

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

APOGEE RETAIL LLC d/b/a UNIQUE  
THRIFT STORES

and

Cases 27-CA-191574  
27-CA-198058

KATHY JOHNSON, an Individual

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Brief of Respondent Apogee Retail LLC d/b/a Unique Thrift Stores

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**BRIEF OF RESPONDENT APOGEE RETAIL LLC d/b/a UNIQUE THRIFT STORES**

Pursuant to 29 C.F.R. §102.35(a)(9) of the Board’s Rules and Regulations, and the Board’s December 13, 2018 Order Approving Stipulation, Granting Motion and Transferring Proceeding to Board, Respondent Apogee Retail LLC Unique Thrift Stores files this Brief.

**I. STATEMENT OF THE CASE**

Apogee Retail LLC d/b/a Unique Thrift Stores (“Apogee” or “Respondent”) adopts and incorporates by reference paragraph 4 of the parties Joint Stipulation (“JS”) of Facts filed with the Board on October 18, 2018.

**II. STATEMENT OF FACTS**

Apogee operates retail thrift stores selling second-hand clothing and other items in locations throughout the United States, including a store in Aurora, Colorado that closed during the pendency of this case.

The charge in Case 27-CA-191574 was filed by Kathy Johnson, an individual (“Johnson”), on January 20, 2017. JS 4(a); Joint Exhibit (“JE”) 1. Johnson filed the first

amended charge in case 27-CA-191574 on May 3, 2017. JS 4(b); JE 2. On May 3, 2017, Johnson also filed Case 27-CA-198058. JS 4(c); JE 3.

On July 13, 2017, Richard F. Griffin, Jr., former General Counsel for the Board, issued an Order Transferring Cases from Region 27 to Region 19. On September 22, 2017, the Regional Director for Region 19 of the Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (“Complaint”) in this matter, and a copy was served on Respondent on the same date. JE 5. On October 5, 2017, Respondent timely served its Answer to the Complaint and Affirmative Defenses (“Answer”) on all Parties. In its Answer, Apogee denied that it had violated the Act. JE 6.

On December 21, 2017, the Regional Director for Region 19, issued an Order Rescheduling Hearing to consider the ramifications of *The Boeing Co.*, 365 NLRB No. 154 (2017). JE 7. On March 23, 2018, the Regional Director of Region 19 issued an Order Postponing Hearing Indefinitely. JE 8.

The current General Counsel for the Board issued an Order Transferring Cases back to Region 27 on August 22, 2018 (erroneously issued with the date "August 22, 2017. JE 9. Then, on August 30, 2018, the Regional Director for Region 27 issued an Amended Consolidated Complaint and Notice of Hearing (“Amended Complaint”) in Cases 27-CA-191574 and 27-CA-198058. JE 10. Respondent timely served its Answer to the Amended Complaint and Affirmative Defenses (“Answer to Amended Complaint”). Apogee’s Answer to Amended Complaint denied that it had violated the Act in any manner. JE 11.

The facts at the core of the Amended Complaint center on provisions contained in two manuals maintained by Apogee: Its nationwide Code of Business Conduct and Ethics (“Code”), and nationwide Loss Prevention Manual (“LP Manual”). JE 12 (Code) and JE 13 (LP Manual).

## *The Code*

The stated purpose of the Code is to create a baseline standard for all Apogee employees based on shared values (in this regard, “Savers” refers to Savers, Inc., Apogee’s parent company, JE 6.). These shared values are:

- Embrace honesty, integrity and ethics in all aspects of the business
- Recognize that team members are the source of our success
- Provide benefits for our community through our non-profit alliances and recycling efforts
- Offer our customer the best selection of resale goods
- Foster a continuous improvement culture to maximize long term financial growth

JE 12, at 2.

The Code requires team members to report “any wrongdoings (sic) that may adversely affect the Company, our investors, our customers or the public at large...” *Id.* Examples of wrongdoing “include, but are not limited to, financial fraud, business abuse, violation of laws and regulations, unethical behavior or practices, endangerment to public health or safety and negligence of duty.” *Id.*, at 4.

The Code “illustrates the shared accountability each team member has in conducting Savers business with honesty and integrity. In all instances every team member must obey the law and act ethically. The Code is intended to assist in making ethical and legal choices.” *Id.* The Code is divided into eight sections addressing how employees can act with “honesty and integrity” by obeying the law and acting ethically:

1. Report illegal or unethical behavior
2. Create an open and productive work environment
3. Act in the best interest of the Company, and avoid & disclose all conflicts of interest
4. Properly utilize and protect all Company assets
5. Respect and maintain the confidentiality of information entrusted to you
6. Conduct all business with team members, customers, suppliers, non-profit partners and competitors in a fair and honest manner
7. Report all financial information accurately

8. Comply with all laws, rules and regulations

*Id.*

Investigations will occur if a team member discloses to management that he/she believes that the Code has been violated, any significant threats to the business or that he/she is being pressured or being asked to compromise the Company's values. An investigation will ensue. JE 12, at 3. The problematic language, to the Regional Director, is the Code's statement that in such investigations "[t]eam members are expected to cooperate fully in investigations and answer any questions truthfully and to the best of their ability. *Reporting persons and those who are interviewed are expected to maintain confidentiality regarding these investigations. Additionally, they are not to conduct investigations themselves unless Savers' investigators request assistance.*" *Id.* (emphasis added)

*LP Manual*

As a large retailer, Apogee also maintains a Loss Prevention Manual. JE 13. The LP Manual addresses loss prevention policies and procedures specific to the retail industry, including cash control, physical security, internal controls (e.g., workplace theft inspections, internal theft, locker inspections), external controls (dealing with robbery, shoplifting and customer bag checks) and standards of conduct with non-profit business partners. *Id.* There is no workplace investigations confidentiality provision in the LP Manual. Instead, the Regional Director points to the following sign-off provision in the team member acknowledgment form: "The following list, neither all-inclusive nor exhaustive, are examples of behaviors that can have an adverse effect on the company and may lead to disciplinary action, up to and including termination...*unauthorized discussion or interview with other team members.*" *Id.* (emphasis added).

*Apogee's Business Justifications for Contested Provisions*

The parties have stipulated to the following business justifications for the provisions that are in dispute in this matter.

(1) The retail industry experiences billions of dollars in theft each year. A significant portion of that theft involves various types of employee theft requiring diligent and effective investigations;

(2) Team members have expressed reluctance to cooperate in investigations out of fear of being labeled a "whistleblower," "rat" or "snitch." This hinders the ability of the employer to act quickly and decisively;

(3) Cases involving multiple suspects prevents the potential leak of critical investigative information to other potential suspects;

(4) Proving false allegations or claims made in bad-faith, is difficult to do when the employer cannot get to the factual truth when people discuss what they know, believe or perceive what other witnesses say during investigations;

(5) The rule against required confidentiality of workplace investigations can place employees and the company at unnecessary risk, including physical risk;

(6) Allowing a company better controls to create and sustain stronger safe harbors for employees when reporting serious issues that require an investigation, is necessary; prohibiting the employer from requiring confidentiality hampers effective and thorough investigations;

(7) Often, investigation yields facts later in the process that would have indicated that confidentiality should have been required at the outset of the investigation;

(8) Employees interviewed during investigations almost always ask for confidentiality.

The parties have also stipulated to the following:

Apogee has conducted multiple investigations in which the inability to require confidentiality has hindered the investigation. These investigations include cases in which:

(a) Apogee was unable to substantiate allegations because the information was not credible because the parties were either coached or they discussed ahead of time what they would say so that their information was the same or similar;

(b) Accusers openly discussed and attempted to influence others to make similar statements perpetuating alleged retaliatory actions that were occurring. Because of these actions, Respondent was unable to substantiate if someone was working in an unsafe manner and placing others at risk;

(c) A manager was under investigation. Employees were afraid of repercussions if they didn't follow along with manager's threats of retaliation. The lack of confidentiality placed involved employees in uncomfortable situations that were unnecessary, negatively impacted morale, etc.;

(d) A manager was accused of favoritism. The accused engaged in threatening and intimidating behavior. The employee receiving preferential treatment made disparaging comments to customers based on knowledge of the accusation and accusers;

(e) Employees shared details of the conversation they had with Employee Relations to multiple employees. The details shared were damaging to an employee's reputation to the point that the employee was unable to return to work;

(f) Respondent was unable to trust the credibility of employee statements because the employees spoke openly with each other about what they knew or believed, making it difficult to determine fact from fiction. The employees intentionally took advantage of the lack of confidentiality requirement to manipulate the outcome;

(g) The inability to require confidentiality allowed an individual to directly threaten others and/or engage in retaliatory behavior;

(h) An employee threatened to physically assault a co-worker if the co-worker did not support the accused in an investigation;

(i) An ex-employee shared that she knew the employer could not keep information learned in an investigation 100% confidential and because she was in fear of retaliation, she resigned rather than complained about a situation.

There are other, critical facts that are not in dispute:

(a) Apogee has not disciplined any employee for violating the rules regarding workplace investigations confidentiality found in the Code and LP Manual;

(b) There are no unions present at any of Respondent's stores;

(c) There has there been no union organizing at any of Respondent's stores.

JS, at 5-8.

### **III. ISSUE PRESENTED**

The parties have stipulated to the following issue on the merits: Whether Respondent violated Section 8(a)(1) of the Act by maintaining the rules described in paragraphs 4(p) and 4(q) of the Joint Stipulation of Facts.

### **IV. ARGUMENT AND CITATION OF AUTHORITY**

The charges lack merit and the Board should dismiss the Amended Complaint in its entirety.

**A. The Code provisions and LP Manual Acknowledgment do not violate Section 8(a)(1) of the Act.**

**1. Under the balancing framework of *The Boeing Co.*, Apogee's rules are lawful.**

This matter raises issues under *The Boeing Co.*, 365 NLRB No. 154 (2017) ("*The Boeing Company*"). The express wording, context and application of Apogee's rules cannot be read as to impermissibly interfere with Section 7 rights. The rules are facially neutral, and there are legitimate and substantial business justifications for the rules that outweigh the comparatively slight impact on employee rights to engage in protected concerted activities.

In *The Boeing Company*, the National Labor Relations Board overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) ("*Lutheran Heritage*"), which was the Board's previous standard governing whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights protected by the Act. 365 NLRB No. 154, at 2. Under *Lutheran Heritage*, an employer's workplace rules were found to violate Section 8(a)(1) if an employee would "reasonably construe" the rules to prohibit the exercise of Section 7 rights, even if the rules did not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities. In *The Boeing Company*, the Board jettisoned the *Lutheran Heritage* "reasonably construe" standard and established a new test: When evaluating a facially neutral rule that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. *Id.*, at 3.

Following *The Boeing Company*, the Board will place rules into one of three categories:

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement maintained by the employer in *The Boeing Company*, and rules requiring employees to abide by basic standards of civility;
- *Category 2* rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications; and
- *Category 3* rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with each other.

365 NLRB No. 154, at 3-4.

Significantly, the Board stated that ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included. *Id.*, at 9.

The Apogee Code and LP Manual sign-off provisions regarding workplace investigations are facially neutral because they do not expressly restrict Section 7 activity, and given their context and purpose, it is appropriate to consider both provisions as Category 1 rules.

Apogee’s rule seeking confidentiality of workplace investigations is found in a section of its Code dealing with investigations of illegal or unethical behavior. JE 12, at 2.

Employees/team members are to report “any wrongdoings that may adversely affect the Company, our investors, our customers or the public at large....” *Id.* Examples of “wrongdoing” “include, but are not limited to, financial fraud, business abuse, violation of laws and regulations, unethical behavior or practices, endangerment to public health or safety and negligence of duty.” *Id.*, at 4. Similarly, the context and purpose of the sign-off provision of the

LP Manual does not expressly restrict an employee's ability to engage in Section 7 activity. The LP Manual, as its title indicates, deals with *loss prevention*. It is not an employee handbook in the normal sense. It addresses various matters dealing with proper cash accounting procedures, dealing with customer and employee searches, and miscellaneous provisions regarding employee and customer theft. A proper reading of the sign-off provision in the context of a manual informing employees how to address matters such as cash register accounting, shoplifting and customer searches, necessarily indicates it does not involve other types of workplace investigations, such as complaints against co-workers and managers.

The Apogee rule seeks confidentiality of investigations in matters involving financial fraud, business abuse, violations of laws and regulations, unethical behavior/practices, public endangerment and negligence of duty. The maintenance of such a rule—in a retail setting—could not be reasonably interpreted as restricting an employee's right to engage in concerted activity. In *Fresh & Easy Markets*, Member Johnson disagreed with the Board majority that held that a rule requiring employees to keep customer and employee information secure was unlawful under *Lutheran Heritage* because, the majority maintained, employees would reasonably construe the restriction to apply to matters such as wages and benefits. 361 NLRB No. 8, 74 (2014) (Member Johnson, dissenting). The Johnson dissent noted that the contested policy was found in a “Code of Business Conduct.” “Thus, immediately, employees are aware that the wages and work conditions are not the intended focus of the Code.” *Id.*, at 76. Furthermore, the disputed language itself was part of the “Confidentiality and Data Protection” section of the Fresh & Easy Code. Member Johnson, applying the principle of *ejusdem generis*, concluded that employees would reasonably interpret the rule to apply only to confidential information because “employee information” is found within numerous terms and phrases about confidential and

collected information. The Johnson dissent considered the disputed language to be indistinguishable from language the Board found to not violate the Act in *Mediaone of Great Florida, Inc.*, 340 NLRB 277 (2003). In *Mediaone*, the Board, held the employer's prohibition on the disclosure of "customer and employee information" lawful because it was included in a detailed list of what constituted "intellectual property," which the employer also considered to be proprietary information. *Id.* at 279. This contextual analysis should prevail with Apogee's workplace investigation confidentiality rules in the Code and LP Manuals. Employees are aware, from the context of the provisions, that wages and working conditions are not the intended focus of the restrictions. And, as in *Mediaone*, the restrictions are within specific policies and language addressing illegal or unethical conduct, employee and customer theft, financial fraud, business abuse, violation of laws and regulations, unethical behavior or practices, endangerment to public health or safety and negligence of duty. Furthermore, the Respondent has never enforced the provisions in question. Under these circumstances, the provisions cannot be reasonably interpreted as limiting Section 7 rights. *Accord, Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 28 (2001) (stating that the Board cannot find a facially neutral policy unlawful based upon "fanciful" speculation, and the Board must "consider the context in which the rule was applied and its actual impact on employees").

Should the Board determine that a balancing of interests is required, the record is clear that any potential adverse impact on protected rights is outweighed by the substantial justifications associated with the rules. These justifications are not in dispute, and, contrary to the General Counsel's assertion, are highly relevant to the maintenance of the rule. These justifications describe how multiple Apogee investigations have been compromised or defeated by witness tampering, employee reluctance to step forward because of the lack of confidentiality,

harm to an employee's reputation, fear of reprisals by managers and co-workers, fear of physical harm, and coopting of witnesses who know in advance about the subject matter of the investigation. One employee even quit rather than step forward to complain in an open environment without the assurance of confidentiality. JS, 5-8. Taken together, these Apogee-specific reasons outweigh any potential adverse impact on employee rights.

Even if the provisions require individual scrutiny, it cannot be said that the rules *would* prohibit or interfere with protected rights, or that any adverse impact on protected conduct outweighs the myriad legitimate business justifications proffered by Apogee. To begin with, Apogee has never enforced the provisions in its Code and LP Manual. Second, the Code and LP Manual deal with specific types of investigations, none of which involve wages, benefits or working conditions. Third, employees "almost always" ask for confidentiality. Fourth, the context and placement of the confidentiality provisions in the Code and LP Manual sign-off form limit the provisions to a narrower scope of investigations, such that employees would not jump to the conclusion that they cannot then discuss with co-workers general matters of concern such as wages, employee benefits, work schedules, and disciplinary matters. Fifth, the provisions were not created in response to unionizing activity; there has not been such activity at Apogee stores and all facilities are non-union. This evidence does not show that the restriction would interfere with protected conduct.

Apogee has offered ample and undisputed justifications for its Code and LP Manual sign-off provisions requiring confidentiality of investigations. These outweigh any theoretical adverse impact on employees. The record is devoid of any evidence of adverse action against an employee. Apogee's justifications (including examples of investigations harmed by the Board's rule), listed *supra*, are legitimate, substantial, and not in dispute. Simply put, the substantial

justifications for the provisions outweigh what little risk there is of interference with Section 7 rights. Consequently, the policies are lawful even if Apogee's rules are considered to be Category 2 rules.

The Board historically has acknowledged the importance of confidentiality of workplace investigations, and the "fact of industrial life" that employers need "to conduct all kinds of investigations of matters occurring in the workplace to ensure compliance with...legal requirements" arising from Federal, State and local laws, administrative requirements, and court decisions. *IBM Corp.*, 341 NLRB 1288, 1292-1293 (2004) (Overruling *Epilepsy Foundation of Northeast Ohio*, 289 NLRB 627 (1988), in a case involving *Weingarten* rights). As the Board stated in *IBM*:

Employee investigations into these matters require discretion and confidentiality. The guarantee of confidentiality helps an employer resolve challenging issues of credibility involving these sensitive, often personal, subjects...If information obtained during an interview is later divulged, even inadvertently, the employee involved could suffer serious embarrassment and damage to his reputation and/or personal relationships and the employer's investigation could be compromised by inability to get the truth about workplace incidents...

*Id.*, at 1293.

The *IBM* Board came to the axiomatic conclusion that "[t]he possibility that information will not be kept confidential greatly reduces the chance that the employer will get the whole truth about a workplace event. It also increases the likelihood that employees with information about sensitive subjects will not come forward." *Id.*; *See also, Belle of Sioux City, LP*, 333 NLRB 98, 113-14 (2001) (lack of confidentiality in investigations could risk employees tailoring their accounts to support or undermine the claim).

The Board recognizes the importance of confidentiality in its own investigations. The Board maintains the confidentiality of witness affidavits and has argued that it is an unfair labor

practice for an employer to seek pre-hearing disclosure of affidavits. *Ampersand Publishing LLC d/b/a Santa Barbara News-Press*, 358 NLRB 1539, 1541 (2012) (“*Santa Barbara News-Press*”). As stated in *Santa Barbara News-Press*, “[t]he Board’s nondisclosure policy ensures that employee attitudes, activities, and sympathies in connection with the union are ‘free of any inquisitive interest by the [e]mployer as are the employees’ union activities themselves.’” *Id.*, citing *Winn-Dixie Stores, Inc.*, 143 NLRB 848, 849 (1963); *See also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (Board argued that “a particularized, case-by-case showing is neither required nor practical” when it comes to confidential witness statements). This rule comports with the Board’s witness sequestration rules at hearings, in which no witness may discuss the testimony they have given or that they intend to give. *Greyhound Lines*, 319 NLRB 554, 554 (1995).

**2. The Board should overrule *Banner Health System*, 362 NLRB No. 137 (2015) (“Banner Health”).**

*The Boeing Company’s* balanced approach to employer workplace rules requires the Board to overrule *Banner Health* and its incorrect and impractical holding that broad confidentiality requirements surrounding workplace investigations are unlawful.

*Banner Health*, relying on *Hyundai America Shipping Agency*, 357 NLRB 860 (2011) (“*Hyundai*”), held that employers may only request employees to keep internal investigations confidential on a case-by-case basis if the employer carries its burden that “there is 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, and there is a need to prevent cover up.’” *Banner Health*, at 4, quoting *Hyundai*, 357 NLRB 860, 857 (2011). “Only if the [employer] determines that such a corruption of its investigation

would likely occur without confidentiality is the [employer] then free to prohibit its employees from discussing these matters among themselves.” *Id.*, at 2-3.

The *Banner Health* rule is impractical and unsupportable under *The Boeing Company*. As Chairman Miscimarra stated in his vigorous dissent in *Banner Health*, the majority test does not appropriately balance employee Section 7 rights against the business justifications for maintaining confidential workplace investigations. *Id.*, at 8. Instead, employee Section 7 rights are the only interests the Board majority considers, with factors favoring non-disclosure requests receiving no weight at all. *Id.*, at 17.

The Chairman highlighted the impracticalities of requiring employer to determine at the outset of investigations whether confidentiality would be needed. Employers face a “Hobson’s Choice,” deciding whether to conduct investigations without taking any reasonable measures to prevent employees from engaging in conduct damaging to the investigation, or to have managers and supervisors make a case-by-case judgment regarding whether there are “objectively reasonable grounds” for believing the integrity of the investigation will be compromised without confidentiality. *Id.*, at 20. He correctly characterized the *Banner Health* approach as impossible to administer, because it compels employers to prove the need for nondisclosure on an *ad hoc* basis, which undermines the ability of employers to conduct investigations consistently throughout the organization. Furthermore, because most investigations occur because the employer does not know what occurred, requiring an advance determination of “objectively reasonable grounds” for confidentiality is impractical because the facts are not yet known. *Id.*

Finally, the Chairman’s dissent found incongruous the majority’s reliance on *Caesar’s Palace*, 336 NLRB 271 (2001), to support its prohibition of a broad confidentiality requirement. The Board in *Caesar’s Palace* found lawful an employer’s “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.’” 336 NLRB at 271. In so finding, *Caesar’s Palace* relied on the requirement that the Board strike a proper balance between employee’s rights and the Respondent’s business justification. *Id.* At 272 n. 6 (“It is the responsibility of the Board to strike the proper balance between the asserted business justification and the invasion of employee rights in light of the Act and its policy.”) Chairman Miscimarra observed that such a balance was lacking in *Banner Health*, and that *Caesar’s Palace* did not support the majority’s mandate of a threshold showing of likely harm to the investigation in the absence of confidentiality. 362 NLRB at 19.

The Board’s prohibition of broad and uniform confidentiality requirements surrounding workplace investigations creates conflict with other Federal, State and local laws regulating the workplace, which promote and, in some cases, require thorough and confidential investigations. *See, e.g.*, 42 U.S.C. §2000e (Title VII of the Civil Rights Act of 1964); 29 U.S.C. §621 (Age Discrimination in Employment Act); 42 U.S.C. §12101 (Americans with Disabilities Act); 29 U.S.C. §2601 (Family and Medical Leave Act); *Faragher v. City of Boca Raton*, 425 U.S. 775 (1998). The EEOC endorses blanket confidentiality rules during employer investigations of harassment allegations:

An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it.

Equal Employment Opportunity Commission, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), available at <https://www.eeoc.gov/policy/docs/harassment.html> (last visited February 4, 2019).

In prohibiting confidentiality as a preventive step to uphold the integrity of investigations, *Banner Health*, with a heavy foot, steps on the toes of these other laws. The Board must interpret the Act in a way that is consistent with other federal employment laws. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (“[W]here the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield”); *See also Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) (“[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives”). It is beyond question that *Banner Health* “trenches” upon these other laws. Reversal of *Banner Health* will preserve the Act’s proper relationship with other federal workplace laws and promote, rather than interfere with, employer compliance with those laws.

Reasonable confidentiality rules surrounding workplace investigations preserves the rights of all employees. Typically, employees expect and want their personnel information to remain confidential. Like many Apogee employees, those participating in investigations often desire confidentiality. Yet, Banner Health quashes these employee desires by allowing other employees to disregard those interests under the guise of a Section 7 “right” to disclose and discuss ongoing investigations. The same can be said for employee rights to be free from sexual and other workplace harassment under Federal, State and local laws, and the right to make complaints under these laws without fear of dissemination of the allegations throughout the workplace. Employees also have a right to a full and fair investigation. It is hard to fathom how the *Banner Health* promotes fairness in investigating employee complaints; rather, the decision erodes the core concept in labor relations of “industrial due process.”

Finally, employees are not left without avenues of redress should an employer unlawfully apply its confidentiality rule. If the Board finds an employer lawfully maintains a rule, the Board may still find that the employer has violated Section 8(a)(1) of the Act by applying the rule to restrict Section 7 rights. *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (1996). Board processes remain available to aggrieved employees challenging employer actions under Section 8(a)(1) of the Act.

## V. CONCLUSION

The Board should overrule *Banner Health* and apply the new standards set forth in *The Boeing Company*. *Banner Health* was wrongly decided, is impractical in its application, creates confusion for employers, and impedes employer compliance with other Federal, State and local laws requiring workplace investigations. The facts establish that the two Apogee facially-neutral workplace investigation confidentiality rules would not be reasonably interpreted to prohibit Section 7 activity, based on their context and purpose. Furthermore, there are substantial and legitimate business justifications supporting the rules. These business justifications outweigh the theoretical and slight risk of impact to employee Section 7 rights. For these reasons, Apogee requests the Board to dismiss the Amended Complaint in its entirety.

Respectfully submitted this 4<sup>th</sup> day of February 2019.



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