

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

# Advice Memorandum

DATE: February 29, 2008

TO : Stephen Glasser , Regional Director  
Region 7

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice 506-0170  
506-2001-5000

SUBJECT: Awrey Bakeries, Inc. 512-5012-0125  
Case 7-CA-50609

This case was submitted for advice as to whether: (1) the Employer unlawfully maintained a rule prohibiting the use of its online systems for any purpose "contrary to the company's best interest"; and (2) whether the Employer unlawfully discharged an employee in response to an e-mail he sent to a fellow employee.

We agree with the Region that the Employer violated Section 8(a)(1) by maintaining its overly broad rule. We further conclude that the discharge at issue was not unlawful, as it was not based on the overly broad portion of the Employer's rule, and the conduct for which the employee was discharged was not protected concerted activity.

### **FACTS**

Awrey Bakeries, Inc. (the Employer) maintains an "Online Systems Use Policy" which states, in pertinent part:

Section 4.1: Maintaining a Hospitable Environment: To ensure corporate online systems a productive and stable environment, it is not permitted the transmittal, retrieval or storage of information that is discriminatory or harassing, obscene, pornographic, or X-rated. It is not permitted the use of corporate online systems for personal gain or any other purpose which is illegal or against company policy **or contrary to the company's best interest.**  
(Emphasis added)

Walter Harris has worked for the Employer as a salaried security officer since December 2006. On July 27, 2007,<sup>1</sup> the Employer issued a new policy requiring security guards to confirm that the receptionist switched over the

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<sup>1</sup> All dates hereinafter are in 2007, unless otherwise noted.

phones to the guard shack at the end of the business day. That same day, Harris e-mailed fellow guard employee Ernest Williams:

Hey man, look at the most recent fucked-up memo/procedure given to us by master. Once again they have insulted our intelligence. *To a hammer everything looks like a nail.* We handled the situation even though we did not create the problem. Check it out, no memo/procedure is addressed to Karen or Kristin. Of course, I believe our shit is monitored but they can kiss my natural Black ass. I am tempted to send a reply to the "blonde of hair" master but I do not believe they are capable of accepting us as thinking beings and I am not ready to leave. I will talk with you later.

On August 1, the Employer's director of human resources met with Harris, said that she didn't appreciate the profanity and didn't approve of the content of the memo, and told Harris that he was terminated for inappropriate use of the Internet.<sup>2</sup> The Employer claims that, in addition to the "Maintaining a Hospitable Environment" section of the Online Systems Use Policy, Harris' e-mail to Williams violated other sections, including:

Section 5.1: Non-Discrimination: It is not permitted the transmittal of messages with derogatory or inflammatory remarks about a person's race, color, sex, age, disability, religion, national origin, physical attributes and sexual preference.

\* \* \* \* \*

Section 8.1: Employees' Conduct in Public: Corporate online systems is a public place for business communications, and all communications over corporate online systems reflect corporate image. All employees are, therefore, responsible to maintain and enhance the corporation's public image, and no abusive, discriminatory, harassing, inflammatory, profane, pornographic or offensive

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<sup>2</sup> There is no contention that Harris was terminated based on the specific "contrary to the company's best interest" language submitted for advice, or based on an earlier e-mail he sent in April, which appears to have involved protected concerted activity.

language or other materials are to be transmitted through the corporate online system.

On August 22, amended on September 25 and October 30, Harris filed the Section 8(a)(1) charge in the instant case, alleging, inter alia, that the prohibition in the Employer's Online Systems Use Policy against any purpose which is "contrary to the company's best interest," is overly broad, and that the e-mail for which the Employer discharged him constituted protected concerted activity.

#### **ACTION**

We agree with the Region that the Employer violated Section 8(a)(1) by maintaining an overly broad Online Systems Use Policy that can be reasonably interpreted by employees to interfere with Section 7 activity. We further conclude that the submitted discharge was not unlawful, as it was not based on the overly broad Online Systems Use Policy, and the conduct for which the employee was discharged was not protected concerted activity.

#### **The Employer's "contrary to the company's best interest" rule**

We agree with the Region that the portion of the Employer's Online Systems Use Policy which prohibits its use for any purpose which is "contrary to the company's best interest" is overly broad. The Board has made it clear that a rule is unlawfully overbroad when it can be reasonably read by employees to interfere with the exercise of Section 7 activity and to bar employees from asserting their statutory rights under the Act.<sup>3</sup> Here, it is reasonable for employees to assume that protected concerted activity would not be in "the company's best interest," and therefore that it is prohibited under the rule. We particularly note that there is nothing in the rule that confines its scope to legitimate Employer business concerns or clarifies that it is not intended to apply to Section 7 activity.<sup>4</sup>

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<sup>3</sup> Lafayette Park Hotel, 326 NLRB 824 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

<sup>4</sup> See University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003), in which the Board found unlawful a rule that prohibited, among other things, "disrespectful conduct" because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope." See generally Southern Maryland Hospital, 293 NLRB 1209, 1221-1222 (1989), enfd. in pertinent part 916 F.2d 932 (4th Cir.

The Charging Party's discharge

We further conclude that the Employer's discharge of Harris was not unlawful, as it was not based on the overly broad portion of the Employer's Online Systems Use Policy, and the conduct for which the employee was discharged was not protected concerted activity.

Section 7 of the Act guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Concerted activity includes "'circumstances in which individual employees seek to initiate or to induce or to prepare for group action' and 'activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization,' so long as what is being articulated goes beyond mere griping."<sup>5</sup>

In the instant case, we can discern no intent to initiate, induce, or prepare for any group action in Harris' July 27 e-mail; instead, it constituted a clear instance of "mere griping." While Harris certainly complained to his fellow employee about terms and conditions of employment -- in particular, the newly-issued memo concerning phone switch-over procedures and Harris' perception of Employer racism -- Harris did no more than just complain to his fellow employee about them. There is no indication in his e-mail or in the surrounding circumstances that he intended that any action be taken by any employee or himself regarding his complaints. Indeed, his comments seem to expressly reject taking any action.<sup>6</sup> Rather, his e-mail seems only intended to be a

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1990) (finding unlawful a rule prohibiting "malicious gossip or derogatory attacks on fellow employees . . . or hospital representative[s]," as it reasonably could have been understood to encompass "truthful union propaganda that places hospital personnel in an unfavorable light"). Compare Tradesmen International, 338 NLRB 460 (2002), in which the Board found lawful a "conflict of interest" rule that addressed legitimate business concerns and gave specific examples of prohibited conduct that clarified to employees that Section 7 activity was not covered by the rule.

<sup>5</sup> Holling Press, Inc., 343 NLRB 301, 302 (2004), citing Meyers Industries, 281 NLRB 882 (1986).

<sup>6</sup> We recognize that Harris ended the e-mail at issue by saying "I will talk with you later," which might be argued to indicate that he contemplated future concerted activity or, at least, additional conversations on the subjects

quintessentially personal expression of displeasure and merely a way to blow off steam to a fellow employee, i.e., "mere griping." Therefore, we conclude that Harris' e-mail did not constitute protected concerted activity, and that the Employer's discharge of Harris was not unlawful.

Accordingly, we conclude that the Employer violated Section 8(a)(1) by maintaining its overly broad Online Systems Use Policy. The Region should dismiss, absent withdrawal, the allegation that the Employer violated the Act by discharging Harris, as the discharge was not based on the overly broad portion of the Employer's Online Systems Use Policy, and the conduct for which he was discharged was not protected concerted activity.

B.J.K

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discussed in the e-mail. In the context of the e-mail, however, and in the absence of any evidence indicating some intent to initiate group action at that time or in the future, we do not find that this language itself demonstrates an intent to engage in concerted activity. Rather, it seems more to have been intended as a generic friendly comment from one co-worker to another, directed at no substantive matter in particular.