Laws at Odds: The Medical Peer Review Privilege from Disclosure and the National Labor Relations Act

By Elizabeth Torphy-Donzella and Jeremy Himmelstein

Introduction

Section 7 of the National Labor Relations Act ("NLRA") provides employees with the right "to bargain collectively though representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."[1] Additionally, the NLRA prohibits employers from "interfere[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" their Section 7 rights.[2] However, hospitals always, and employment agreements often, contain confidentiality provisions to ensure that sensitive information is not inadvertently placed in the wrong hands. At times, maintaining confidentiality may conflict with an employee's rights under the NLRA.

To maintain accreditation, most hospitals and medical providers are required to utilize peer review committees for physicians.[3] Many states also require hospitals to administer peer review committees for nurses so that nurses remain qualified to provide quality care to patients.[4] Peer review is the process that licensed medical personnel take to evaluate physicians, nurses, and other employees to ensure that they are competent and do not engage in unprofessional conduct. When a peer review committee finds that an employee acted below the hospital's standard of care, the committee usually informs an oversight board and reports the findings to state licensing agencies. Because legislators believe that free exchange of opinions is crucial to the effectiveness of peer review, all fifty states and the District of Columbia have peer review statutes that include documentary privileges.[5] Generally, these statutes prohibit all records, recommendations, evaluations, or any other information from being admitted into discovery even when compelled by a subpoena.[6] Despite the existence of these provisions, some courts have found that the privileges do not provide such protections when unions are involved.

This article will review the U.S. Court of Appeals for the D.C. Circuit's decision in *Midwest Division – MMC, LLC, d/b/a Menorah Medical Center v. NLRB*[7] ("*Midwest Division*") – one of the most recent court cases addressing whether the peer review privilege extends to a union's request for disciplinary records.

Background

It is settled law that employees have the right to bring union representation to any meeting they are required to attend if they reasonably believe that the meeting will result in disciplinary action.[8] The U.S. Supreme Court explained this right in *NLRB v. J. Weingarten, Inc.*,[9] ("*Weingarten*"), holding that an employer committed an unfair labor practice when a manager denied a sales employee's request to have a union steward accompany her to an investigatory meeting. Because the employee was required to attend a meeting that might have led to her termination, the Court held that the employee's rights to representation, or *Weingarten* rights, were violated. However, the Court made an important distinction.

> [T]he employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one.[10]

Thus, an employee's *Weingarten* rights are not implicated when the employer provides the employee with the option to attend or not to attend.

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[1] 29 U.S.C. § 157.

[2] 29 U.S.C. § 158(a)(1).

[3] Dinesh Vyas & Ahmed E. Hozain, *Clinical peer review in the United States: History, legal development and subsequent abuse.* World J. Gastroenterol. 2014; 20(21):6357–6363 (June 7, 2014).

[4] *See e.g.*, Tex. Occupations Code Ann., §§ 303.001(5); 303.0015 (Vernon, 2017).

[5] *See* Anita Modak-Truran, *A Fifty-State Survey of the Medical Peer Review Privilege* (Oct. 1, 2008).

[6] *See e.g.*, D.C. Code § 44-805; Conn. Gen. Stat. § 19a-17b.

[7] 2017 U.S. App. LEXIS 15637 (D.C. Cir. Aug. 18, 2017).

[8] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256 (1975).

[9] *Weingarten*, 420 U.S. at 256.

[10] *Weingarten*, 420 U.S. at 258.

Following the Supreme Court's ruling in *Weingarten*, the U.S. Court of Appeals for the Ninth Circuit analyzed whether an employee's right to representation extends to meetings that are conducted in compliance with a state statute. In *Mt. Vernon Tanker Co. v. NLRB*,[11] the Ninth Circuit assessed an employee-seaman's claim that his rights were breached when he was required to attend an investigation without union support, after being charged with "willful disobedience of a lawful order."[12] Even though this meeting could have led to disciplinary action, the court held that the seaman was not entitled to union representation because the meeting was "mandated by law"[13] and "the [NLRB] has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other equally important congressional objectives."[14]

The Ninth Circuit's interpretation of *Weingarten* is also important when considering union information requests and whether an employer's refusal to disclose information is a violation of Section 8 of the NLRA. The Supreme Court has held that employers have a statutory obligation to "provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."[15] However, does a union's interest in protecting an employee from discharge or other discipline supersede an employer's duty to comply with state or federal statutes? The National Labor Relations Board ("NLRB" or "Board") examined a similar issue in *Borgess Medical Center*, where a registered nurse was discharged for giving a patient the wrong medications.[16] In preparation for arbitration, the union requested the hospital's "incident reports concerning other medication errors."[17] The hospital refused to furnish the records because the information was confidential and protected from disclosure under Michigan state law. While the Board agreed that the hospital had a legitimate confidentiality interest in complying with state law, the Board ruled in favor of the union, holding that the hospital "made no effort" to offer an alternative solution that did not violate state law.[18]

The NLRB made clear that employers must at least try to accommodate a union's disclosure request. Taking a union-friendly approach in *Midwest Division*, the D.C. Circuit expanded this rule even further.

The Midwest Division Decision

Summary of the NLRB's Decision

Menorah Medical Center ("Menorah") is a full service, acute care hospital that employs physicians, nurses, support staff, and administrative employees.[19] To comply with Kansas law, Menorah utilizes a "Nursing Peer Review Committee" which "addresses issues of reportable incidents involving nurses" and, if necessary, refers such incidents to the Kansas State Board of Nursing.[20] "Kansas law attaches a confidentiality privilege to certain aspects of peer-review proceedings."[21] Specifically, "reports, statements, [and] findings" from internal deliberations may not be subject to any "means of legal compulsion."[22]

In May 2012, Sherry Centye and Brenda Smith, two Menorah nurses, were provided with letters from Menorah's risk manager, which alleged that they had "exhibited unprofessional conduct . . . determined to be a Standard of Care Level 4: *grounds for disciplinary action*."[23] The letters stated that "an in-person exchange would take place only if you choose."[24] Furthermore, Centye and Smith were permitted to "submit a written response to the Committee . . . in lieu of an appearance."[25] The nurses requested that Menorah allow a union representative to attend the committee hearing, which Menorah's risk manager denied. After the hearing, a union representative contacted Menorah's staff and requested information pertaining to the structure of the committee, all prior allegations made against nurses, and any discipline that the committee had issued in the past. Menorah denied all the requests, stating that the information was privileged and confidential under Kansas law. The Union filed unfair labor practice charges with the NLRB alleging that Menorah violated the NLRA in its refusal to accommodate the Union's requests.

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[11] *Mt. Vernon Tanker Co.*, 549 F.2d at 571.

[12] 549 F.2d at 574-75.

[13] 549 F.2d at 575.

[14] 549 F.2d at 576 (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

[15] *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979).

[16] *Borgess Medical Center*, 342 NLRB 1105, 1105 (2004).

[17] 342 NLRB at 1105.

[18] 342 NLRB at 1106.

[19] *Menorah Medical Center*, 362 NLRB No. 193, 2015 NLRB LEXIS 670, at *56 (NLRB Aug. 27, 2015).

[20] 2015 NLRB LEXIS 670, at *61-62.

[21] *Midwest Division,* 2017 U.S. App. LEXIS 15637, at *5.

[22] Kan. Stat. Ann. § 65-4915(b).

[23] *Menorah*, 2015 NLRB LEXIS 670, at *67.

[24] *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *7.

[25] 2017 U.S. App. LEXIS 15637, at *7.

The NLRB ruled in favor of the Union, holding that Menorah violated the nurses' *Weingarten* rights when it refused to allow the nurses to have union representation at the committee hearings. Furthermore, the Board held that Menorah wrongfully withheld information that the Union requested because the Union needed the information to effectively represent its members.

Menorah's Arguments on Appeal

On appeal to the U.S. Court of Appeals for the D.C. Circuit, Menorah challenged the Board's determination that the hospital committed unfair labor practices when it denied the nurses the right to bring union representatives to the committee hearing and when the hospital withheld information about the committee and results of prior committee hearings.[26] First, Menorah argued that the Board wrongly asserted jurisdiction over the dispute because the hospital's peer review committee functioned as a "State or political subdivision" and not a statutory employer subject to the NLRA.[27]

Next, Menorah argued that its denial of the nurses' requests for union representation did not infringe on their *Weingarten* rights because *Weingarten* is only implicated when bargaining-unit employees are compelled to attend disciplinary proceedings without union representation. Specifically, Menorah contended that it provided the nurses with the option to attend or not and thus, no rights were violated when it denied union representation.[28] Third, Menorah challenged the NLRB's ruling that it violated the NLRA when it withheld confidential information about the peer review program. In support, Menorah cited *Kaleida Health, Inc.*,[29] a recent NLRB decision holding that employers need only provide sensitive information when "the union's need for the information outweigh[s] the general policy regarding confidentiality." In this case, Menorah contended that Kansas law specifically enumerated a state-law privilege for peer review committees, and as such, no countervailing union interest could outweigh maintaining confidentiality.

The D.C. Circuit's Decision

The court first disposed of Menorah's lack of jurisdiction argument, holding that the hospital's peer review committee was not a "political subdivision" under Supreme Court precedent and thus, Menorah was not exempt from the NLRA. In *NLRB v. Nat. Gas. Util. Dist. of Hawkins County*,[30] the U.S. Supreme Court stated that to be a political subdivision exempt from the NLRA, an entity must be "(1) created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or the general electorate."[31] In this case, the D.C. Circuit summarily denied Menorah's argument because the Kansas statute "makes each hospital responsible for 'establishing and maintaining its own system of risk management,'" thus, "the very statutory scheme that requires the existence of peer-review committees[] specifies that they are created and administered by hospitals, not the state."[32] Furthermore, Menorah could not meet the second prong because the committee was not "appointed or removable by pubic officials."[33]

Following its determination that Menorah was an employer subject to the NLRA, the court analyzed the merits of the Board's unfair labor practice findings. First, the court unanimously reversed the Board's ruling that Menorah violated the nurses' *Weingarten* rights when it refused the nurses' request for union representation. Consistent with the Supreme Court's holding in *Weingarten*, the D.C. Circuit held that Menorah did not wrongfully refuse the nurses' request for representation because the charge letters provided the nurses the opportunity to appear before the peer review committee "if you choose." Additionally, the letter stated that the nurses were entitled to "submit a written response . . . in lieu of an appearance." The court agreed with the Board that because the charge letters did not contain any factual details, the nurses could incur severe drawbacks if they chose to forego attendance. However, the court noted that *Weingarten* "contains no suggestion that the NLRA requires an employer to *renew* advice to an employee that her attendance at a hearing is optional."[34] By contrast, *Weingarten* only required that Menorah offer the choice between attending or declining. Because the nurses were

[26] 2017 U.S. App. LEXIS 15637, at *10.

[27] 2017 U.S. App. LEXIS 15637, at *10 (citing 29 U.S.C. § 152(2)).

[28] *See* 2017 U.S. App. LEXIS 15637, at *15-20.

[29] 356 NLRB 1373, 1379 (2011).

[30] 402 U.S. 600, 604-05 (1971).

[31] 402 U.S. at 604-05.

[32] *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *12 (quoting Kan. Stat. Ann. § 65-4922(a)).

[33] 2017 U.S. App. LEXIS 15637, at *14.

[34] 2017 U.S. App. LEXIS 15637, at *18 (emphasis in original).

provided with these options, the court held that their *Weingarten* right to representation was not violated.[35]

The court also found that Menorah's confidentiality rule barring employees from discussing reportable incidents violated the NLRA because employees have the "right to discuss the terms and conditions of [their] employment with other employees."[36] Ruling that Menorah did not present a "legitimate and substantial business justification" that "outweigh[ed] the adverse effect on the interests of the employees," the court held that Menorah's confidentiality rule was "unduly broad in violation" of the NLRA.[37]

The court split on the remaining unfair labor practice findings. The standard for assessing requests for information was agreed upon by all members of the panel. Employers have "a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."[38] When a union successfully demonstrates that information is relevant, the "employer must furnish the requested information if 'the union's need for the information outweigh[s] the general policy regarding confidentiality.'"[39] That is where the agreement ended, however. The panel majority affirmed the Board's determination that that the requested information was "relevant to the Union's ability to enforce the collective-bargaining agreement" because "the Committee's work can lead to [Menorah's] suspension or discharge of an employee."[40] This was evidenced, said the panel majority, by Menorah's risk management plan, which states that "[w]hen the investigation of a reported incident [i.e., by the Peer Review Committee] results in an adverse finding, the event will be considered at the time of . . . employee performance evaluations."[41] As for the second prong of the analysis, the majority held that Menorah could not demonstrate any legitimate need to maintain confidentiality other than to remain compliant with state law.[42] Although the majority recognized that Kansas law attaches a privilege to "the reports, statements, memoranda, proceedings, findings and other records submitted to or generated by peer review committees[,]" it observed that, notwithstanding Kansas' interest in creating a statutory peer review privilege, the Supreme Court of Kansas has held that the privilege does not attach broadly to "any document that may incidentally come into the committees' possession."[43] Instead, the privilege applies only to documents and "forms found to be 'part of the peer review process as envisioned by the legislature.'"[44] The majority narrowly interpreted the privilege and, in doing so, found the union's interest in the information prevailed over the hospital's interest in confidentiality. Thus, the court agreed with the NLRB that the hospital violated the NLRA by rebuffing the union's information requests, including the request for copies of the investigatory information and disciplinary records relied upon by the committee in reaching its determinations.[45]

Dissenting from this holding, Judge Kavanaugh found the balance of interests to be decidedly in favor of the hospital. The hospital's interest in preserving the statutory privilege and the underlying purpose of the privilege – ensuring "the frank participation of medical professionals in peer review committee deliberations"[46] – was weighty in the dissent's estimation. By contrast, the union's need for the information was "minimal at best . . . because the peer review committee does not itself threaten direct adverse action against the Union's members."[47] As such, the dissenting judge would have vacated the Board's order and remanded the case to the Board to "properly rebalance the hospital's confidentiality interest against the Union's asserted need for the information[.]"[48]

Conclusion

The peer review privilege is based on the widely recognized principle that the robust and open discussion of

[35] 2017 U.S. App. LEXIS 15637, at *15-20. Judge Kavanaugh, who dissented in part, agreed with the majority's rejection of the Board's finding that the hospital violated the employee's *Weingarten* rights. However, he would have reached the threshold issue of whether such rights are implicated at all in the peer review process. "Because the peer review committee at issue here is not part of the hospital's disciplinary process and is instead part of the state licensing process, employees do not have *Weingarten* rights in interviews conducted by the peer review committee." *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *33.

[36] 2017 U.S. App. LEXIS 15637, at *27 (quoting *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007)).

[37] 2017 U.S. App. LEXIS 15637, at *28-29.

[38] 2017 U.S. App. LEXIS 15637, at *21 (quoting *Detroit Edison Co.*, 440 U.S. at 303)).

[39] 2017 U.S. App. LEXIS 15637, at *21 (quoting *Kaleida Health, Inc.*, 356 NLRB at 1379)).

[40] 2017 U.S. App. LEXIS 15637, at *22.

[41] 2017 U.S. App. LEXIS 15637, at *23.

[42] 2017 U.S. App. LEXIS 15637, at *24.

[43] 2017 U.S. App. LEXIS 15637, at *24 (*citing Adams v. St. Francis Reg'l Med. Ctr.,* 264 Kan. 144, 144 (1998)).

[44] *Midwest Division,* 2017 U.S. App. LEXIS 15637, at * 24 (citing *Adams,* 264 Kan. at 158)

[45] 2017 U.S. App. LEXIS 15637, at *26-27.

[46] 2017 U.S. App. LEXIS 15637, at *34.

[47] 2017 U.S. App. LEXIS 15637, at *34 (citations and internal quotations omitted).

[48] 2017 U.S. App. LEXIS 15637, at *35.

medical errors within the peer review committee setting is sufficiently critical that its deliberations should remain confidential. Indeed, the privilege (like many privileges) recognizes that although the evidence may be inarguably *relevant* to a proceeding, it nonetheless should be shielded from disclosure to effectuate an important purpose. As the American Hospital Association noted in an amicus brief filed in support of the hospital, "[w]ithout strict confidentiality, peer review's effectiveness would collapse."[49]

Given the importance of the D.C. Circuit in interpretation of federal labor law, the panel majority's decision threatens to have a chilling effect on peer review panel proceedings in hospitals with union-represented medical professionals. The determination that hospital peer review panels may be compelled to disclose the names of nurses under investigation, all investigatory information relied upon by the committee, and all documents consulted by the committee in reaching its decision could well undermine the ability of committees to investigate conduct giving rise to breaches of patient care. Once disclosed to the Union, the privilege is lost and, by logical extension, parties to litigation arising from such medical errors will be able to secure information that otherwise would be unavailable to them. It is submitted that this undermines the intent of State legislators and poses a serious threat to patient care. The D.C. Circuit panel decision represents misplaced deference.

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RECENT DEVELOPMENTS

ADA

NRC Regulations Doom ADA Claim

McNelis v. Pennsylvania Power & Light Co., 2017 U.S. App. LEXIS 15207 (3d Cir. Aug. 15, 2017)

Daryle McNelis ("McNelis") worked as an armed security officer at a nuclear power plant owned by Pennsylvania Power & Light Co. ("PPL"). After McNelis began experiencing mental health problems, including paranoia and problems with alcohol, his wife insisted that he undergo a three-day stay at a psychiatric facility. When McNelis was discharged, he was instructed to discontinue or reduce his use of alcohol.

Having learned of McNelis' emotional erratic behavior from a coworker, PPL required McNelis to undergo a medical clearance before returning to work. McNelis was examined by a psychologist who performed testing required by PPL's policies and the regulations of the Nuclear Regulatory Commission ("NRC"). The psychologist's report concluded that pending receipt of a report from a facility where McNelis would receive an alcohol assessment and possible treatment, McNelis was not fit for duty. Given the psychologist's conclusion, PPL revoked McNelis' authorization to access the nuclear facility and terminated his employment.

Subsequently, McNelis filed suit against PPL in federal district court for the Middle District of Pennsylvania for disability discrimination in violation of the Americans with Disabilities Act ("ADA"), as well as the 1973 Rehabilitation Act and the Pennsylvania Human Relations Act whose provisions are interpreted consistently with those of the ADA. McNelis claimed that the company had erroneously regarded him as having a disability in the form of alcoholism, mental illness and/or illegal drug use and that this misperception was a motivating factor for his termination. The district court granted summary judgment to PPL on all of McNelis' claims, and McNelis appealed to the Third Circuit Court of Appeals.

In considering McNelis' appeal, the Third Circuit explained that to establish a *prima facie* case of disability discrimination, McNelis had to establish not only that he had been regarded as disabled, but, additionally, that he was qualified to perform the essential functions of his armed security officer position with or without reasonable accommodation. After reviewing the evidence, the court of appeals concluded that McNelis could not make this showing because the NRC requires security officers, like McNelis, to be fit for duty and to maintain an unescorted security clearance. In McNelis' case, he could satisfy neither requirement at the time he was terminated, and hence, he was not qualified under the ADA.

The Third Circuit rejected McNelis' contention that the court should not rely upon the psychologist's report that McNelis was not fit for duty because he was denied the opportunity to address the erroneous perceptions of the psychologist. The appeals court noted that McNelis was given a chance to challenge the psychologist's conclusions through PPL's review procedures, and McNelis was not entitled to more process than had been delineated by the NRC in its regulations.

[49] *Midwest Division*, 2017 U.S. App. LEXIS 15637, at *34 (Kavanaugh, J. dissenting in part).