PERSPECTIVES

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A periodic newsletter from the Labor & Employment Practice Group of Dickinson Mackaman Tyler & Hagen, P.C.

Labor Law Guidelines on Employer E-Mail Policies

by RUSSELL L. SAMSON

The National Labor Relations Act applies to private sector employers in this country regardless of whether or not they are "unionized." All employees of private sector employers have the rights protected under "Section 7" – 29 U.S.C. Section 157 – including the right to engage in organizational activities, or other concerted activities for mutual aid or protection. While an employer has general rights to regulate its workforce, some actions or rules are "per se violations" of the National Labor Relations Act. For example, a requirement that employees keep their pay rates "confidential" and not reveal or discuss them with other employees.

In 1945, the United States Supreme Court, in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), affirmed an NLRB decision that an employer violated the National Labor Relations Act by maintaining a rule which prohibited "solicitation anywhere on company property." The case arose when an individual employee, during a lunch break, was "soliciting" other employees (who also were on a lunch break) to join a union. In labor parlance, times when an employee is expected to be actively engaged in productive work is "working time." Other times – like breaks – are considered "nonworking" time, even if an employer is paying the employee (during a coffee break for example). Employers violate the National Labor Relations Act by prohibiting "solicitation" during nonworking time. Absent "special circumstances" (which an employer must provide) which might justify such a rule, promulgating and maintaining such a rule is a violation of the National Labor Relations Act – regardless of whether any individual was actually disciplined for violating the rule.

The bulk of "Section 7" cases arise in the context of union organizing. It is no secret that unions have been increasingly focusing on adding members, i.e., "organizing," in recent years. Unions are increasingly relying on web sites, electronic bulletin boards, and e-mail to disseminate their messages and solicit new members. Some unions have "authorization cards" available on their web sites. While technology continues to move forward at a rapid pace, until its December 16, 2007 decision in *The Guard Publishing Co.*, 315 NLRB No. 70, the NLRB had not addressed questions about what standards should apply with regard to electronic workplace conduct.

In 1996, The Guard Publishing Company — a unionized business which publishes a daily newspaper in Eugene, Oregon — implemented a "Communications Systems Policy" or "CSP." The policy governed employees' use of the company's communications systems. The policy stated, in relevant part:

> Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

The company's employees used e-mail regularly for work-related matters, but the company was aware that its employees used the e-mail system to send and receive personal messages, too. Those messages included such things as baby announcements, party invitations, etc. At the hearing, there was no evidence that the employees "used e-mail to solicit support for or participation in any outside cause or organization," other than the United Way,

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for which the company conducted an annual charitable campaign.

In 2000 when the company and its union were engaged in some heated contract negotiations, the union president (an employee) used the company's e-mail system to send a message to about 50 co-workers at their work e-mail addresses about a union rally. That individual, on a separate occasion, sent an e-mail to co-workers from the union office, encouraging them to "wear green" in support of union contract demands. On a third occasion, the same individual sent e-mails to co-workers urging them to participate in the union's entry in a local city celebratory parade. The employee was issued two written warnings – one for the first e-mail sent from her desk, and the second for the last two e-mails.

An unfair labor practice complaint was filed. It alleged that the company violated the National Labor Relations Act by maintaining a communications policy which included an "overly broad no-solicitation rule." It also alleged that the company violated the National Labor Relations Act by enforcing its communication policy in a discriminatory manner. In February 2002 (some three months after the hearing was held) an administrative law judge issued a decision and both parties appealed to the NLRB. The Board's decision was issued on December 16, 2007 – almost five years later. The Board split three to two. The majority opinion was issued by the "Republican majority." The minority opinion was issued by the "Democrats." While members of the NLRB are appointed for a five-year term, there are currently three vacancies on the NLRB.

In the opinion of the majority, the rule at issue was not a "no solicitation" rule subject to the *Republic Aviation* standard. Rather, it was a rule dealing with the regulation of the company's property. Federal labor law has long recognized that an employer has a "basic property right" to "regulate and restrict employee use of company property." The communications system, in the mind of the Board majority in *Guard Publishing*, is a piece of property. While acknowledging that employee rights to use employer e-mail systems for Section 7 activity had not been confronted before, the *Guard Publishing* majority noted that many cases have dealt with bulletin boards, telephones, copy machines, and televisions/video players. The *Register Guard* majority stated that "the Board has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory."

The two dissenters took a different approach to *Republic Aviation* and to the nature of e-mail systems generally. "In 2007, one cannot reasonably contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper. National labor policy must be responsive to the enormous technological changes that are taking place in our society. Where, as here, an employer has given employees access to e-mail for regular, routine use in their work, we would find that banning all nonwork-related 'solicitations' is presumptively unlawful absent special circumstances."

Regardless of whether the policy on e-mail usage regulated "speech" like the rule in *Republic Aviation,* or regulated the use of company property, there was no question that even though the policy prohibited all non-job related solicitations, the company had tolerated at least certain private "solicitations" over time in the past. Under traditional NLRB law, disciplining someone for "union" activity where no discipline had been imposed on anyone else in the past would have established a violation of the law. The *Guard Publishing* majority overruled prior NLRB precedent with regard to what had to be proven to establish unlawful "discrimination." In its place the Board majority determined that to be unlawful, "discrimination means the unequal treatment of equals." This appears to be somewhat akin to the general standard in civil rights litigation that for an inference of illegal discrimination to be drawn, the complainant and the proposed comparator must be "similarly situated." In *Guard Publishing*, the NLRB majority noted that – with the exception of limited communications dealing with a United Way campaign — all of the e-mail messages that the company "tolerated" dealt with "personal" items. There was, said the majority, no evidence that the company "permitted employees to use e-mail to solicit other employees to support any group or organization." Thus, where the written warnings were issued with regard to messages sent to solicit co-employees to support "the union," there was no discriminatory enforcement of a rule. The dissenting opinion argued that the focus of the majority on "discrimination" was misplaced: Section 8(a) (1) of the National Labor Relations Act prohibits an employer from "interfering with, restraining or coercing employees" in the exercise of rights guaranteed them under the law. That is, the NLRA does not merely give employees the right to be free from discrimination based on their activity; it gives them the right to engage in the concerted activity for mutual aid or protection.

When the *Guard Publishing* decision was issued, it was touted for the changes that were announced, but when viewed in context one wonders what it really portends. By the end of the calendar month in which the *Guard Publishing* decision was announced, two of the three individuals who formed the majority were no longer on the Board.

It is reasonable to conclude that if there is a change in the political party which controls the White House, there may be significant changes in the precedential value of the decision. Traditionally, there have been two Democrats and two Republicans on the NLRB,

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with the Chair – the fifth member – being of the President's party. In addition to the five-person Board, the President also appoints (with the advice and consent of the Senate) the General Counsel. It is the Office of General Counsel which is responsible for the investigation and prosecution of unfair labor practice charges.

And while this case was awaiting decision – recall that the e-mails that began the process were sent in 2000 – technology has moved forward. Today, "technology" includes text-messaging on what may be privately-owned equipment. One is reminded of the statement of the United States Circuit Court of Appeals for the District of Columbia Circuit, in *Epilepsy Foundation of Northeast Ohio v. NLRB,* 268 F.3d 1095 (D.C. Cir. 2001): "It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing composition of the Board."

Regardless of the ultimate outcome of this ongoing debate on what e-mail is or is not, employers are reminded to consistently enforce whatever e-mail policy it may have. While monitoring e-mail is not always an easy task, a lack of enforcement of a communication policy runs the risk of a challenge. And before disciplining an employee for a violation of the policy, an employer needs to confirm that the communication does, in fact, run afoul of the announced standards: Recall that in this case, one of the e-mails (although it was union-related) was deemed to be "informational" and not a "solicitation."

Pre-Employment Testing

by EMILY S. PONTIUS

On December 3, 2007, the EEOC issued a fact sheet (available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html) providing information about federal anti-discrimination laws that may affect employer usage of employment tests. The EEOC specifically mentioned the following types of tests often used by employers for hiring and promotion:

- Cognitive tests that assess reasoning, memory, perceptual speed and accuracy, math and reading skills, or knowledge of a particular function or job;
- Physical ability tests to assess whether a prospective employee has the necessary strength, stamina, or physical skill to perform a particular job;
- Personality tests and integrity tests to measure desirable or undesirable traits such as dependability, and to predict likelihood of some types of conduct;
- Medical inquiries, physical examinations, and psychological tests to assess physical and mental health;
- Credit checks for information on credit and financial history;
- Criminal background checks; and
- English proficiency tests.

Such tests may violate federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age. Absent intentional discrimination by the employer, the law may be violated when

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employment tests disproportionately exclude members of a protected class. To avoid discrimination in testing, employers need to be vigilant in designing, implementing, and evaluating employee testing programs.

Design or Choice of Test

Employment tests must be appropriate for the positions and purposes for which they are used. A 2006 case from the Eighth Circuit Court of Appeals illustrates the importance of using the right test for the job. In *EEOC v. Dial Corporation*, 469 F.3d 735 (2006), the court decided that the physical strength test used by Dial was much more strenuous than the job for which it was screening applicants. The job required employees to lift 35-pound packages of sausage, carry the packages, and then lift the packages to a height between thirty and sixty inches from the floor. The screening test required applicants to perform a similar activity, but at a greater rate of speed. The actual job required only about 1.25 lifts per minute, but during the screening test, applicants were told to perform the task constantly for seven minutes, so they performed approximately six lifts per minute. As a result of the discrepancy between the test and the job, the percentage of women hired dropped from about 50% to 15%.

If a test requires an applicant to be stronger, faster, or more skilled than is required for the job, and disproportionately affects a protected class, the test is not appropriate and may be discriminatory. Aside from strength tests, carefully consider the appropriateness of reading, math, and English proficiency tests. If the test screens out a protected group disproportionately, and the job does not require employees to perform these skills at the same level required by the test, the test is discriminatory.

Administration of Test

After choosing or designing an appropriate instrument to screen applicants, take equal care to instruct existing employees on how to administer and score the test. Administrators of the test should understand the limitations of the test, and know how to recognize when accommodations are necessary. The test must be administered without regard to race, color, national origin, sex, religion, and age. The Americans with Disabilities Act (ADA) makes it illegal to screen out applicants with disabilities unless the test, as used by the employer, is shown to be job-related and consistent with business necessity.

In *EEOC v. Daimler Chrysler Corporation*, a case settled by the EEOC, applicants with learning disabilities complained that the pre-employment test for an hourly unskilled manufacturing job required them to read at a high level just to take the test. As part of the settlement agreement, Daimler Chrysler agreed to provide accommodation, consisting of a reader for all instructions and all written parts of the test, or an audiotape providing the same information, for learning disabled applicants. An individual with a disability may be fully qualified to perform the job, but be unable to take the pre-employment test. Alert employees who administer tests to be aware of this possibility.

Evaluation of Test

Even when a test is carefully chosen and administered, it must be subject to ongoing evaluation. Carefully keep track of the numbers. Who is being screened out by this test, and are protected groups being screened out disproportionately? It is also important to keep current with changes in the workplace. If the duties of a job change, the employment test must change with it in order to remain relevant and valid.

EMPLOYER ALERTS

The Employment and Labor Law group at Dickinson, Mackaman, Tyler & Hagen, P.C. has begun to provide "Employer Alerts" via email to clients. These alerts contain breaking news or other timely information of importance to employers.

If you would like to receive these Employer Alerts, please send an email to eworth@dickinsonlaw.com.

FMLA Only Protects Absences Once the Employee Is Actually Receiving Substance Abuse Treatment

by HELEN C. ADAMS

Krzysztof Chalimoniuk worked for Interstate Brands Corporation ("IBC"), a manufacturer of baked goods, for 15 years before he was terminated for excessive absenteeism. The facts leading up to his termination paint a sympathetic picture, but the termination decision was still upheld.

Chalimoniuk had fought his alcoholism for years. On Friday, July 28, Chalimoniuk stopped after work and bought a large quantity of alcohol. Over the weekend, he drank enough alcohol to lose his memory for 2 to 3 days. Chalimoniuk was scheduled to work on Monday, July 31, Wednesday, August 2, and Thursday, August 3, but he did not report to work on those days. On Saturday, July 29, Chalimoniuk's wife realized that her husband was on a binge and she called the hospital to see if she could arrange treatment for her husband. On August 1, Chalimoniuk called his doctor's office but it was closed. He called the doctor's office again on August 2 but was referred back to the hospital for inpatient treatment. Chalimoniuk called the hospital and his insurance company on August 2 to arrange his admission to the hospital. Because of a delay in insurance approval for the admission, Chalimoniuk was not admitted to the hospital's treatment program until August 4, where he remained until his release on August 10.

At some point during his absence, Chalimoniuk requested FMLA forms from IBC. On August 11, Chalimoniuk delivered the completed medical certificate to the human resources department. The treating doctor indicated that Chalimoniuk suffered from a serious health condition, which involved "Absence Plus Treatment," and that Chalimoniuk was incapacitated from July 29 to August 11.

Chalimoniuk's absences on July 31, August 2, and August 3 put him over the allowable limit under IBC's attendance policy, unless those absences were deemed covered under the FMLA. Because Chalimoniuk did not start his substance abuse treatment until August 4, IBC did not count those three days as qualifying FMLA absences and terminated his employment under the company's attendance policy.

In making the termination decision, IBC relied on the Department of Labor's FMLA regulations. 29 C.F.R. 825.114(d) states that:

> Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

Chalimoniuk sued IBC, alleging that his termination violated the FMLA. In an attempt to establish that Chalimoniuk received treatment on the 3 days at issue prior to his hospital admission, Chalimoniuk's doctor testified that: "treatment for alcoholism begins when the patient takes the first step towards seeking professional help." According to the doctor, this includes the first phone call to the health care provider seeking evaluation, treatment or referral.

Unfortunately for Chalimoniuk, the court did not agree that he began his substance abuse treatment before his admission to the hospital. Rather, the court agreed with IBC and held that the termination decision did not violate the FMLA.

Employer Notes: This case highlights the importance of carefully reviewing the applicable FMLA regulations before making a final decision as to whether to count absences as FMLA qualifying or not. In this case, the actual language of the regulation dealing with substance abuse treatment convinced the court to side with the employer. On the other hand, if the court had allowed the case to be heard by a jury, Chalimoniuk's termination may have seemed harsh and unfair given that he was trying to obtain treatment and was delayed in starting the treatment program due to a snafu in the insurance company's pre-approval of the treatment. This case provides an example of the types of difficult situations employers may face when dealing with employees with attendance problems and the FMLA.