

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

# Advice Memorandum

DATE: August 10, 2007

TO : Joseph A. Barker, Regional Director  
Region 13

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

SUBJECT: University of Chicago Medical Center  
Cases 13-CA-43938, 13-CA-43956

506-2017  
506-2017-0800  
512-5012  
512-5012-5000

This case raises the issue of whether the Employer violated the Act by disciplining employees for sending out mass e-mails concerning issues related to employees' terms and conditions of employment. We agree with the Region that the Employer violated Section 8(a)(1) by disciplining the employees.

### **FACTS**

The University of Chicago Medical Center (the Employer) is an acute care hospital. Employees James Anderson (Anderson) and LaTonya Anderson work in the Hospital's Peri-Operative Services Department. About 120 individuals (employees and managers) are on the Department's "OR Peri-Operative Services" distribution list.

On March 7, 2007,<sup>1</sup> the Peri-Operative Services Department held its weekly "in service" meeting to update employees about department matters. About 40 employees and managers from both the Peri-Operative Service Department and DCAM (the outpatient facility) attended the meeting. At the meeting, Peri-Operative Services Director Harker announced that the Hospital was installing internet access to the operating rooms in order to improve doctors' access to patient medical data. Operating Room Systems Manager Allen then lectured employees on the resulting greater repercussions of inappropriate use of the internet. According to employee Anderson, Allen indicated that

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<sup>1</sup> Hereafter all dates are 2007 unless otherwise indicated.

management was concerned that employees would abuse the system and that if they did, management would now "watch you, we will catch you, you will be disciplined up to termination." Some staff members raised concerns about the change in policy, namely, that since technicians and nurses frequently log in to the internet at different locations and do not log out during medical procedures, other employees' inappropriate use of the internet could be attributed to them. Staff members also stated their objections to the tone of Allen's remarks.

Following the meeting, Anderson and at least four co-workers discussed their concerns about the change in internet policy and complained about the tone of Allen's remarks. Anderson offered to send an e-mail informing management about the staff's concerns and his co-workers expressed support for the e-mail.

On March 10, Anderson sent an e-mail to Surgical Services Vice President Gray and to Harker and copied the Peri-Operative Service Department distribution list. The e-mail explained the staff's disagreement with the change in internet policy. The e-mail also stated, in pertinent part:

As would almost certainly be expected, this past Wednesday's in-service has generated a tremendous amount of ill-feeling amongst the staff. The demeaning tone of [Allen's] monologue is a blaring example of the psychological undertones of many (but respectfully not all) of the management entities throughout perioperative services. Leaders who set their minds toward a "Search and Destroy" style of management instead of an understanding of the responsibility to shape the talents and potential of employees toward the needs of the institution are all too abundant. Please take caution to remember that you are dealing with an adult, not a pediatric population!

The e-mail then listed three suggestions. The first two pertained to the internet policy, and the third requested that management:

Ensure that the same respectful and professional consideration is modeled in communication by Management to the staff as you would want to be demonstrated in dialogue from staff members toward you - remembering that this is a professional/professional management situation not an Adult/child or a Master/slave scenario (emphasis in original).

On March 11 and 12, at least three employees e-mailed back that they shared Anderson's criticisms of the new internet policy and his disapproval over the way employees were treated at the meeting. LaTonya Anderson sent an e-mail stating that she was not at the meeting but was appalled by the disrespectful treatment that other employees had described.

On March 13, Gray e-mailed back and addressed the substantive concerns that Anderson and other employees had raised regarding the internet policy. The e-mail also stated:

. . . . A number of you make the point that you do not wish to be treated in a demeaning fashion, though you use different metaphors to characterize this . . . . My own view is that you are all adults and that it goes without saying that you will behave responsibly . . . . Finally, I do wish that we could dial down the rhetoric a bit. I understand, and very much regret, that some of you were affronted in last Wednesday's inservice. But I don't think that broadcast e-mails are the answer, especially when directed at one specific individual. It is perfectly OK to disagree with the tone of a message, or its substance, and to tell your manager this. Indeed, I heard about the meeting long before I got the first e-mail. But e-mail is a remote mechanism, and can sometimes tempt us into hurtful words belying our better natures.

On March 14, the Peri-Operative Department held another in-service meeting. According to Anderson, although Harker mentioned the internet issue, she did not respond to the concerns that had been raised by the staff about either the internet or Allen's comments. Following the meeting, Anderson and some of his co-workers spoke and agreed that the issues raised during the last meeting had still not been resolved. Soon thereafter, Anderson sent another e-mail to Gray and Harker, copying the Peri-Operative Service Department distribution list. The e-mail provided in pertinent part:

. . . . no one feels as though either you or Deb intended to offend anyone [but] . . . the offense was a public one which cast a negative hue on all of us in Preoperative services . . . . This is why the rebuttals were also public and global. . . . The e-mail broadcast was an effort to convince the expression of an issue that was already boiling. Doing so allows for addressing of the true issue and reduces poor morale which can persist even when memory persecutes precise recollection of an event.

By e-mail of March 15, Gray responded:

this ongoing exchange is an inappropriate use of the broadcast e-mail function, and it has to stop. Now. The OR Peri-Operative Services list is to be used for disseminating important information or for substantive discussion, not to express opinions like this. Opinions about the inservice were heard by management and we told you we heard them and clarified our intent. I really believe that singling someone out in an e-mail intended for a couple of hundred people is completely inappropriate and just plain wrong.

By e-mail of March 24, Anderson replied:

. . . . [i]t is a clear provision of the National Labor Relations Act to allow for the specific type of collective dialogue contained within this e-mail exchange. The issues discussed within this exchange affect every individual within the '#OR Peri-Operative Services' global address list and therefore they are all granted special rights to collectively bargain regarding the conditions of their workplace according to language of Section 7 of the NLRA . . . . interference with this PEACEFUL and LAWFUL attempt to negotiate specific changes to environment constitutes a blatant disregard for federal law . . . . if we are protesting what we don't 'like' it is being done in accordance with a collective attempt to maintain a protected work environment - not to cry like spanked or punished children . . . .

On March 26, LaTonya Anderson sent another e-mail stating "[v]ery well put James. I totally agree!"

On March 28, a Human Resources manager and Anderson's supervisor met with Anderson to discuss the e-mail exchange. Anderson explained that the purpose of his e-mail was to discuss the internet privileges and to address Allen's disrespectful tone toward the operating room staff at the March 7 meeting. When asked why he continued the e-mails after Gray asked him to stop, Anderson explained that he was addressing the employees' right to approach managers that Gray was preventing. At the end of the meeting, the managers told Anderson that his e-mail privileges were suspended indefinitely pending an investigation. On March 30, a manager met with LaTonya Anderson and told her that her e-mail privileges were also suspended indefinitely pending an investigation. On April 4, the Employer issued a three-day suspension to Anderson, and a written warning

to LaTonya Anderson. Both employees' e-mail privileges remain suspended.

**ACTION**

We conclude that the Employer violated Section 8(a)(1) and (3) by disciplining employees for sending e-mails that complained about management practices and other working conditions.<sup>2</sup>

As an initial matter, we agree with the Region that employee Anderson was engaged in protected, concerted activity when he sent e-mails objecting to the Employer's change in internet policy and to the tone of supervisor Allen's remarks to employees. Thus, the evidence indicates that employees were upset both about the change in internet policy and about Allen's treatment of the employees, that Anderson sent out the e-mails complaining about both those issues after discussing them with other employees and obtaining their support, and that employees responded to Anderson's e-mail with their own e-mail expressions of solidarity. Accordingly, the Employer's discipline of Anderson and LaTonya Anderson for engaging in that Section 7 activity violated Section 8(a)(1) unless their conduct lost the protection of the Act, as the Employer asserts, because the e-mails included language that was "so offensive, defamatory or opprobrious as to remove it from the protection of the Act."<sup>3</sup>

The Employer contends that the e-mails, particularly the reference in one to a "master/slave relationship," lost the Act's protection because they were "racially inflammatory."<sup>4</sup> We disagree. Anderson and his co-workers

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<sup>2</sup> [FOIA Exemption 5

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<sup>3</sup> American Hospital Association, 230 NLRB 54, 55-56, (1977) quoting Ben Perkin Corporation, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7<sup>th</sup> Cir. 1971).

<sup>4</sup> The Employer does not point to any specific statement in LaTonya's e-mails that it considered unduly offensive/racially inflammatory.

were concerned that managers were creating ill feeling amongst employees by using a management style that they found disrespectful and demeaning. Anderson never raised the issue of race, made any racial slurs, or accused anyone of racial harassment; rather, he merely implored managers to treat their staff in the "same respectful and professional" way that they wished to be treated. In this context, he reminded them that theirs was a "professional/professional" relationship rather than an "[a]dult/child or a [m]aster/slave scenario." Anderson's use of those hierarchical constructs in order to point out their inappropriateness at the workplace was relevant to the discussion and not unduly offensive.<sup>5</sup> The statements were not, as an objective matter, inflammatory, and did not lose the Act's protection because managers may have interpreted them that way.<sup>6</sup>

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<sup>5</sup> See, e.g., Arthur Young and Company, 291 NLRB 39, 44 (1988) (employees' remarks, such as that the office was run by Puerto Ricans and blacks and that the way to get ahead in that department was to be black or Puerto Rican, were at worst simply expressions of opinion that minorities received preferential treatment, were directly related to terms and conditions of employment, and were not so offensive as to adversely affect company discipline); United Parcel Service, 234 NLRB 223, 227 (1978) (assuming some materials in an employee newsletter were sufficiently inflammatory or obscene to lose the Act's protection, those materials were "inextricably commingled" with other materials relating to the group's protected battle for better working conditions, and the "basic thrust" of the newspaper was for a protected objective). Compare Cox Communications Gulf Coast, 343 NLRB 164, 164 (2004) (charging party would have been discharged even in the absence of his union activity, where he made highly charged and gratuitously offensive racial remarks to his fellow employee about blacks, Jews, the Ku Klux Klan, and the Confederate flag; and his fellow employee became very upset and requested that the charging party be removed from his work station).

<sup>6</sup> See American Hospital Association, 230 NLRB at 56 (the fact that management found the language of leaflets insulting is scarcely determinative, lest every time employees engage in protected activity they risk discipline if the employer happens to take offense).

We also reject the Employer's claim that Anderson engaged in insubordination by disregarding Gray's order to refrain from sending additional e-mails. An employer may not rely on an employer's failure to adhere to a rule or direction prohibiting protected activity as a basis for discipline.<sup>7</sup> In addition, the e-mail Anderson sent after Gray ordered him to stop contained none of the complained-of language that the Employer argues deprived his statements of the Act's protection. Rather, it merely discussed employees' Section 7 right to engage in collective dialogue and cautioned against employer interference with "peaceful and lawful attempt[s] to negotiate" workplace changes. Moreover, since Gray's e-mail directing employees to stop using e-mail to "express opinions like this" was sent to the entire Peri-Operative Services mailing list, it was appropriate for Anderson to respond in kind. Accordingly, Anderson was not insubordinate when he disregarded the Employer's unlawful order to stop engaging in protected e-mail communications.

Further, we would reject any Employer claim that it legitimately disciplined Anderson for violating its policy prohibiting use of the e-mail system for non-business purposes. Any such application of the e-mail policy would be discriminatory. First, the policy itself permits moderate personal use of the e-mail system. Second, the evidence demonstrates that the Employer in fact has permitted the use of its e-mail and Internet systems for personal messages, including permitting employees to send personal e-mails to the same distribution lists that Anderson used here.<sup>8</sup> For example, employees used those

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<sup>7</sup> See Louisiana Council No. 17, 250 NLRB 880, 882 (1980) (employer unlawfully discharged employee for violating rule prohibiting employees from attempting to resolve their problems with employer by seeking the aid of employer's governing association; the rule, even assuming it had a legitimate objective, could not be used as a basis for interfering with protected activity).

<sup>8</sup> See E.I. Du Pont De Nemours & Company, 311 NLRB 893 (1993) (having permitted the routine use of electronic mail to distribute a wide variety of material that had little relevance to the employer's business, the employer discriminatorily denied employees the use of the system to distribute union literature and notices); Media General Operations, Inc., D/B/A General Operations, Inc., 346 NLRB No. 11 (December 16, 2005) (employer's disparate

distribution lists to announce an off-site retirement party, seek contributions for a nurse-sponsored book drive, and to share complaints about working conditions on such issues as vacation time and the cleanliness of the ladies' washroom with other staff members.

[FOIA Exemption 5

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Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(3) and (1) by disciplining employee Anderson for sending e-mails concerning issues related to employees' terms and conditions of employment, and by disciplining Latonya Anderson because she sent e-mails expressing her support for Anderson's concerted activities.

B.J.K.

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enforcement of e-mail rules violated Section 8(a)(1) where employer had permitted a wide variety of e-mail messages unrelated to the employer's business).

<sup>9</sup> [FOIA Exemption 5

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