small. Consider the plight of employees and the employer described in the "Workplace Fatalities / Safety Investigation," where (i) two employees assigned to clean a railway tank car are discovered dead from asphyxiation; (ii) more than 350 other employees perform the same cleaning operation every week; (iii) the employer must conduct investigative interviews with 17 employees who had some involvement with the tank car and cleaning operation during the week in question; and (iv) the employer and any responsible employees face potential criminal liability. Under my colleagues' approach, the Board would focus on the possibility that one or more of the 17 employees being interviewed might engage in NLRA-protected activity, without considering the critical interest shared by all employees—especially the 350 employees who perform the very same cleaning operation—in ensuring that their employer conducts an effective investigation. Yet there is no doubt that my colleagues' standard would render impermissible the type of narrow nondisclosure request at issue in this case, i.e., a "suggestion" that the employee only refrain from discussing *details of the investigative-meeting conversation itself*.[63] Thus, in the

[57] *Great Dane*, 388 U.S. at 34.

[58] There is, of course, no such thing as a "Section 7 right to discuss discipline or ongoing disciplinary investigations." Sec. 7 does not protect employees engaged in such discussions unless the discussions constitute concerted activity for the purpose of mutual aid or protection.

[59] Employees under Sec. 7 also have the protected right to "refrain from any or all of such activities" (subject to an exception relating to union security arrangements outlined in Sec. 8(a)(3) of the Act).

[60] Neither the majority opinion nor this dissent relies on an empirical analysis of the number of workplace investigations that involve or give rise to Sec. 7 activity by employees, and I doubt that such an empirical analysis exists. However, I believe the Board can take notice that presently, employers and employees are regulated by a vastly greater number of Federal, State, and local laws, unrelated to the NLRA, than have ever previously existed in the United States. It is also relevant that more than 116 million private sector employees are employed in the United States. U.S. Dept. Labor, Bureau of Labor Statistics, Economic News Release, Table B-1, Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail (April 2014) (http://www.bls.gov/news.release/empsit.t17.htm). By comparison, the Board's entire unfair labor practice charge intake in Fiscal Year 2013 consisted of 21,394 charges resulting in 1272 complaints (which includes charges filed and complaints issued against unions). NLRB Charges and Complaints (http://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints). The employment figure stated above does not precisely conform to the number of employees who are subject to the NLRA (since, among other things, this figure includes railway and airline employees subject to the Railway Labor Act), and one can also assume that a much greater number of employees engage in protected concerted activity than is reflected in Board charges and complaints. However, all employees are potentially affected by workplace investigations, and even if the above figures are viewed in the most conservative manner possible, they suggest an extremely small proportion of those employees engage in protected concerted activity that rises to the level of receiving attention from the Board.

[61] *Erie Resistor*, 373 U.S. at 228–229.

[62] *Weingarten*, 420 U.S. at 266.

[63] The wording of GC Exh. 12 and Odell's testimony (quoted in the text accompanying fn. 20 and in fn. 21, supra) indicate that any nondisclosure request only pertained to the "conversation" that occurred during an investigative meeting. It is also clear that my colleagues' standard, in the "Workplace Fatalities / Safety Investigation" example, would invalidate any nondisclosure request. Not only do they state that "it is the employer's burden to justify a prohibition" in relation to the "particular ongoing investigation," but the justification "must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." Even though the "Workplace Fatalities / Safety Investigation" obviously involves extremely important issues, and even though a limited nondisclosure request of the type at issue here would help ensure an effective investigation, such an instruction would be unlawful under the majority's standard. The "Workplace Fatalities / Safety Investigation" involves two employee deaths and the possibility of 350 additional deaths or serious injuries, but nothing evidences what the majority apparently

"Workplace Fatalities / Safety Investigation," even if employees honored such a limited nondisclosure request, every employee could still freely exercise his or her NLRA-protected right to engage in protected concerted discussions regarding the investigation, any employee complaints, their concerns about safety, and other matters. Indeed, even if employees *failed* to honor the nondisclosure request, their Section 7 rights would remain intact, since the judge found that the request was merely a "suggestion" without any threatened imposition of discipline.

Third, although HR Consultant Odell did not make a nondisclosure request to employee Navarro, the facts of the instant case reinforce the notion that Navarro's Section 7 rights would not have been impeded by such a request. Navarro initiated the meeting with Odell to seek her *assistance* because Navarro was uncomfortable with the temporary sterilizing instructions he had received from Manager Fellenz. The judge found that in the meeting with Odell, Navarro "expressed concern for his job." The record is devoid of any suggestion that Navarro believed anything said during the Odell meeting interfered with the exercise of his NLRA-protected rights. Indeed, notwithstanding my colleagues' reasoning that today's decision is necessary to protect the "right" of employees to discuss "discipline" or "ongoing disciplinary investigations" with other employees, Odell—based on her meeting with Navarro—*prevented* Navarro from receiving "corrective action" for his failure to follow the temporary sterilizing instructions.[64] It is not clear that Navarro engaged in NLRA-protected activity, but my colleagues correctly note that Navarro discussed with coworkers the temporary instrument-sterilizing instructions.[65] There is no evidence—none—that Navarro was prevented or dissuaded from discussing with coworkers the temporary instructions, any concerns he had about potential discipline, or any ongoing investigation.[66]

Finally, the record demonstrates that the nondisclosure request at issue here—in the "maybe half a dozen" times when it was made by Odell—presented no material risk of interference with the exercise of Section 7 rights because there is no evidence (1) that the request prevented any employee from discussing anything with union representatives or that there was a denial of *Weingarten* representation in the investigative meeting; (2) that the request targeted, prevented or penalized specific NLRA-protected concerted activity that actually occurred; or (3) that discipline was imposed based on disclosures involving actual protected concerted activity.

(b) *The Majority Gives Insufficient Weight to the "Business Ends To Be Served" by Nondisclosure Requests in Investigative Meetings*. The second half of the "weighing" and "balancing" required of the Board relates to the "interest of the employer in operating his business in a particular manner" and the "business ends to be served by the employer's conduct."[67]

In my view, my colleagues improperly dispense with this half of the "delicate task" that is assigned to the Board. Instead of "weighing" and "balancing" the legitimate interest served by making a nondisclosure request in an investigative meeting against any interference with NLRA-protected rights, the majority engages in reasoning similar to what one commentator has termed "push-button law."[68] Employee Section 7 rights are the *only* interests taken into account, and factors favoring nondisclosure requests receive no weight at all. Although I commend and share my colleagues' salutary purpose of enforcing the Act, I cannot join their all-or-nothing analysis, under which reasonable nondisclosure requests are assigned a value of zero unless an employer satisfies the high burden of proving, in "a particular ongoing investigation," on a "case-by-case basis," that there were "ob-

would require: objective evidence that "the integrity of the investigation [would] be compromised without confidentiality."

Indeed, because my colleagues require that employers "proceed on a case-by-case basis," the Board would presumably invalidate any preexisting standard request for nondisclosure whenever an investigation involves, for example, workplace fatalities, workplace criminal assaults, or workplace sexual abuse. Moreover, it appears that reliance on a "standard" nondisclosure request for designated types of investigations would be unlawful *even if* an actual investigation *satisfied* the requirement of "objectively reasonable grounds for believing that the integrity of the investigation [would] be compromised without confidentiality." My colleagues dispute this point by stating, "[t]here is nothing in [their] decision that would preclude employers from developing standard guidance for human resources professionals, so long as those policies are consistent with the framework described" in the majority's decision "and the considerations it entails." But to be "consistent with the framework" set forth in the majority's decision, any guidance would need to direct human resource officials to make *ad hoc* confidentiality determinations "on a case-by-case basis." I believe Congress could not have reasonably intended, when enacting our statute, that mere requests for nondisclosure in workplace investigations would be unlawful unless employers undertake a *de novo* case-by-case evaluation in each and every "particular ongoing investigation" (and, possibly, each and every interview) of the cumulative requirements adopted by my colleagues.

[64] See text accompanying fn. 22, supra.

[65] I need not reach nor do I decide whether Navarro engaged in NLRA-protected conduct in his discussions with coworkers or, if so, whether the Respondent had knowledge of such conduct.

[66] Indeed, as stated above, Odell testified she did not regard her meeting with Navarro as involving an "investigation" because in her view, an "investigation" entails speaking with two or more employees, which she believed was not required in Navarro's case. See text accompanying fn. 16, supra.

[67] *Erie Resistor*, 373 U.S. at 228–229.

[68] Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 Syracuse L. Rev. 98 (1955) (footnote omitted).

jectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality." I believe the majority's approach is inconsistent with our "duty" to strike a "proper balance between . . . asserted business justifications" and the potential "invasion of employee rights."[69] Most important is my colleagues' failure to recognize the purpose that the type of nondisclosure request at issue here serves in the wide variety of workplace investigations employers are required to conduct.

My colleagues' failure to attach any value to such requests stands in stark contrast to the record, which provides the Respondent's business justification for the requests. Thus, the "Interview of Complainant" form explains the "reason" for requesting nondisclosure, which is "when people are talking it is difficult to do a fair investigation and separate facts from rumors."[70] Odell testified the request is intended "to keep the investigation . . . as pure as possible"[71] so "there's not . . . what did you say, what did I say . . . comparing notes" regarding "opinions or facts."[72] And the judge concluded that the nondisclosure request was "for the purpose of protecting the integrity of the investigation."[73] He stated it was "analogous to the sequestration rule so that employees give their own version of the facts and not what they heard another state."[74]

My colleagues' reasoning is also contrary to the Board's own precedent, which confers upon parties the right, in *every* case, to move to sequester witnesses during Board hearings.[75] Indeed, the standard Board sequestration order—though considerably longer and more onerous than the request or suggestion at issue here—bears a striking resemblance to the one-sentence nondisclosure request in the instant case. The Board-approved sequestration explanation states, in part:

> Counsel has invoked a rule requiring that the witnesses be sequestered. . . .
>
> The [sequestration] rule . . . means that *from this point on until the hearing is finally closed*, no witness *may discuss with other potential witnesses either the testimony that they have given or that they intend to give*. The best way to avoid any problems is simply *not to discuss the case with any other potential witness until after the hearing is completed*.
>
> Under the rule as applied by the Board, with one exception, counsel for a party may not in any manner, including the showing of transcripts, *inform a witness about the content of the testimony given by a preceding witness*, without express permission of the Administrative Law Judge. The exception is that counsel for a party may inform counsel's own witness of the content of testimony, including the showing of transcripts, given by a witness for the opposing side in order to prepare for rebuttal of such testimony.
>
> *I expect counsel to police the rule and to bring any violation of it to my attention immediately*. Also, it is the obligation of counsel to *inform potential witnesses who are not now present in the hearing room of their obligations under the rule*.[76]

The Board is duty-bound to enforce the NLRA, and the integrity of Board proceedings is important in *every* case. So, too, is the integrity of every workplace investigation conducted by employers, which routinely and predictably address a broad array of statutory requirements and, far too often, matters of life or death. The integrity of workplace investigations has equal importance for employees. For these reasons, I believe the Board cannot appropriately attach a weight of zero to the substantial justification that exists for a nondisclosure request similar to the one at issue here. If the Board satisfies its duty to engage in the "delicate" task of "weighing" and "balancing" the impact on the exercise of Section 7 rights of such a narrow request, on the one hand, and the "business ends to be served by the employer's conduct,"[77] on the other, I believe the only reasonable conclusion is that such a request does not violate Section 8(a)(1) of the Act.

(c) *The Majority's Reasoning and Conclusion are not Supported by Board Case Law*. The cases my colleagues rely on to invalidate the nondisclosure "policy" at issue here do not support their finding. My colleagues primarily rely on *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011), but that case has nothing to do with the type of limited request HR Consultant Odell made of individual employees "maybe half a dozen times" not to discuss the details of their investigative-meeting conversation. The employer in *Hyundai Ameri-*

[69] *Great Dane*, 388 U.S. 26, 33–34.
[70] GC Exh. 12.
[71] Tr. 193, 259.
[72] Tr. 259.
[73] *Banner Estrella Medical Center*, 358 NLRB No. 93, slip op. at 6.
[74] Id.
[75] See *Greyhound Lines*, 319 NLRB 554, 554 (1995); see also Casehandling Manual, Part One, Unfair Labor Practice Proceedings Sec. 10394.1; Judge's Bench Book, Sec. 1-300 (Model Sequestration Order) and Sec. 10-100 et seq. (noting that the Board conforms to the statutory command to follow the Federal Rules of Evidence, including Fed.R.Evid. 615, "Exclusion of Witnesses," "so far as practical").
[76] *Greyhound Lines*, 319 NLRB at 554 (emphasis added).
[77] *Erie Resistor*, 373 U.S. at 228–229.

ca unlawfully promulgated "an oral rule *prohibiting* employees from discussing with other persons *any matters under investigation* by its human resources department,"[78] which prohibited, for example, one employee's "use of 'blind copy' emails to alert coworkers to communication . . . [with] management regarding matters under investigation by the [r]espondent."[79] This type of "oral rule," which was a basis for an employee's discharge in *Hyundai*, bears no similarity to the limited nondisclosure "suggestion," unaccompanied by any threat of discipline or adverse impact on actual NLRA-protected activity, in the instant case.

Two other cases relied upon by my colleagues—*Phoenix Transit Systems*[80] and *Mobil Oil Exploration & Producing*[81]—likewise involve extremely broad confidentiality requirements that were the basis for discipline. I agree with the violation found in *Phoenix Transit* because, unlike the instant case, the employer discharged an employee for publicizing complaints *nearly two years* after an investigation into them had concluded,[82] the employer was found to have retaliated against protected concerted activity that actually occurred,[83] and the judge reasoned that the employer's confidentiality requirement "was simply too broadly interpreted and applied."[84] Along similar lines, *Mobil Oil Exploration* involved an employer that, in discharging an employee, relied in part on a broad commitment to keep an "investigation" confidential, and the discharge was found to constitute retaliation for protected concerted activity that occurred when the employee "openly discussed the investigation in front of others."[85] The instant case is distinguishable from both of these cases in multiple respects.

I also agree with the analysis and result in *Caesar's Palace*,[86] where the Board held that the employer lawfully gave employees being interviewed "strict instructions not to discuss anything related to the investigation 'with anybody at any time' or 'in any way, shape or form in or out of the work place.'"[87] Specifically, the Board in *Caesar's Palace* relied on the requirement that the Board "strike a *proper balance* between the employees' rights and the Respondent's business justification."[88] Unlike the instant case, *Caesar's Palace* involved a "strict" confidentiality requirement, and employees engaged in protected concerted activity and were discharged based on their breach of the confidentiality commitment. Notwithstanding these facts, the Board upheld the discharges because the employer had been investigating reports of drug dealing, theft, and threats to the "lives of fellow employees," and the Board found that the facts of that case (which included "allegations of a management coverup and possible management retaliation, as well as threats of violence") rendered the discharges lawful. *Caesar's Palace* does not reasonably support the majority's suggestion that the facts of that case now establish a threshold showing that, if *not* made, renders *unlawful* the narrow nondisclosure "suggestion" at issue here, which did not conflict with actual protected concerted conduct, where there was no threat or imposition of discipline, and where the nondisclosure request was limited to the investigative-meeting conversation itself.

As a final matter, my colleagues here improperly disregard the fact that Odell mentioned nondisclosure as a "request" or "suggestion" that encompassed only the investigative-meeting conversation itself (not the investigation) and was limited in duration to the time period the investigation remained ongoing. My colleagues reject my reliance on what they characterize as "the supposedly suggestive nature of Odell's request," and they quote *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994), enfd. 83 F.3d 156 (6th Cir. 1996), for the proposition that "[i]t makes no difference whether the employees were 'asked' not to discuss their wage rates or ordered not to do so." As demonstrated by the foregoing quotation, *Franklin Iron* has no application here because it involved employees who were asked "not to discuss their wage rates." Longstanding Board law establishes that any restriction—whether requested or ordered—on the discussion of wage rates constitutes a per se violation of the Act given the central role played by wages in Section 7 activity, and there is no legitimate employer justification for such a restriction. As indicated above, the narrow nondisclosure request at issue here is completely dissimilar from a restriction on wage discussions, as to both its nonexistent or, at most, slight impact on Section 7 rights and the reasonable justifications that support it.

3. *The Majority's Test is Unrealistic and Undermines the Interests of Employers and Employees Alike*. I believe my colleagues, though well intentioned, adopt an unrealistic standard that will produce immense difficulty

[78] 357 NLRB No. 80, slip op. at 1 (emphasis added).
[79] Id., slip op. at 14.
[80] 337 NLRB 510 (2002).
[81] 325 NLRB 176 (1997).
[82] 337 NLRB at 513.
[83] Id.
[84] Id. at 514. The Board adopted the judge's findings regarding the confidentiality requirement and stated that the employer prohibited discussion "even among the affected employees *whom Respondent initially assembled* at a meeting to solicit information concerning the complaint." Id. at 510 (emphasis added).
[85] 325 NLRB at 177.
[86] 336 NLRB 271 (2001).
[87] Id. at 271.
[88] Id. (emphasis added).

for employers, to the detriment of the very employees my colleagues mistakenly believe they are helping in today's decision.

The biggest practical problem with the new standard relates to the impossibility of administering it. Because the majority requires employers to prove the need for nondisclosure in any "particular ongoing investigation" on a "case-by-case basis," employers may not adopt any internal guidelines that identify *types* of investigations when employee-participants should consistently be asked not to disclose details regarding investigative-meeting conversations. Nothing along these lines may be decided in advance by employers.[89] Instead of establishing work force investigation procedures that can be consistently applied throughout an organization—at least regarding certain categories of investigations, for example—the Board requires employers to discard consistency in favor of a haphazard, ad hoc patchwork of "just-in-time" decisionmaking about whether or when nondisclosure requests should be made.

Nor is it practical or reasonable for employers to limit nondisclosure requests to those investigations that have nothing to do with potential discipline. Most investigations take place because the employer *does not know* what occurred and whether discipline might be warranted. For example, one might believe discipline is not in the offing when a retail store investigates the sexual assault of a customer in the store's parking lot at night when the store was closed. What happens if the employer requests nondisclosure when interviewing employees in this "non-disciplinary" investigation, but it turns out that (i) three employees had personal relationships with the assault victim; or (ii) one employee's failure to replace burned-out lights in the parking lot may have been a contributing factor; or (iii) an employee actually committed the assault, which comes to light based partly on the employer's investigation and partly on information supplied by the police? Finally, even if an employer *successfully* identified "discipline" investigations and made nondisclosure requests only in other (nondisciplinary) investigations, this would produce the incongruous result of safeguarding the integrity of the *least* important investigations from the perspective of employees, while making it *unlawful* to safeguard the integrity of the *most* important investigations from the perspective of employees. I believe this outcome is unsupported by the NLRA, could not reasonably have been intended by Congress, and plainly undermines other employment statutes unrelated to the NLRA.

In the best case, I believe my colleagues create a Hobson's Choice for employers, who must decide whether (i) to conduct investigations without taking any reasonable measures to prevent employee-witnesses from engaging in discussions that predictably will damage the investigation; or (ii) to have every individual supervisor and manager make a case-by-case determination, regarding every "particular ongoing investigation," about whether evidence may be adduced of "objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality" warranting a request for nondisclosure of investigative-meeting conversations, where the legality of the request will be known only after years of NLRB litigation, which may result in Board-ordered rescission of discharges or discipline and (depending on the circumstances) other remedies that may relate to other changes made as a result of the investigation.

In the worst cases—which hopefully will be few in number—the restrictions imposed in this case will not merely undermine important investigations, they will adversely affect efforts to prevent or address workplace violence, to enforce restrictions against discrimination and harassment, to avoid workplace accidents and injuries, and to make important business decisions.

I have expressed my full support of the Act's aggressive enforcement when the evidence proves that two or more employees have engaged in "concerted" activities

[89] The majority makes this prohibition explicit. They state: "The employer cannot reflexively impose confidentiality requirements in all cases or *in all cases of a particular type*" (emphasis added). This "particular type" prohibition is especially difficult for employers to administer. Moreover, I suspect the Board itself, when attempting to maintain consistency while applying the majority's standard in future cases, will need to recognize that confidentiality is *predictably* necessary in certain types of investigations—for example, those involving workplace fatalities, criminal assaults, or sexual abuse (to name only three examples). Ironically, if the Board achieves such consistency from case *to* case, this will require employers *not* to proceed case *by* case. See also fn. 63, supra.

My colleagues' prohibition against reasonable employer judgments about the need for nondisclosure in "cases of a particular type" is also premised on the false assumption that each and every case is so unique that it precludes the development of reasonable categories in advance (by employers) or after the fact (by the Board). This proposition is contradicted by the Board's own experience with *Weingarten* representation, for example, where the Board, with Supreme Court approval, adopted a requirement that employees in unionized work settings must be afforded a right to request representation *only* in "cases of a particular type" —namely, those "where the employee reasonably believes the investigation will result in disciplinary action." *Weingarten*, 420 U.S. at 257. The existence of the *Weingarten* standard, which includes caveats and qualifications recognized by the Supreme Court more than 40 years ago (id. at 256–260), demonstrates that every workplace investigation is not so inherently unique as to defy the formulation of reasonable requirements in advance for "cases of a particular type."

for the "purpose of . . . mutual aid or protection."[90] However, absent such evidence, I have opposed the broad application of NLRA-based restrictions on workplace investigations, and I made the following observation:

> [I]t undermines the policies and purposes of *other* important federal, state and local statutes to broadly apply the NLRA's "process" restrictions on top of the non-NLRA substantive and procedural requirements implicated in a single employee's individual complaint. Employers will need to focus on limiting and narrowly tailoring their investigations and discussions with employees, rather than focusing on the substantive legal issues relating to individual complaints. Employers will need to anticipate—consistent with the Respondent's experience—that one or two questions may result in years of Board litigation, separate from the complex non-NLRA laws and procedures that actually govern the employee complaint. Extensive research is not needed to conclude that *these problems will delay or obstruct investigations and inhibit the vigor with which they can be carried out*. Necessarily, *these problems will operate to the detriment of employees*.[91]

The Board's paramount responsibility is to enforce the NLRA. However, the Supreme Court has instructed us to acknowledge the "entire scope of Congressional purpose," which requires "careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."[92] Most important is the need, when addressing the type of nondisclosure request that is presented here, to "strike a *proper balance* between . . . employees' rights and the Respondent's business justification."[93] The Board is also required to adopt standards that can be applied so that parties can have "certainty beforehand" and "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 684–686 (1981). Under the majority's test, such certainty is achievable only if employers *never* request nondisclosure from employee witnesses regarding the subject matter of any investigative meeting. In my view, such an outcome does not strike a "proper balance" between NLRA and non-NLRA legal obligations, it is not reasonably supported by the NLRA, it is contrary to the Board's own treatment of witness nondisclosure in our proceedings, and it is ill-advised as a matter of public policy.

Conclusion

I believe my colleagues' finding that Section 8(a)(1) renders unlawful the Respondent's nondisclosure request during "maybe half a dozen" workplace investigations is unsupported by the record evidence. Moreover, even if the Respondent routinely made nondisclosure requests in workplace investigations, I believe the majority's invalidation of such a request reflects a failure to properly balance Section 7 rights against the legitimate reasons that exist for such a request.

Accordingly, as to these issues, I respectfully dissent.

Dated, Washington, D.C. June 26, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[90] *Fresh & Easy*, 361 NLRB No. 12, slip op. at 22 (Member Miscimarra, dissenting in part).

[91] Id. (emphasis in original and emphasis added).

[92] *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

[93] *Caesar's Palace*, 336 NLRB at 271 (emphasis added); *Great Dane*, 388 U.S. at 33–34; see also *Erie Resistor*, 373 U.S. at 229.

Appendix A – Banner Health "Interview of Complainant" Form
(excluding notes specific to James Navarro meeting) (Gen. Counsel's Exh. 12)

Banner Health

FOR HUMAN RESOURCES USE ONLY

Interview of Complainant *(Emphasis on details)*

CONFIDENTIAL
INVESTIGATION

EEO/Affirmative Action Dept.

Date: **Employee:** **Investigator:**

Introduction for all interviews:

- Explain purpose of the investigation. Example: "I am investigating a (your) complaint or inappropriate behavior."
- This is a confidential interview and I will keep our discussion confidential except as require[d] by law, or Banner policy or as necessary to conduct this investigation. I ask you not to discuss this with your coworkers while this investigation is going on, for this reason, when people are talking it is difficult to do a fair investigation and separate facts from rumors.
- Matter under investigation is serious, and the company has a commitment/obligation to investigate this claim.
- No conclusion/recommendation will be made until all of the facts have been gathered and analyzed.
- Any attempt to influence the outcome of the investigation, any retaliation against anyone who participates, any provision of false information or failure to be forthcoming can be the basis for corrective action up to and including termination.
- Please remember there is no tolerance for retaliation. if you or anyone else feels they experience retaliation as a result of this investigation you should tell your HR dept. or myself immediately.

1. Describe what occurred.
    a. When did this occur?
    b. Where did this occur?
    c. Who was present?

2. What did you do in response? (What was the reaction of complainant to the behavior?)

3. Did you tell anyone about this prior to this complaint?
    a. When?
    b. Who?

4. Do you have any documentation (emails, texts, recordings, pictures, facebook, etc.)

5. Did you discuss the matter with any of your co-workers?

6. What compelled you to bring it forward at this time?

7. Have you witnessed any other behaviors that you would consider inappropriate?

8. Is there anything else you would like us to know?

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or apply the provision in our confidentiality agreement that contains the following language "Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

WE WILL NOT maintain or apply a policy of requesting employees not to discuss ongoing investigations of employee misconduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind the provision in the confidentiality agreement described above, and advise employees in writing that the provision is no longer being maintained.

BANNER HEALTH SYSTEM D/B/A
BANNER ESTRELLA MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/28-CA-023438 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.