United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 18, 2014

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IAM District Lodge 751
19-CA-119268

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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act by terminating the Charging Party for disclosing to other employees confidential information provided by the Employer and obtained through her job duties, and by denying the Charging Party representation of her choosing during a disciplinary meeting. We conclude that the Charging Party was not engaged in protected concerted activity when she disclosed confidential information obtained as part of her job; therefore, the Employer lawfully discharged her for that activity. We also conclude that the Employer did not violate Section 8(a)(1) of the Act by denying the Charging Party a representative of her choosing during an investigatory interview because, even if the Board were to overturn *IBM*[1] and provide *Weingarten* rights to unrepresented employees, such a right does not include representation by private counsel.

FACTS

The Charging Party works in the accounting office as a highly paid Payroll Clerk/Staff Assistant for the International Association of Machinists, District Lodge 751's (the "Employer") main office. Her immediate supervisor is the Employer's elected Secretary/Treasurer. The two accounting department employees are not represented by a labor organization. The Charging Party's primary job duties include overseeing payroll processing, pensions, insurance, and employees' 401(k) accounts.

In 2009, the Charging Party signed a confidentiality agreement that states, inter alia, that:

[1] 341 NLRB 1288 (2004).

> As an employee of the District, you may gain access to confidential and/or proprietary information regarding the District, its personnel, and its operations…Such Confidential Information shall be kept confidential and shall not be disclosed, used, copied, or removed from the District premises except as necessary to perform the duties of your job or as specifically directed by the District…Failure to abide by the terms of this policy may subject you to disciplinary action, up to and including termination…

The Charging Party has received at least five written or verbal warnings from the Employer, several of which have been for disclosing confidential information. In 2012, the Employer verbally instructed the Charging Party that all communications from the Secretary/Treasurer's office were confidential, were not to be shared with anyone, and that violations would be grounds for discipline up to termination.

In early September 2013,[2] the Employer's Secretary/Treasurer asked the Charging Party to create a spreadsheet with several years' worth of sick and vacation leave used by one of the Employer's clerical employees. The Charging Party created the timesheet and gave it to the Secretary/Treasurer, who explained to the Charging Party that she was thinking of firing that clerical employee and the Secretary/Treasurer's own secretary for abusing leave. The Charging Party concedes that the spreadsheet she created and the conversation about the possible terminations were highly confidential.

On September 17th, the Secretary/Treasurer called the Charging Party and the other accounting department employee into a private meeting and told them that she was changing the clerical employees' leave policy by issuing a memo that stated the Employer would now adhere to language in the clerical collective bargaining agreement that only allowed leave to be taken in one hour increments. The Secretary/Treasurer wanted the Charging Party and the other accounting department employee to know in advance of the change because they handled leave for payroll purposes and should not allow leave to be used in less than one hour increments. The Secretary/Treasurer explained that several employees were coming in late each day and abusing the Union's 5-minute grace period. She named a specific clerical who came in late with a latte in hand, and commented that if that employee had time to get a latte, she could get to work on time.

On September 18th, the Employer issued a memo to clerical employees announcing the change in the leave policy. Either on September 18th before the memo

[2] All dates herein are 2013 unless otherwise noted.

issued, or a few days after[3], the Charging Party told the employee who the Secretary/Treasurer had witnessed arriving late that the Secretary/Treasurer had specifically commented about her abusing the five-minute grace period, that the policy was being changed because of her leave abuse, and warned her to be careful about coming in late.[4]

On October 18th, the Secretary/Treasurer suspended the Charging Party, pending an investigation, for leaking the policy change and the reasons behind the policy change before the memo announcing the change was issued. The Charging Party asked for representation, but the Secretary/Treasurer denied her request, refused to answer any of the Charging Party's questions, and did not ask the Charging Party any questions.

On October 28th, the Secretary/Treasurer called the Charging Party and told her she needed to attend a disciplinary meeting on October 31st and that she may have a family member present. The Charging Party asked if she could have an attorney present; the Employer denied that request.

On October 31st, the Charging Party met with the Secretary/Treasurer and the Employer's attorney. They asked the Charging Party if she knew what she had done, to which she replied that she did not. They informed her that the Employer had proof she had leaked the change in leave policy before it issued, but declined to say what evidence it had. They offered the Charging Party a severance package – which she refused. They then terminated the Charging Party and provided her a letter stating:

> Effective immediately you are terminated from your employment with District Lodge 751. You have repeatedly failed to keep information shared with you in your role as Payroll Clerk/Staff Assistant confidential. You have been talked to about this issue on numerous prior occasions and have been given multiple chances to correct your behavior. Nonetheless, the behavior has continued and it was recently learned that you disclosed confidential information to other employees without authority to do so. The District Lodge must have someone in the Payroll Clerk/Staff Assistant position that I can trust to maintain

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[3] There is conflicting evidence on this issue. Since the breach of confidentiality was the explanation of the basis for the policy change, and the related alert to the tardy employee that she was under investigation, it does not matter whether the discussion occurred before or after the new policy was announced.

[4] While the Charging Party denies stating that the employee's name had come up during a conversation with the Secretary/Treasurer, she admits that she warned the employee about coming in late.

confidential information. Based on your history, we do not have any confidence that you can maintain confidential information. As such, you are unqualified to hold the position of Payroll Clerk/Staff Assistant, and are properly terminated.

ACTION

We conclude that the Employer lawfully discharged the Charging Party for disclosing confidential information, obtained through her job duties, that the Employer had a right to keep confidential. We also conclude that the Employer lawfully denied the Charging Party representation during an investigatory interview because even if the unrepresented Charging Party was entitled to a *Weingarten* representative, such a right does not extend to a request for private counsel.

The Board has held that the disclosure of certain types of information may involve such disloyalty to an employer that the disclosure falls outside the protection of Section 7. In making these determinations, two factors are generally considered: (1) whether the information that was disclosed was wrongfully obtained;[5] or (2) whether the information that was disclosed was of a type which the employer had a right to expect would be treated as confidential, such that the disclosure was fundamentally a breach of trust.[6]

Here, the Charging Party clearly obtained the confidential information as part of her work duties as Payroll Clerk/Staff Assistant to the Secretary/Treasurer. In this regard, the Employer's Secretary/Treasurer informed the Charging Party that a change was being made to the clerical employee's leave policy, and explained to the Charging Party the impetus behind the change. Thus, the information was not wrongfully obtained.

However, the information disclosed was information that the Employer had a right to expect would be treated as confidential, i.e., information regarding the Employer's concern about leave abuse and its investigation of an employee's leave abuse. When determining whether an employer has the right to expect material to be treated as confidential, the Board considers whether the employer has taken measures to prohibit and prevent disclosure. For example, in *International Business Machines Corp.*, the Board upheld the discharge of an employee who disclosed wage information he had lawfully obtained from the company, but was not authorized to

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[5] *Roadway Express*, 271 NLRB 1238, 1239, n.7 (1984) (removal of confidential bills of lading from file and providing to union not protected).

[6] *Bell Federal Savings & Loan Assn.*, 214 NLRB 75 (1974) (switchboard operator informing union of employer's phone calls from legal counsel, not protected).

disclose, in violation of the company' policy regarding confidential company-compiled wage data.[7] There, the employer had classified the documents as confidential, and the employee was aware of the company's rule prohibiting distribution of such material. The Board relied on the facts that the employer's "sole motive for discharging" the employee was his "knowing breach of its confidentiality rule", and there was "no allegation or evidence" that the employer's policy of classifying its wage information "was designed, instituted, or maintained for purposes which would contravene Section 7 of the Act."[8] Further, the employer had established "substantial and legitimate business justifications for its policy."[9] Similarly, in *Cook County College Teacher Union. Local 1600*, the Board upheld the discipline of a secretary for disseminating to her union a directory of all 120 of the employer's management officials and their home addresses.[10] The secretary had access to the internal, private directory only to facilitate official communications – not to use the directory for her own purposes. In finding no violation, the Board specifically relied on the fact that the employer had warned the employee of the confidentiality of the information and had told the employee not to disseminate it.[11]

Here, the Employer took several steps to maintain the confidentiality of personnel decisions and conversations about personnel decisions between the accounting department and the Secretary/Treasurer's office. The Charging Party signed a 2009 confidentiality policy governing information the employees of the accounting department may acquire through their duties and through their work with the Secretary/Treasurer's office. The Employer had also reprimanded the Charging Party several times in the past for disclosing confidential information, and in 2012, the Secretary/Treasurer specifically warned the Charging Party and her accounting department coworker that all communication from the Secretary/Treasurer's Office was to be treated as confidential information and not shared with anyone. Finally, the Charging Party acknowledged that the spreadsheet she had prepared in early

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[7] 265 NLRB 638, 638 (1982).

[8] *Id*.

[9] *Id.* (employees can discuss their own wages, but employer did not inform employees, and treats as confidential, what it pays others).

[10] 331 NLRB 118 (2000).

[11] 331 NLRB at 121. *Accord Ashville School, Inc.,* 347 NLRB 877, 882, n.2 (2006) (employer lawfully terminated a payroll accountant for disclosing confidential wage and salary information that the accountant knew was confidential).

September showing several years leave by one clerical employee, and the subsequent conversation about terminating employees for using too much medical leave, were highly confidential. Thus, the Charging Party's disclosure of the confidential information obtained in her position as Payroll Clerk/Staff Assistant was not protected activity. [12]

The Board's decisions in *Tracer Protection Services, Inc.*[13] and *Jhirmack Enterprises*[14] are distinguishable. In *Tracer Protection Services,* the Board found protected an employee's warning to another employee that management was considering disciplining him in circumstances where the conversation amongst managers discussing the possible discipline was innocuously overheard and the employee did not learn of the conversation through his job duties with the employer. Similarly, in *Jhirmack Enterprises*, the Board found unlawful an employer's discharge of an employee for warning another employee about group complaints made against him, where the discharged employee had acquired the information during a group meeting of employees with management.

Here, the Charging Party learned of the change in leave policy and investigation into the abuse of the leave policy solely because of her job responsibilities as a Payroll Clerk/Staff Assistant to the Secretary/Treasurer. By repeating the impetus behind the change in leave policy and warning the employee under investigation, the Charging Party violated her duty to maintain the confidentiality of this information, and thus was lawfully terminated for breaching that duty.

Finally, we conclude that the Employer did not violate Section 8(a)(1) by denying the Charging Party a representative of her choosing during the October 18th and October 31st meetings. The October 18th meeting, where the Employer suspended the Charging Party pending an investigation for leaking the contents of the leave policy memo, was not an investigatory interview, as the Employer simply told the Charging Party that she was being suspended and did not ask or answer any questions. With regard to the October 31st meeting, the right to representation during an investigatory

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[12] Because we conclude that the Charging Party's disclosure of confidential information was not protected by Section 7, we need not reach the issue of whether she was a "confidential employee" accorded less protection under the Act. *See Bell Federal Savings & Loan Assn.,* 214 NLRB at 78, n.7.

[13] 328 NLRB 734 (1999).

[14] 283 NLRB 609 (1987).

interview does not extend to a request for private counsel.[15] Thus, even if the Board were to overturn *IBM*[16] and provide *Weingarten* rights to unrepresented employees, the Employer's conduct would not violate the Act.

Accordingly, the Employer lawfully discharged the Charging Party for disclosing confidential information and lawfully denied her request for representation during the October 18th and 31st meetings. Therefore, the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

[15] *Consolidated Casino Corp.,* 266 NLRB 988 (1983); *Montgomery Ward & Co.,* 269 NLRB 904 (1984).

[16] 341 NLRB 1288.