

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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

July 30, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

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

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.²

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, 2011,³ for failing to follow the directions of a supervisor.⁴ Navarro testified that prior to being disciplined,

¹ 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.

² The Acting General Counsel has 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 in this 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. Member Hayes would not require the Respondent to mail the Appendix to former employees of its closed facilities outside Phoenix. 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.

³ All dates hereafter are in 2011, unless otherwise noted.

⁴ 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 Re-

he expressed concerns to supervisors and coworkers regarding the manner in which he was being instructed to clean surgical instruments. 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 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 find, pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that the Acting General Counsel failed to establish that the Respondent had knowledge of Navarro's alleged protected concerted activity (speaking to supervisors and coworkers about his concern over the Respondent's impromptu sterilization procedures) at the time that it disciplined him with the coaching. See, e.g., *Ellison Media Co.*, 344 NLRB 1112, 1112 fn. 3, 1123 (2005) (dismissing alleged unlawful discharge where the General Counsel failed to establish employer knowledge of protected activity). As a result, we also agree with the judge's finding that the Acting General Counsel failed to establish that the Respondent disciplined Navarro for any protected concerted activity, rather than its stated reason of insubordination.⁵

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 "behav-

spondent notified Navarro that the coaching had been removed from his record.

⁵ Member Griffin would dismiss the allegation on different grounds. In his view, the Respondent issued the coaching based on its belief 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 Acting General Counsel established that Navarro's protected activity was a motivating factor in the coaching, he would 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*, supra. Like his colleagues, Member Griffin would find it unnecessary to determine whether Navarro was, in fact, insubordinate.

iors” 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 Acting General Counsel’s argument that the revised evaluation somehow violated Section 8(a)(1).⁶

3. As the judge found, human resources consultant JoAnn Odell routinely asked employees making a complaint not to discuss the matter with their coworkers while the Respondent’s investigation was ongoing. The judge found that the Respondent’s maintenance and application of this prohibition did not violate Section 8(a)(1). We disagree.

To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees’ Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (no legitimate and substantial justification where employer routinely prohibited employees from discussing matters under investigation). In this case, the judge found that the Respondent’s prohibition was justified by its concern with protecting the integrity of its investigations. Contrary to the judge, we find that the Respondent’s generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees’ Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent’s burden “to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up.” *Id.* The Respondent’s blanket approach clearly failed to meet those requirements. Accordingly, we find that the Respondent, by maintaining and applying a rule prohibiting employees from discussing ongoing investigations of employee misconduct, violated Section 8(a)(1) of the Act.

The dissent characterizes the Respondent’s prohibition of the discussion of ongoing investigations as not an actual rule, but rather a mere suggestion to employees. The

record evidence does not support that claim. The prohibition is included as one of six bullet points on the Respondent’s standard Interview of Complainant Form under the heading “Introduction for all interviews.” Odell testified that, although she does not give the instruction to every employee being investigated, she frequently does so, and she did in this case by instructing Navarro not to discuss the investigation. However characterized, Odell’s statement, viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights. See, e.g., *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994), *enfd.* 83 F.3d 156 (6th Cir. 1996) (“It makes no difference whether the employees were ‘asked’ not to discuss their wage rates or ordered not to 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).”).⁷ In addition, the dissent would not find a violation because Odell did not expressly threaten discipline for violation of the rule. The law, however, does not require that a rule contain a direct or specific threat of discipline in order to be found unlawful. See *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999) (supervisor’s instruction to employees not to discuss their discipline found unlawful restraint of Section 7 rights, even though the instruction contained no explicit threat of a penalty).

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 rule prohibiting employees from discussing 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,

⁶ 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 Acting General Counsel’s exception to the judge’s refusal to admit ACG Exh. 11 (“Colleague Feedback Forms”). Even if admitted and credited, the documents would not change the result in this case, given the judge’s conclusion that the evaluation could not have been influenced by any subsequent protected concerted activity.

⁷ On its facts alone, *Praxair Distribution, Inc.*, 358 NLRB No. 7 (2012), cited by our dissenting colleague, is clearly distinguishable. There, the alleged unlawful rule prohibiting employees from discussing their concerted activities was based on nothing more than a supervisor’s single, offhand denial of an employee’s request to make a phone call, to “an unidentified person for an unspecified purpose,” during an investigatory interview.

disciplinary action, etc.) that is not shared by the employee.”

(b) Maintaining or enforcing the rule that employees may not discuss with each other 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.

(a) 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.”⁸ 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.⁹ 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.

(b) 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. July 30, 2012

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

Contrary to my colleagues, I would affirm the judge’s dismissal of the allegation that the Respondent promulgated an unlawful work rule prohibiting employees from discussing matters related to an ongoing investigation. It is axiomatic that, to violate the Act, an employer’s work rule must be an actual work rule with binding effect on employees. See *Praxair Distribution, Inc.*, 358 NLRB No. 7, slip op. 6 (2012), (employer’s response to a “vague request . . . did not amount to a ‘rule’ of any kind” and therefore did not constitute an unlawful confidentiality rule). Here, as in *Praxair*, the Respondent did not promulgate any rule at all. It merely suggested that employees not discuss matters under investigation. I therefore respectfully dissent.

My colleagues cite *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 15 (2011), to support their view. But in that case, the respondent threatened employees with discipline if they discussed matters under investigation, and discharged an employee at least in part because he blind copied emails between himself and management to other employees. *Id.* at 14–15. Here, human resources officer JoAnn Odell did no such thing. She merely asked employee James Navarro not to discuss a matter under investigation with coworkers in order to protect the integrity of her investigation. She did not threaten him with discipline. In the judge’s words, her

⁸ 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.”

⁹ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

request was merely a “suggestion.” In these circumstances, I cannot find that the Respondent promulgated any binding rule about employees discussing investigations.¹

Dated, Washington, D.C. July 30, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX
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 rule prohibiting employees from discussing 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.

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

¹ Because I would find that there was no work rule at all, it is unnecessary to reach the issue of whether the Respondent met its burden of proving a business necessity for the rule.

William Mabry, III, Esq., for the General Counsel.
Mark Kisicki, Esq. and *Elizabeth Townsend, Esq. (Stephoe & Johnson)*, of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Phoenix, Arizona, on August 30–31. On April 7, 2011, James Navarro (Navarro) filed the charge alleging that Banner Health System d/b/a Banner Estrella Medical Center (Respondent or the Employer) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on June 30, 2011, against Respondent alleging that Respondent violated Section 8(a)(1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. The complaint was amended on the second day of trial to add additional 8(a)(1) allegations.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,¹ and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

Respondent, an Arizona corporation, has been engaged in the operation of a hospital providing inpatient and outpatient medical care in Phoenix, Arizona. During the 12 months prior to the filing of the charge, Respondent received gross revenues in excess of \$250,000. During the same period of time, Respondent purchased and received goods valued in excess of \$5000 which originated outside of California. During the same period of time, Respondent purchased and received goods valued in excess of \$50,000 from outside the State of Arizona. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Alleged Unfair Labor Practices

A. Background and Issues

Respondent operates a hospital located in Phoenix, Arizona, that provides inpatient and outpatient medical care. James Navarro has worked for Respondent as a sterile technician for about 3 years. The central processing sterile department (CPSD) employs 13 sterile processing technicians, operating 24 hours a day, 7 days a week, and has three shifts.

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Sterile processing technicians are responsible for the proper care and handling of all surgical instruments. These employees are also required to utilize equipment according to the manufacturer's recommendations and hospital policy and perform all functions according to established policies, procedures, regulatory and accreditation requirements, as well as applicable professional standards.

On Saturday, February 19, 2011, Navarro was working the day shift. Around 9 a.m. that morning, Navarro learned that there was a lack of hot water and steam pressure. Navarro spoke to an employee from Respondent's facilities department who advised him that the steampipe needed to be fixed, that there would not be any hot water, steam pressure, or heat.

Navarro then contacted House Supervisor Cecilia Dicob and informed her of the steampipe problem. Next, Navarro called Ken Fellenz, senior manager of the CPSD department. Navarro informed him that he would not be able to sterilize the surgical instruments due to the broken steampipe, that there were six operating surgeries scheduled for that day. He also informed Fellenz that there were labor and delivery instruments that were going to be used and that the surgery department had clean surgical instruments for surgeries that day.

Fellenz ordered Navarro to use the Sterrad machine to sterilize the labor and delivery instruments. The Sterrad machine is a low temperature sterilizer that uses hydrogen peroxide as the sterilant. The normal procedure is that the Autoclave, a large steam sterilizer is used for the labor and delivery instruments. The Autoclave could not be used that day because of the lack of steam. Navarro told Fellenz that he was unaware that the Sterrad machine could be used, as it was not the established procedure.

After speaking with Fellenz, Navarro began researching whether the Sterrad machine could be used to sterilize the labor and delivery instruments. Navarro found no documents supporting the use of the Sterrad machine. He then contacted Muriel Kremb, lead coordinator. Kremb told Navarro to use hot water from the coffee machine in the break room for the first step in the cleaning process of the labor and delivery instruments. Navarro stated that these procedures were not established protocol and that somebody could get sick. Navarro did not clean or sterilize the labor and delivery instruments that day.

That day, employee Ruth Hernandez called Navarro to inform him that she might be late that day. Navarro told Hernandez that she might not have to come in because there was no steam. Hernandez called Kremb and was told to report to work. When Hernandez arrived at work, Navarro expressed his concern about the procedures suggested by Fellenz and Kremb. Navarro stated that he could not find documentation to support the procedure recommended by Fellenz and Kremb.

On February 20, when Navarro arrived at work he found that all the instruments had been cleaned. Navarro discussed with employee Curtis Wilks his concerns about using hot water from the coffee machine.

On February 20, Navarro spoke to House Supervisor Dicob on two occasions. Navarro told Dicob that he wasn't trying to be insubordinate but that he did not feel comfortable using the methods directed by Fellenz and Kremb because it was not

established procedure. Dicob answered that she was trying to find a solution to the steampipe issue. After speaking with Dicob, Navarro spoke to Nurse Mary Hedges. Navarro told Hedges of the procedures he was instructed to follow and asked Hedges if she had ever seen or heard anything about using the Sterrad machine or using hot water from the coffee machine. Hedges shared Navarro's concerns.

Around noon, Fellenz called Navarro and asked why Navarro had not used the Sterrad machine as instructed. Navarro stated that he was uncomfortable using that procedure. Fellenz stated that Navarro was refusing to follow instructions. Navarro stated that he was not refusing but was uncomfortable. Fellenz angrily stated that Navarro was not doing as instructed and that they would discuss the matter the following day.

On Monday, February 21, Navarro met with JoAnn Odell, human resources consultant. Navarro informed Odell that there had been no hot water available and that he was instructed by Fellenz and Kremb to use hot water from the coffee machine and the Sterrad machine. Navarro said that he was uncomfortable with this procedure and that he could find no documentation to support this procedure. Navarro expressed concern for his job.

On the morning of February 21, Fellenz wrote a memorandum concerning the weekend and his conversations with Navarro. Convinced that Navarro had been insubordinate Fellenz met with Joan McKisson, director of peri-operative services. Fellenz told McKisson that he wanted to put Navarro on corrective action for failing to sterilize instruments as instructed by Fellenz. Fellenz and McKisson met with Odell in her office. Odell advised against corrective action because there was no procedure in place to support cleaning and sterilization as suggested by Fellenz. The three agreed that Navarro would be given a nondisciplinary coaching instead.

Around 2 p.m., Navarro was called to McKisson's office. McKisson informed Navarro that Fellenz had accused him of refusing to follow his instructions. Navarro insisted that he had finally followed instructions. Nonetheless, Navarro was given a coaching. The coaching document states, "James refused to do as instructed by manager and lead tech which directly affected patient care." On June 2, Respondent issued a memorandum stating that the coaching was removed and would not be part of Navarro's employment record.

On February 24, Fellenz called Navarro into his office and gave him a yearly performance evaluation.² The performance review consists of two sections: essential functions and behaviors. On the essential functions section, Navarro's grade was fully meets expectations. However, on the behaviors section, Navarro's rating was not fully meeting expectations. Navarro objected to the comments in the behavior section. Fellenz credibly testified that he had filled out the behaviors section based on complaints made to him by employees who worked with Navarro. Employees Hernandez and Louis Garcia both testified that they had complained to Fellenz on many occasions about Navarro.

² The evaluation had been written prior to February 20.

Odell, Respondent's human resources consultant, spoke to Fellenz and told him that the evaluation was inconsistent since one half of the evaluation had Navarro not meeting expectations but on the overall evaluation fully meeting expectations. Fellenz indicated that he intended that Navarro overall met expectations. Fellenz then issued a revised annual performance evaluation. Fellenz revised four of the five categories in the behavior section. Fellenz then graded fully meets expectations in the behavior section and fully meets expectations in the overall rating.

During the hearing, General Counsel amended the complaint to allege that Respondent's confidentiality agreement and interview of complainant form violates Section 8(a)(1) of the Act.

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 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.

Every employee hired by Respondent is required to sign a confidentiality agreement. The confidentiality agreement states:

I understand that I may hear, see and create information that is private and confidential. Examples of confidential information are;

Patient information both medical and financial,

Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee,

Copyright computer programs, Business and strategic plans
Contract terms, financial cost data and other internal documents.

Keeping this kind of information private and confidential is so important that if I fail to do so, I understand that I could be subject to corrective action, including termination and possible legal action.

B. *The Coaching and Evaluations*

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Employees having no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaint and obtain a remedy. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–15 (1962). Accordingly, an employer may not, without violating Section 8(a)(1) of the Act, discipline or otherwise threaten, restrain, or coerce employees because they engage in protected concerted activities.

The Act protects employees who engage in individual action which is "engaged in with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.3d 683, 685 (3d Cir. 1964); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees' views for his

activity to be concerted. See *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (employee was engaged in concerted activity where, not having had a chance to meet with any employee beforehand, he made a comment in protest as a spontaneous reaction to the employer's announcement that no annual wage increase would be forthcoming). See also *Enterprise Products*, 264 NLRB 946, 949–950 (1982); *Cibao Meat Products*, 338 NLRB 934 (2003). In *Bell of Sioux City*, 333 NLRB 98, 105 (2001), the Board found protected concerted activity where an employee complained to fellow employee that she was treated unfairly. The Board found concerted activity as it involved a speaker and listeners. In addition, employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted. *El Gran Combo*, 284 NLRB 1115 (1987).

If the employer can show that the same action would have been taken against an employee in the absence of his or her protected activity, the employer rebuts the General Counsel's prima facie case. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The clear evidence indicates that Fellenz was angry that Navarro had not followed his instructions to use the Sterrad machine to sterilize the surgical instruments. He spoke to Navarro and angrily asked why the employee had not followed his instructions. Navarro stated that he was not refusing to follow the instructions but he did not follow the instructions. The first thing the next morning, Fellenz wrote a memorandum reciting his belief that Navarro had been insubordinate. He spoke with his supervisor, McKisson, and then Odell, the human resources consultant. It was decided to give Navarro a coaching. Accordingly, I find that Navarro was given the coaching not because of any protected concerted activity, but solely because Fellenz believed Navarro had engaged in insubordination.

I find that the performance review given to Navarro was not motivated by any protected concerted activity. First, the performance review was filled out prior to the concerted activity. Secondly, Fellenz credibly testified that he was influenced by complaints made by Navarro's coworkers. Two coworkers credibly testified that they had made numerous complaints to Fellenz concerning Navarro.

C. *Independent Violation of Section 8(a)(1)*

Central to the protections provided by Section 7 of the Act is the employees' right to communicate to coworkers about their wages, hours, and other terms and conditions of employment. An employer's rules prohibiting Section 7 activity are a violation of the Act, even if such rules have never been enforced. *Franklin Iron & Medal Corp.*, 316 NLRB 819, 820 (1994).

In *NLS Group*, 355 NLRB 1154 (2010), enf. 65 F.3d 475 (1st Cir. 2011), the Board stated that if a rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In the instant case, Respondent's confidentiality agreement provides that private employee information (such as salaries, disciplinary action,

etc.) that is not shared by the employee is to be kept confidential. Further, keeping this kind of information private and confidential is so important that failure to do so, could subject an employee to corrective action, including termination and possible legal action.

In *Labinal, Inc.*, 340 NLRB 203, 209–210 (2003), the employer argued there was no violation because the rule merely prohibited employees from finding out about another employee's personal pay information and precluded disclosure of that information absent the employee's knowledge or permission. The Board noted,

To prohibit one employee from discussing another employee's pay without the knowledge and permission of that employee muzzles employees who seek to engage in concerted activity for mutual aid or protection. By requiring that one employee get permission of another employee to discuss the latter's wages, would, as a practical matter, deny the former the use of information innocently obtained which is the very information he or she needs to discuss the wages with fellow employees before taking the matter to management. *Id.*

In the instant case, Respondent's confidentiality agreement prohibits employees from discussing other employees' salaries or disciplinary actions, unless such information was originally disclosed by the original employee. As such it requires an employee to get permission from another employee to discuss the latter's wages and discipline, and could reasonably be construed to prohibit Section 7 activity. Thus, under *Labinal*, supra, I find that the rule in Respondent's confidentiality agreement to violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by including in its confidentiality agreement a prohibition against sharing private employee information such as salaries and discipline.
3. Respondent did not otherwise violate the Act as alleged in the complaint.
4. The above unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

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 is confidentiality agreement that contains the following language "Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee."

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

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

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

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

Dated, Washington, D.C. October 31, 2011

APPENDIX

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 enforce 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 in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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