

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

Advice Memorandum

DATE: July 13, 2007

TO : Joseph P. Norelli, Regional Director
Region 20

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

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SUBJECT: Sutter Regional Medical Foundation,
Case 20-CA-33348

This case was submitted for advice as to whether the Employer violated the Act when it suspended an employee for sending out a pro-Union mass e-mail. We agree with the Region that the Employer violated Section 8(a)(1) and (3) by suspending the employee.

FACTS

Sutter Regional Medical Foundation (the Employer) operates several ambulatory care health care facilities, including one in Fairfield, California. The Employer maintains policies and procedures for employees on its intranet, including an "Internet and E-mail Usage" policy which states:

E-mail and Internet access are provided to support SRMF business purposes. While users who are given access to these tools may make incidental personal use of them, they may not spend work time on extensive personal use. Each user's manager has the right and responsibility to determine what is "extensive use", counsel their staff, and may revoke access privileges for abuse of the system.

In June 2006, Office & Professional Employees International Union, Local 29, AFL-CIO (the Union) began an organizing campaign among office workers at the Employer's facilities. In July 2006, the Employer issued a written warning to employee Rachel Diskin, a key Union supporter and organizer, for sending out two e-mails to 26 employees inviting them to a Union meeting. In Case 20-CA-33085, the Region concluded that this warning violated Section 8(a)(1) and (3), as the Employer had disparately disciplined Diskin. Case 20-CA-33085 was settled in January 2007,¹

¹ All dates hereinafter are 2007, unless otherwise noted.

pursuant to an informal settlement agreement in which the Employer agreed that it would not: (1) discipline employees because of their membership in, activities in support of, or affiliation with a union; or (2) prohibit employees from sending e-mails or soliciting other employees about unions during working time, while permitting e-mails and solicitations about other non-work matters during working time. After the settlement of Case 20-CA-33085, Diskin and other employees regularly sent out pro-Union and anti-Union e-mails at work, without incident.

On March 5, Diskin's supervisor asked what Diskin had been doing that morning at 9:18, which was when Diskin had sent out a pro-Union e-mail. The supervisor then said that if Diskin was sending mass e-mails, she had to be on break. Diskin was not disciplined for sending the March 5 e-mail.

On the evening of March 11, Diskin used her home computer to draft an e-mail to send out the next morning to the approximately 130 employees at the Employer's Fairfield facility. The e-mail complained about the Employer's having recently fired a well-liked manager, and how this action reinforced the need for the employees to vote for the Union because, if the Employer was willing to terminate one of its managers without good reason, it would not think twice about similarly terminating an employee. The e-mail also stated that the employees needed the Union because of a lack of job security, disparity in wages, increasingly high workloads, and preferential treatment of some employees over others.

The Employer maintains distribution groups on its e-mail system, but employees do not have access to send messages to the distribution groups. For this reason, in order to send her e-mail to all employees at her workplace, Diskin manually entered the e-mail addresses of all employees from her work e-mail address book when she composed her e-mail at home on March 11.

On March 12, apparently while on her morning break, Diskin used her work computer to access the e-mail she had drafted the night before in her personal e-mail account and sent the e-mail on her work e-mail account. Later that day, the Employer suspended Diskin indefinitely, giving the reason that her e-mail was "inappropriate."

On March 20, the Employer issued Diskin a Disciplinary Action Notice, which stated that she was suspended from March 13 through 20 because:

Ms. Diskin sent a lengthy, unsolicited non-work-related e-mail to a large group of employees during

work hours, interrupting their work. This action was outside the appropriate use of the e-mail system. The e-mail was also inappropriate in relating false information about the termination of the employment relationship between [the Employer] and a management employee.

On March 22, the Union filed the charge in the instant case, alleging that the Employer's suspension of Diskin was discriminatory and violated Section 8(a)(1) and (3) of the Act, as it was in retaliation for her protected Union activity. The Region's investigation has adduced no evidence that the Employer ever inquired as to whether Diskin composed or sent her e-mail on work time; nor is there evidence indicating that Diskin made any material false statements in her e-mail. Moreover, while the Employer claims that it believed Diskin circumvented the Employer's restrictions on employees sending e-mails through its e-mail distribution groups, and that it reached this conclusion after "some investigation," it never asked Diskin how she created the e-mail address list. In addition, while the Employer claims to have legitimate concerns about the effect of mass e-mails on its computer systems, the Employer has provided no evidence to support any such concerns.

ACTION

We agree with the Region that the Employer violated Section 8(a)(1) and (3) by suspending Diskin for her pro-Union e-mail. Initially, we emphasize that the Employer has promulgated no rule prohibiting mass e-mails. Indeed, a week before Diskin was suspended, her supervisor had told her she could send out mass e-mails, as long as she was on a break. Nor has the Employer presented any evidence demonstrating that any such prohibition would be necessary to protect its computer resources.²

Moreover, the Employer's professed concerns that Diskin composed or sent her e-mail on work time, or circumvented its restrictions on employees sending e-mails through its e-mail distribution groups, are belied by the

² Cf., Express Scripts Inc., Case 28-CA-19605, Advice Memorandum dated February 24, 2005, at 4-5 (employer could lawfully preclude employees from using its e-mail system to distribute union-related emails, as the employer provided evidence demonstrating the likelihood of significant interference with its use of its computer resources).

employer's failure to even ask Diskin about these issues.³ Indeed, it appears that Diskin composed the e-mail at home, sent it on her break, and manually created the e-mail's address list rather than using the Employer's e-mail distribution group.

Finally, the Employer's claim that Diskin's e-mail was "inappropriate in relating false information about the termination of the employment relationship between [the Employer] and a management employee" is belied by the Employer's failure to provide any evidence of material false statements in the e-mail. Thus, none of the Employer's proffered reasons for the suspension are supported by the evidence.⁴

Rather, as the Region found in Case 20-CA-33085, it appears that the Employer discriminatorily disciplined Diskin in retaliation for the pro-Union content of her e-mail, along with her efforts leading the Union organizing drive.⁵ We agree with the Region that this conclusion is mandated by the Employer's knowledge of Diskin's extensive union activities, the evidence of animus established in the earlier case, and the pretextual nature of the Employer's asserted reasons for the suspension.⁶

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section

³ Although Diskin is not certain that she was on break when she sent her March 12 e-mail, she believes she was. In any case, given the Employer's failure to investigate this issue, it is clear that whether she was on break or not was not the determinative factor in her discipline.

⁴ We further note that, even if the Employer legitimately believed Diskin's e-mail to constitute "extensive personal use" of its e-mail system in violation of its "Internet and E-mail Usage" policy, that policy only provides for revoking Diskin's computer access privileges, not suspension.

⁵ The Region has not submitted for advice the issue of whether to revoke the settlement agreement in Case 20-CA-33085.

⁶ [FOIA Exemption 5

8(a)(1) and (3) when it suspended Diskin from March 13 to 20 for sending out her pro-Union e-mail.

B.J.K.