

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

Advice Memorandum

DATE: December 21, 2004

TO : Ronald M. Sharp, Regional Director
Region 18

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

SUBJECT: Examination Management Services, 506-6090-3600
Inc., d/b/a International Claims 512-5006-6767-8300
Specialists 512-5012-1737
Case 18-CA-17341 512-5012-3300
512-5012-3317
512-5012-8320-5033
524-5073-7100

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (3) by: (1) maintaining an unlawfully overbroad rule that prohibits all non-business use of its e-mail/computer network, including employees' messages otherwise protected by Section 7; and (2) discharging an employee for using the Employer's e-mail system to ask employees if they were interested in union representation.

We agree with the Region that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by discharging an employee based on the Section 7 content of his e-mail communication.
[FOIA Exemptions 2 and 5

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FACTS

Examination Management Services, Inc., d/b/a International Claims Specialists (the Employer) provides a variety of medical information services, including investigative services, to the insurance industry.¹ Its investigative division has eight branch offices, including

¹ The Employer is a nationwide organization with more than 230 branch offices and employs over 6,000 workers. The Employer's internet website is <http://www.emsinet.com>.

a Midwest regional office located in Plainfield, Illinois. The Plainfield office is designated a "surveillance only" office, and its coverage includes eight states in the Midwest.

The charging party, Jon E. Kinard, worked for the Employer as a full-time insurance claims field investigator from about March 1993 until his termination on June 14, 2004.² Since the summer of 2003, Kinard was assigned to the Plainfield "surveillance only" office and his work was almost exclusively surveillance work. As a field investigator, Kinard worked out of his home in Coon Rapids, Minnesota, even though he was assigned to the Plainfield office.³ The Employer provides field investigators with a telephone line, a fax machine, a video camera, a cell phone, and a company e-mail address. Kinard provided his own computer and internet service. He also maintains a personal e-mail address.

Only a small amount of Kinard's typical workday was spent on the computer or in his home office. Most of his time was spent in the field performing surveillance. Kinard states that Plainfield regional manager Robert Chiszar encouraged employees to use computer technology and the internet in their work. Generally, Kinard's use of the computer was limited to utilizing Mapquest, sending and returning e-mails, performing some research on the subject of his surveillance, and writing reports regarding his surveillance, which he would send to the regional office.⁴ The Employer maintains databases on its computer network that field agents can access from their home computers. Also, the Employer required Kinard to check his e-mail messages daily and submit responses to e-mail inquiries.

Around October 2003, Chiszar and Employer Vice President Tom Ceres told Kinard that he was not generating

² All dates are in 2004 unless otherwise indicated.

³ Kinard seldom had any face-to-face contact with any other field investigators, who are scattered throughout the country. Kinard states that he worked only two investigations with other field agents (each one day in length) during the 18 months prior to his discharge. The Employer provided Kinard with a roster listing employees in his region, their home phone numbers, cell phone numbers, and personal e-mail addresses.

⁴ It is unclear whether the reports, or the accompanying surveillance videos/pictures, would be transmitted to the Employer via e-mail.

enough revenue and that if something didn't change, he would be discharged. Since Kinard was not responsible for soliciting new business, he requested that more work be assigned to him. In subsequent conversations, Chiszar told Kinard that lack of work was not an excuse for low production. In May, Chiszar sent Kinard a printout stating that Kinard was required to bill around \$11,000 per month. Kinard called Chiszar several times to request that he be sent more work, but Chiszar always replied that work was slow in Minnesota and to be patient. Kinard explained that even if assigned a "full plate" of work, he would not be able to generate \$11,000 in billings for May. Chiszar simply told him to work as hard as he could. Kinard ended up billing about \$8,000 in May.

Kinard went on vacation beginning May 31. While on vacation, he received a phone call from Chiszar and Ceres. They told Kinard that he had not generated \$11,000 in billings for May, and therefore he could either take a 33% pay cut and continue to receive benefits or work part time at \$18/hour with no benefits. When Kinard returned from vacation, he chose to take the cut in pay and maintain his benefits, and he so notified Chiszar. Kinard also learned that a long-time field investigator, Fred Hoffman, had been terminated.

Kinard states that it appeared to him that the Employer was trying to get rid of its more senior, higher-paid employees. He decided to send a group e-mail to fellow investigators to see if they were interested in unionizing. On about June 7, Kinard sent an e-mail from his personal computer and personal e-mail account to about 25 employees at their personal and business e-mail addresses, asking "Can I get a yea or nay on checking out unionizing?" He transmitted the e-mail on Monday, June 7, at about 11:00 a.m. from his home on a day he was not doing any investigation. Kinard's e-mail received several positive responses. However, it appears that one of the recipients informed an Employer supervisor of the e-mail.

On June 14, Chiszar called Kinard and told him he was being discharged. When Kinard asked for an explanation, Chiszar asked Kinard whether he had sent out a "union e-mail about unionizing." Kinard confirmed that he had. Chiszar then stated that the Employer considered this to be personal use of the e-mail system and grounds for termination, consistent with the Employer's personnel manual. Chiszar further explained that the e-mail had been sent to employees using company e-mail addresses, and that employees were not permitted to use those addresses for personal business. Kinard subsequently contacted Deb Fitzpatrick, the Employer's vice president for human

resources in Dallas, Texas, who told him he had violated the "personal use" provision on page 24 of the Employer's personnel manual. She then sent Kinard a letter dated June 18, advising him that he was terminated for violating an Employer policy prohibiting employees from using Company-provided internet services to distribute "unauthorized solicitations." The personnel change form maintained in Kinard's personnel file states that Kinard was discharged for the "unauthorized use of company equipment for solicitation purposes." In addition, it states: "Jon emailed other employees asking them if they would be interested in unionizing. He sent this email to the employees' company email addresses."

The Employer maintains a personnel manual that is distributed to all of its employees and contains a section titled "Internet Use."⁵ The Internet Use rule, on pages 24-25 of the manual, governs employee use of Employer-provided internet services, including e-mail, FTP, telnet, web browsing, Usenet, or newsgroups, accessed on or from the Employer's premises, using Employer computer equipment or via Employer-paid access methods, and/or used in a manner that identifies the individual with the Employer. The Internet Use rule prohibits, inter alia, working on behalf of organizations without any professional or business affiliation with the Employer; sending, receiving, or storing offensive, obscene, or defamatory material; annoying or harassing other individuals; distributing or storing chain letters, jokes, solicitations, offers to buy or sell goods, or other material not related to the Employer's business; or sending uninvited e-mail of a personal nature. The Internet Use rule also contains a "Personal Use" provision that states: "[i]nternet services are provided by the Company for the employees' business use only. Employees are not to use internet services for personal purposes."⁶ The Internet Use provision further states that the Employer reserves the right to monitor employee internet use and that violators are subject to discipline, up to and including discharge.

There is evidence that the Employer condoned personal use of its computer network, for non-Section 7 purposes, notwithstanding the "Internet Use" policy's prohibition on

⁵ The personnel manual also contains a Section titled "Solicitation/Literature Distribution." The Region has concluded that a number of provisions in this section violate the Act.

⁶ Employer's Personnel Manual, Employee Internet Use, Paragraph 4 (Personal Use), p. 25.

personal use. Thus, Chiszar used his company e-mail account to send a birth announcement regarding employee Hudson to about 30 employees, supervisors and managers, including 6 company e-mail addresses. One of the e-mail recipients, employee Mark Flaherty, sent a follow-up "reply" e-mail, also congratulating Hudson on the birth, to the same list of personnel, including seven company e-mail addresses. Among those receiving both Chiszar's and Flaherty's e-mails was Employer vice president Tom Ceres. The Employer did not discipline Chiszar or Flaherty for that use of its computer network. In addition, Kinard has informed the Region that another birth announcement regarding supervisor Dan Ortiz was circulated over company e-mail in early summer 2004.⁷

The Employer contends that it has repeatedly enforced the "Internet Use" rule, citing three other employees who had been terminated for violating the policy. One employee was discharged in August 2003 for "Violation of Policy." The e-mail provided with his discharge sheet states that pornographic material was found on his computer, as well as non-pornographic pirated software. The other two employees were discharged in 2002, also for "Violation of Policy." The e-mail attached to their respective discharge sheets indicates that they had sent pornographic e-mails to each other using their company e-mail addresses. The Employer acknowledges that the above three individuals and Kinard are the only employees it has disciplined or discharged under its "Internet Use" rule.

The Employer states that it does not monitor its computer system, and has no other specific knowledge of employee personal use of company e-mail, although it acknowledges that some of the several hundred viruses which attacked its system during the period from July 22 through August 30⁸ had to have resulted from personal use of its e-mail system. The Employer claims that it cannot afford to investigate the sources of the hundreds of viruses it encounters per week. Thus, the Employer enforces its "Internet Use" rule only when alleged misuse is brought to its attention by an e-mail recipient.

⁷ Kinard was unable to produce a hard copy of the e-mail(s) regarding the Ortiz birth announcement. [FOIA Exemptions 2 and 5

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⁸ The Employer provided the Region with a 492-page list of e-mail viruses that have invaded its system.

ACTION

We agree with the Region that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by discharging employee Kinard based on the Section 7 content of his e-mail. However, the Region should dismiss, absent withdrawal, the allegation that the Employer's "Internet Use" rule is unlawfully overbroad.

The Board has held that an employer may not discriminatorily limit employees' use of e-mail based on Section 7 considerations.⁹ Based on this principle, we conclude that the Employer violated Section 8(a)(1) and (3) by restricting Kinard's use of e-mail, and discharging him, based on the Section 7 content of his e-mail. This discrimination is demonstrated by the fact that the Employer knows of, and thus permits, widespread non-business use of its e-mail system; that the Employer has disparately enforced its e-mail policy against Section 7 use; and that the Employer's written and oral statements indicate that Kinard was discharged because of the Section 7 content of his e-mail. Thus, despite the Employer's claimed concern about nonbusiness use of its e-mail system, it tolerates personal use of e-mail except when it finds the content objectionable.

Initially, the Employer is well aware that personal use of its e-mail system is widespread. For example, the Employer's computer system was attacked by several hundred viruses during a recent five-week period, and the Employer admits that at least some of these viruses resulted from personal use of its e-mail system.¹⁰ The Employer has defended its business-use-only e-mail policy by claiming that personal use of the system burdens its computer memory system and introduces computer viruses. Yet the Employer states it does not monitor the system because of the time

⁹ E.I. du Pont & Co., 311 NLRB 893, 919 (1993).

¹⁰ It is also common knowledge that employees use e-mail in the workplace for both work and nonwork-related purposes. Thus, according to at least one scholar, 40% of all employee e-mails are nonwork-related. See Edward Lieber, Picketing the Information Superhighway: Must Employers Bargain with a Union over their E-mail Policy?, 1998 Ann. Surv. Am. L. 517, 521 fn. 21, citing Bruce Barsook & Terry Roemer, Workplace E-mail Raises Privacy Issues, Am. City & County, Sept. 20, 1998 (report by University of Illinois law professor Matthew Finkin).

and expense such monitoring would require. In fact, the Employer does not even periodically remind employees that personal use is prohibited, despite its awareness of employee ignorance of or disregard for the rule.

In addition, the Employer has not demonstrated that it ever enforced the "no personal use" rule prior to its discipline of Kinard. The three other instances of discipline it has cited also involved violations of other aspects of the Employer's internet policy, including its rule against sending or receiving offensive or obscene material.

Moreover, the Employer has condoned specific instances of personal use of its e-mail system while disparately enforcing the policy against Kinard's Section 7 e-mail use. The April e-mails from Chiszar and Flaherty congratulating employee Hudson on the birth of his daughter (and other "birth announcement" e-mails to which Kinard will testify) violated the Employer's business-only e-mail policy, yet the Employer imposed no discipline as a result. The Employer clearly was aware of those e-mails: its Regional Manager, Chiszar, initiated the April e-mail, its Vice President, Ceres, received that e-mail and its response, and supervisor Ortiz was the subject, and presumably the recipient, of the summer birth announcement.¹¹ In a written position statement, the Employer contends that the birth announcements did not violate its business-use-only e-mail policy, because those were "human-resources type[s] of communication." However, the Board has found birth announcements, marriage announcements and the like to be non-business communications.¹² Although we do not have

¹¹ United Parcel Service, 327 NLRB 317, 317 (1998), *enfd.* 228 F.3d 772 (6th Cir. 2000) (employer unlawfully restricted employee's distribution of dissident union literature in area where it routinely permitted distribution of other nonwork materials; employer's knowledge of those other nonwork distributions was reasonably inferred from evidence that such nonwork distributions were open and routine and that supervisors routinely mingled with employees when they occurred). See also Big Three Industrial Gas & Equipment Co., 230 NLRB 392, 392 (1977), *enfd.* 579 F.2d 304 (5th Cir. 1978), *cert. denied* 440 U.S. 960 (1979) (unlawful for plant superintendent to suspend union authorization card signers who violated company rule, but not third employee violator who had not signed card, even though superintendent unaware that third employee had violated rule; supervisor's knowledge sufficient).

¹² See Fleming Cos., 336 NLRB 192, 193-194 (2001), *enf. denied in part* 349 F.3d 968 (7th Cir. 2003) (unlawful to

evidence of a large number of personal e-mails specifically condoned by the Employer, the Employer's disparate treatment of Kinard's e-mail vis-à-vis the birth announcements indicates that the Employer discriminatorily enforces its e-mail policy based on content.¹³ And, the fact that the Employer's position statement attempts to make a content-based distinction between Kinard's Section 7 e-mail and other non-business (i.e. birth announcement) e-mails further bolsters this conclusion. Moreover, the Employer's three other discharges under its Internet Use policy were also based on e-mail content, rather than on the fact that they involved personal usage of the computer system.

The circumstances surrounding Kinard's discharge also support the conclusion that the discharge was content-based. Thus, Kinard's discharge sheet specifically states that he had sought out other employees' interest in "unionizing." Indeed, when Chiszar first informed Kinard he was being discharged, he asked Kinard to confirm whether he had transmitted a "union e-mail about unionizing." Finally, Fitzpatrick's letter to Kinard stated that he was discharged for violating an e-mail policy prohibiting "unauthorized" solicitations, rather than mere non-business use of the e-mail system.

prohibit posting union literature on employee bulletin board while allowing wide range of other personal postings, including wedding announcements, birthday cards, "thank you" cards, and birth announcements); K-Mart Corp., 255 NLRB 922, 925-26 (1981), enfd. mem. 676 F.2d 710 (9th Cir. 1982) (assuming business-only bulletin board rule actually existed as employer claimed, employer's removal of union paraphernalia from bulletin board, while not always removing items of a personal nature such as wedding announcements, postcards, sale notices, births, letters, and illnesses, violated 8(a)(1)). See also St. Joseph's Hospital, 337 NLRB 94, 94-95 (2001) (unlawful to prohibit employee from displaying a union-related screen saver on her computer while routinely allowing employees to display a wide variety of personal, nonwork-related screen saver messages, including "Go Buccaneers," "Go FSU," "Be Positive," and "Have a Nice Day").

¹³ [FOIA Exemptions 2 and 5

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¹⁷ [FOIA Exemptions 2 and 5

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[*FOIA Exemptions 2 and 5*, continued

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¹⁸ [*FOIA Exemptions 2 and 5*

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