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

Advice Memorandum

DATE: November 6, 2001

TO : Rochelle Kentov, Regional Director
Margaret J. Diaz, Regional Attorney
Karen K. LaMartin, Assistant to Regional Director
Region 12

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

SUBJECT: AT&T Broadband & Internet Services
Case 12-CA-21220

512-5012
512-5012-0133-5000
512-5012-1725-0150
512-5012-6737
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This case was submitted for advice as to whether the Employer's maintenance of certain work rules violates Section 8(a)(1) in light of Lafayette Park Hotel.[1]

FACTS

A. Background

In April 2000, Electrical Workers IBEW Local 177 ("the Union") started to organize field technicians at MediaOne Group ("MediaOne"), a broadband and internet services provider. AT&T acquired MediaOne on June 15, 2000, and merged it with an existing subsidiary apparently performing similar services to create AT&T Broadband & Internet Services ("AT&T" or "the Employer").

B. The Handbooks

Sometime in 1998, MediaOne began disseminating an employee handbook. MediaOne maintained and enforced that handbook until the acquisition and merger. Thereafter, the Employer continued to use the MediaOne handbook from June 15, 2000, until January 2001 when it implemented its own employee handbook.

The MediaOne handbook covered a panoply of employee conduct under such broad headings as "Business Integrity

[1] 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

and Ethics" and "On-the-Job Expectations." Among MediaOne's rules and policies were rules governing harassment, "unacceptable" behavior, and confidentiality. The AT&T handbook also contains rules and policies regarding harassment and confidentiality, as well as the use of computers, the internet, and e-mail; communicating with the media; and conflicts of interest. There is no evidence that any employee has been formally disciplined under any of the policies discussed below, nor is there any evidence that any rule or policy has been promulgated or revised in response to employees' protected concerted activity or the Union's organizing campaign.

ACTION

We agree with the Region that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing MediaOne handbook provisions regarding harassment and confidentiality,[2] as well as its own subsequent handbook provisions regarding confidentiality. We also agree with the Region that allegations regarding the MediaOne handbook prohibition against "unacceptable" behavior and AT&T's policies regarding harassment; conflict of interest; and employees' use of computers, the internet, and e-mail, should be dismissed absent withdrawal. The allegation related to the Employer's handbook provision addressing employees' communications with the media should also be dismissed, absent withdrawal.[3]

As noted above, there is no evidence that any of the rules at issue were promulgated or enforced discriminatorily. However, as the Board stated in Lafayette Park, above:

> In determining whether the mere maintenance of rules such as those at issue here violates

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[2] We agree with the Region that the Employer is liable for its enforcement of the MediaOne handbook, regardless of whether the current handbook supercedes, replaces, or otherwise renders earlier policies moot. The Employer has not repudiated its maintenance or enforcement of the unlawful MediaOne policies from June 15, 2000 until implementing its own handbook in January 2001. On the contrary, the Employer steadfastly maintains that none of the past or present handbook provisions is unlawful.

[3] [*FOIA Exemption 5*

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> Section 8(a)(1) of the Act, the appropriate inquiry is whether the rules would reasonably tend to chill employees in their exercise of Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, *even absent enforcement*.[4]

I. The Employers' Confidentiality Policies

A. MediaOne's Confidentiality Policy

MediaOne's confidentiality policy states:

> During your employment with MediaOne Group, you'll be exposed to a great deal of information about our customers, your fellow employees and how we run our business. Our customers trust us not to release information about them. Your co-workers expect to have their privacy respected. And it is critical that our competitors **not** have access to information about how we run our business. For these reasons, you must do your utmost to protect this information on a daily basis. You must handle all information in the strictest confidence and not discuss it with non-employees. You're also responsible for the internal security of sensitive information, and you should limit conversations about it to what's necessary for effectively conducting business. (Emphasis in original.)

B. AT&T's Confidentiality Policy

AT&T's confidentiality policy is found in the "Business Integrity and Ethics Policies at a Glance" section of its handbook. There, the Employer addresses "proprietary information" by advising employees:

> You're responsible for the appropriate use and protection of company and third party proprietary information, including information assets and intellectual property. Information is any form (printed, electronic or inherent knowledge) of company or third party proprietary information. Intellectual property includes, but is not limited to:
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> - business plans

[4] 326 NLRB at 825, citations omitted (emphasis added).

- technological research and development
- product documentation, marketing plans and pricing information
- copyrighted works such as music, written documents (magazines, trade journals, newspapers, etc.), audiovisual productions, brand names and the legal rights to protect such property (for example, patents, trademarks, copyrights)
- trade secrets and non-public information
- customer and employee information, including organizational charts and databases
- financial information
- patents, copyrights, trademarks, service marks, trade names and goodwill.

The Employer further admonishes employees to guard against the loss, damage, theft, misuse, etc., of the information, and prohibits employees from disclosing the information "outside the company." The Employer closes this section of the handbook by telling employees to contact the law department if, among other things, they "have any questions regarding proprietary information."

In Lafayette Park Hotel, the Board held that the employer's rule prohibiting disclosure of "Hotel-private information" was lawful, because it was reasonably addressed to protecting proprietary information and did not implicate employee Section 7 rights.[5] In Flamingo Hilton-Laughlin,[6] however, the Board distinguished Lafayette Park and held that the employer's "code of conduct," providing that "[e]mployees will not reveal confidential information regarding our customers, fellow employees, or Hotel business," was unlawful to the extent that it prohibited employees from revealing information about "fellow employees."[7]

Both the MediaOne and AT&T policies refer to employees' obligation to protect company and customer

[5] Id. at 826.

[6] 330 NLRB No. 34 (1999).

[7] Id., slip op. at 2, n.3, 6 (1999).

information (what AT&T calls "proprietary information"), but also prohibit the disclosure of information about employees. Neither policy offers a limiting definition of "employee information," but employees are advised not to "discuss [such information] with non-employees"[8] or "disclose it outside the company."[9] These undefined, and therefore unlimited, restrictions regarding "employee information" or "information about fellow employees" could reasonably be read to include information about hours, wages, or working conditions. Further, the prohibition against discussion or disclosure of such information to non-employees or outside the company could reasonably be expected to prevent employees from discussing such information with union organizers or NLRB investigators. Moreover, AT&T's prohibition against disclosing information "outside the company" could be read to prevent employees from talking about employment matters among themselves or with others off-premises and would, therefore, be unlawfully overbroad. Thus, we agree with the Region that both policies are unlawfully overbroad and complaint should issue, absent settlement.[10]

II. The Employers' Anti-Harassment Policies

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[8] MediaOne handbook, p. 18.

[9] AT&T handbook, p. 74.

[10] See University Medical Center, 335 NLRB No. 87, slip op. at 5 (2001) (broadly stated rule prohibiting employees from discussing confidential information concerning employees unlawful); Pontiac Osteopathic Hospital, 284 NLRB 442, 466 (1987) (confidentiality policy that prohibited discussion of employee problems unlawful); Certified Grocers, 276 NLRB 133, 138 (1985) enf. denied 806 F.2d 744 (7th Cir. 1986) (employer's threats to discipline employees for disclosing employee information, including names, addresses, and wage information, unlawful). See also, Courage Productions, LLC, Case 12-CA-21077, Advice Memorandum dated August 24, 2001 (rule prohibiting disclosure of information concerning crewmembers, production schedules, and locations unlawful); Pro-Tec Fire Services, Ltd., Case 14-CA-26041, Advice Memorandum dated August 18, 2000. But see, Ark Las Vegas Restaurant Corp., 335 NLRB No. 97, slip op. at 1 n.2, 8-9 (2001) (rule restricting disclosure of information about the company or its clients lawful); Super K-Mart, 330 NLRB No. 29, slip op. at 1 (1999) (rule lawfully prohibited disclosure of company business and documents without prohibiting discussion of wages or working conditions).

A. The MediaOne Anti-Harassment Provisions

The precise wording regarding harassment and unacceptable behavior was addressed in the Standard of Conduct section of the MediaOne handbook and read, in pertinent part:

> The following acts of misconduct can result in disciplinary action, up to and including termination. The list is not intended to be exhaustive but rather to identify some of those behaviors that will not be tolerated at MediaOne Group:
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> *****
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> - harassing fellow employees, including sexual harassment;
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> *****
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> - engaging in any other conduct that the company deems unacceptable.

MediaOne addressed harassment again in its "Business Integrity and Ethics" section:

> It's MediaOne Group's policy that the workplace is for work, and we expect every employee to contribute to an atmosphere of professionalism. Therefore, an atmosphere of tension created by racial, ethnic, religious or age-related remarks or animosity; or unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature won't be condoned.
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> To ensure compliance with our policy prohibiting harassment, we've implemented the following procedure:
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> - Any employee who feels he/she has been subjected to harassment on the job must immediately report the matter in detail to his/her immediate supervisor, HR representative or any other member of management, or call the Company Hotline.
>
> *****
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> If the company determines that harassment has occurred, the offender will be appropriately disciplined, up to and including termination.

The investigation disclosed that on November 30, 2000, the Employer advised an employee that he "harassed" a co-worker while engaging in organizing activities. The employee asked supervisor Lauzon, during worktime, if Lauzon had signed a Union authorization card; Lauzon took offense at the employee's question, and apparently reported the incident to a MediaOne manager. Immediately thereafter, Field Operations Manager Johns spoke to the employee involved, telling the employee that his "harassment" of Lauzon was unacceptable. [*FOIA Exemptions 6, 7(C), and 7(D)*] he told the employee, Whether it is solicitation for a union or any type of comment that offends people, we can't have that either.

Union organizing is protected activity, even in those circumstances where it annoys or disturbs some employees.[11] Accordingly, handbook rules that proscribe but do not define "harassment," or related behavior such as using abusive language or treating others discourteously or disrespectfully, constrain employees' exercise of Section 7 rights and, therefore, are unlawfully overbroad.[12] However, where such rules are presented as part of an employer's broader treatment of serious job-related misconduct, we have concluded that otherwise ambiguous terms can be defined by their context and, therefore, would not be unlawfully overbroad.[13]

The MediaOne rule prohibited "harassing fellow employees, including sexual harassment" which, alone, would reasonably be read to include Union activity.[14] Harassment,

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[11] See RCN Corporation, 333 NLRB No. 45 slip op. at 6 (2001) and cases cited therein.

[12] See, Adtranz, ABB Daimler-Benz, 331 NLRB No. 40, slip op. at 3-4 (2000), vacated in rel. part 253 F.3d 19 (D.C. Cir. 2001); Bayer Corporation, Case 34-CA-9028, Advice Memorandum dated August 16, 2000 (undefined rule prohibiting "harassment" and "ridicule unlawfully overbroad).

[13] See, e.g., Webvan Group, Inc., Case 32-CA-18695, Advice Memorandum dated July 16, 2001 (rule prohibiting "rudeness, abusive, or inappropriate behavior or ... foul, profane, or abusive language lawful; part of a laundry list of rules addressing serious job-related misconduct). See also, Wal-Mart Stores, Inc., Case 32-CA-18745, Advice Memorandum dated May 11, 2001; and Mariner Post-Acute Network, Case 11-CA-18096, Advice Memorandum dated February 10, 1999 where we reached similar conclusions.

[14] Bayer Corporation, Case 34-CA-9028, above.

however, is addressed shortly thereafter using specific examples of what might constitute harassment (an atmosphere of tension created by racial, ethnic, religious, age-related remarks, etc.). Given this additional context, the prohibition against "harassment" would appear to address serious misconduct unrelated to Section 7 activity. However, the November 30 incident involving Lauzon and John resolves any ambiguity as to the scope of the rule; the Employer has used that provision to include, and presumably quell, any Union organizing activity. Thus, despite the Employer's argument that the provision's overall context rendered the prohibition lawful, the Employer has, in fact, enforced the policy in such a way that it is unlawfully overbroad.[15] Accordingly, we conclude that complaint should issue, absent settlement, regarding the Employer's maintenance and November 30 application of the MediaOne rule.

B. The AT&T Anti-Harassment Provisions

The Employer addresses "harassment" in over two pages of its "How We Work: Employee Guidelines" section under "Category Two - Misconduct." There, the Employer lists 22 examples of misconduct, including:

- Being rude or discourteous to a customer or potential customer, fellow worker, contractor or vendor.

- Harassing or stalking fellow employees, customers, or potential customers.

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- Using threatening or intimidating language.

"In cases of misconduct," the handbook states, "your employment may be terminated at any time without prior warning."

AT&T's handbook provisions regarding harassment, promulgated in January 2001, provide a more comprehensive

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[15] See, e.g., Gallup, Inc., 334 NLRB No. 52, slip op. at 12-13 (2001) (employer violated 8(a)(1) by telling an employee he could be disciplined for harassing another employee by offering them union literature); ACTIV Industries, 277 NLRB 834 n.2, 839 (1985) (employer unlawfully labeled union organizing "harassment," and unlawfully disciplined employee for same).

context for restrictions on employee conduct. There, the Employer outlines its commitment to diversity and its goal to build an environment that "respects and values individual differences." The Employer also describes its "zero tolerance" policy regarding discrimination, harassment, or retaliation in the company with regard to "differences" among employees. The Employer goes further to extend its policy to dealings with customers, including treatment of employees by customers. Finally, the Employer defines harassment as "unwelcome conduct ... based on a person's protected status, such as sex, color, race, religion, national origin, sexual orientation, age, physical or mental disability or other protected characteristics."

We agree with the Region that the context for the anti-harassment provisions, and the ancillary prohibitions against rudeness and the use of threatening language, establishes that Section 7 activity is not at issue. The policy is not ambiguous as to the intended meaning of harassment or the scope of the prohibition. On the contrary, the specificity of the Employer's examples and its list of examples of protected characteristics would not lead a reasonable person to conclude that they could be disciplined for engaging in protected concerted activity.

III. MediaOne's Rule Prohibiting "Unacceptable Behavior"

As noted above, MediaOne concluded its list of misconduct that could lead to disciplinary action with a prohibition against "engaging in any other conduct that the company deems unacceptable." In the abstract, "unacceptable behavior" could be read to include protected concerted activity; however, this phrase follows the company's recitation of serious, job-related misconduct.[16] For example, MediaOne identifies such unacceptable conduct as engaging in violent behavior, falsifying documents, failing to perform competently, failing to report to work, and stealing materials. The list does not specifically identify obviously protected concerted activity. Thus, we agree with the Region that the prohibition against other unacceptable behavior could not reasonably be expected to chill employees' free exercise of Section 7 rights.[17]

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[16] "Unacceptable behavior" is not specifically addressed anywhere else in the MediaOne handbook.

[17] See Lafayette Park, above, at 826-827 (rule declaring "improper" off-premises conduct "unacceptable," lawful because it addressed serious misconduct); Webvan Group, Case 32-CA-18695, above (rule prohibiting, among other things, "inappropriate behavior," lawful as it addressed

IV. AT&T's Communicating with the Media Policy

AT&T's "communicating with the media" policy is found in the "Business Integrity and Ethics Policies at a Glance" section. There, employees are advised that the Employer has designated "certain spokespersons as the only employees who can discuss certain information with the news media and financial community." The policy further provides:

> The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons.

(emphasis in original).

Employees are instructed to direct all media inquiries to that person and coordinate with the "designated spokesperson" if, "as part of [an employee's] normal job duties, [he or she] is asked to author or co-author articles or papers, or to deliver speeches or presentations on subjects related to the company's business."

The full text of this handbook provision establishes that the Employer seeks to regulate employee contact with "the news media" regarding business-related matters and to ensure a consistent, controlled company response or message, not a blanket prohibition against all employee contact with various media outlets. Indeed, the policy specifically refers to the company's response to "crisis situations," and ensuring a "timely and professional" response to media inquiries. The remainder of the policy is quite narrow, limited to those situations when employees publish articles, give speeches or presentations, or otherwise act as representatives of the company. In these circumstances, we conclude that the policy would not reasonably be interpreted to interfere with employees' exercise of Section 7 rights and should be dismissed, absent withdrawal

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serious job-related misconduct). Accord: Wal-Mart Stores, Case 32-CA-18745, above; Mariner Post-Acute Network, Case 11-CA-18096, above. But see Coaster Paper Co., Cases 15-CA-15975 et al., Advice Memorandum dated February 16, 2001 (rule prohibiting "any action" which "tends to destroy good relations between the company and its employees and its suppliers or customers" unlawfully overbroad).

V. AT&T's Conflict of Interest Policy

The Employer dedicates four pages of its handbook[18] to "Conflicts of Interest." The stated objective is to avoid "issues that may arise when [an employee's] personal interests (business, financial, civic or professional) conflict with the interests of the company and/or with [the employee's] loyalty, judgment or decision-making." The Employer states further, "Even the appearance of a conflict of interest can be harmful, because it may look like poor judgment was used." Employees are required to complete a questionnaire addressing specific issues that could give rise to a conflict of interest. The conflict of interest policy specifically addresses business entertainment and gifts, outside employment, participation on outside boards, employment of immediate family, and personal financial investments in publicly and privately held companies. The policy does not specifically address Section 7 activity.

Therefore, we agree with the Region that the Employer's "Conflicts of Interest" provision does not violate the Act. Unlike the confidentiality and "communicating with the media" provisions, the conflict of interest provision is neither overly broad nor ambiguous. Thus, it clearly sets forth examples of the conflicts employees should avoid, none of which either specifically or implicitly involve any Section 7 activity. Moreover, these specific examples of conflicts show that the Employer is seeking to prohibit employees from engaging in nepotism, graft, or establishing competing businesses, clearly legitimate business interests. The mere maintenance of this rule does not reasonably tend to chill employees in the exercise of their Section 7 rights, since employees would understand that the rule is designed to protect the Employer from actual or apparent conflicts of interest, and was not meant to implicate Section 7 rights.[19]

VI. AT&T's Policy Restricting Employees' Use of Computers, Internet, and E-mail

The Employer's policy governing the use of computers, the internet, and e-mail lists rules regarding Computer

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[18] Also in the "Business Integrity and Ethics Policies at a Glance" section, pp. 56 - 59.

[19] See also Webvan Group, Case 32-CA-18695, above; BET Services, Inc. d/b/a Aggregate Equipment and Supply, Case 3-CA-12769, et al., Advice Memorandum dated January 14, 1999.

Operations and Security, as well as general use and internet use guidelines.

When assessing the legality of an employer's rules restricting employees' use of computers, internet, or e-mail, we have examined whether the employees at issue perform a significant amount of their work using the employer's computer network. In those cases where employees spent considerable time using a computer, the internet, or e-mail to be productive, we have found that the employee's computer constituted the employees' "work area" within the meaning of Republic Aviation[20] and Stoddard-Quirk,[21] and overbroad restrictions on their use was unlawful.[22] Conversely, we have instructed Regions to dismiss allegations regarding restrictions on computer, internet, and/or e-mail use in those cases where the employer's computer network did not constitute any employee's "work area."[23]

Here, the evidence presented fails to establish that the employees at issue (field technicians) use computers, the internet, or e-mail, to be productive in their work. Thus, we agree with the Region that computers and, therefore, the internet and e-mail, do not constitute work areas for these employees as defined in Republic Aviation or Stoddard Quirk, and the analysis of Pratt & Whitney, TXU

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[20] 324 U.S. 793 (1945).

[21] 138 NLRB 615 (1962).

[22] See Pratt & Whitney, Cases 12-CA-18446 et al., Advice Memorandum dated February 23, 1998 (employer's ban on all non-business e-mail was unlawfully overbroad where employees communicated with each other and management primarily by e-mail and performed a significant amount of their work on the computer network). See also National TechTeam, Inc., Case 16-CA-20176, Advice Memorandum dated April 11, 2000; TXU Electric, Case 16-CA-19810, Advice Memorandum dated October 18, 1999, where we reached similar conclusions.

[23] See GlassWerks SLB, LLC, Case 32-CA-17870, Advice Memorandum dated March 30, 2000 (employees performed manual driving, production, and maintenance work, so a "computer work area" in fact did not exist for them; employer's business-only restriction was lawful). See also IRIS-USA, Case 32-CA-17763, Advice Memorandum dated February 2, 2000 at pp. 4-5; Adtranz, ABB Daimler-Benz, Cases 32-CA-17172 et al., Advice Memorandum dated March 14, 2000; Webvan Group, Case 32-CA-18695, above, reaching similar conclusions.

Electric, and similar cases does not apply. Accordingly, allegations related to these rules and policies should be dismissed, absent withdrawal.[24]

CONCLUSION

In sum, the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing MediaOne handbook provisions regarding harassment and confidentiality and by maintaining and enforcing its own subsequent handbook provisions regarding confidentiality. Accordingly, complaint should issue, absent settlement, regarding those allegations.[25] The Region should dismiss, absent withdrawal, allegations regarding the enforcement of MediaOne prohibition against "unacceptable" behavior; and AT&T's policies regarding harassment, conflict of interest, and employees' use of computers, the internet, and e-mail, and communications with the media.

B.J.K.

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[24] [*FOIA Exemption 5*

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[25] [*FOIA Exemption 5*

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