

***TIMEKEEPING SYSTEMS, INC.: PROTECTING
EMPLOYEE EXPRESSION BY E-MAIL UNDER
SECTIONS 7 AND 8 OF THE NATIONAL
LABOR RELATIONS ACT***

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ABSTRACT

The protection employees have when they use their employer's electronic mail system has been studied repeatedly in this and many other academic and professional journals. Most of the studies have agreed with a concept put forth in a previous issue of this journal: "While the law is not fully settled, rarely have employee e-mail communications been accorded protection under concepts of privacy" [1, p. 27]. Employees, however, have been discharged over their use of e-mail in the workplace, and this article explores the use of sections 7 and 8 of the National Labor Relations Act as a weapon to protect against such discharges.

Traditionally sections 7 and 8 of the National Labor Relations Act are thought to be sections of federal law that protect worker's rights to form, join, or assist labor organizations and provide weapons for unions to fight unfair labor practices. Indeed, much of the language of the law and cases decided under it involve union activities. Section 7 of the act sets forth the general principle that employers may not interfere with the employees' right to form, join, or assist organizations that would bargain for them collectively, and section 8 (A) (1) creates a set of employer unfair labor practices. However, language in section 7 also covers employees who are not members of a union, particularly the language that protects those employees' right to "engage in concerted activities . . . for the purpose of mutual aid or protection."

The grapevine of the modern workplace is the company's electronic mail (e-mail) system, which many employees have used to express their strong views about workplace issues and personalities. The courts have routinely rejected privacy claims brought by e-mail users who were fired for their comments, but recent case law suggests that sections 7 and 8 of the NLRA may afford an opportunity for an employee to protest a discharge case successfully based on the notion of "mutual aid or protection." This protection appears to require, however, that the e-mail deals with terms and conditions of employment. This protection does not extend to other topics of communication.

E-MAIL AS A PROTECTED EMPLOYEE RIGHT

Is the use of e-mail by one employee to contact fellow employees concerning issues related to wages and hours "concerted activity" under section 7 of the National Labor Relations Act? An NLRB administrative law judge ruled that it was in a 1997 National Labor Relations Board decision (hereafter NLRB or Board) [2]. The case involved Lawrence Leinweber, a software engineer who was fired from his job at Timekeeping Systems, Inc., by the company's chief operating officer, Barry Markwitz [2].

The dispute began on December 1, 1995, when Markwitz sent an e-mail message to all company employees discussing his plans for an incentive bonus system and for change in the company's vacation policy. Employees were required to respond to the incentive plan concept and requested to respond to the vacation policy changes. The vacation policy gave rise to the NLRB case [2].

While Markwitz stated in his e-mail that the proposed change in policy would give employees more days off, Leinweber's response to him demonstrated that the number of days off would not change and there would be less flexibility in their use [2, at 246]. Within the week, another employee sent an e-mail to Markwitz heartily endorsing the vacation plan, sending a copy to all of the company's engineers, including Leinweber. Leinweber responded to that employee, telling him that the proposed policy did not "redound to the interest of the employees" [2, at 246]. And on the same day, Leinweber sent a long e-mail to all employees that criticized Markwitz's vacation proposal in language that was later described by the board as flippant and grating [2, at 246].

Because Markwitz was angry at Leinweber's e-mail to employees, he sent a memo to Leinweber stating that he was "saddened and disappointed" by Leinweber's e-mail and that he believed it was "inappropriate and intentionally provocative" and "beneath someone as talented and intelligent as you are" [2, at 246]. More ominously, Markwitz cited a provision of the employment manual that said: "Certain actions or types of behavior may result in immediate dismissal. These include, but are not limited to: failure to treat others with dignity and respect" [2, at 246].

Markwitz ordered Leinweber to write him by 5 p.m. that day telling him why the e-mail message was inappropriate, how Leinweber's e-mail had hurt the company, and how the matter should have been handled. He told Leinweber further that if he did not comply, and if his response was not acceptable to Markwitz, Leinweber would be terminated. The two men met and agreed to extend the deadline to the next day. Leinweber testified that he stayed up late trying to compose a letter but could not come up with anything that satisfied him. When he met with Markwitz the next day, Leinweber stated that he could not write anything incriminating because it could be used against him later. Markwitz bade him farewell and fired him later that day. In the formal termination letter written a few days later, the reasons given for the discharge were failure to treat others with courtesy and respect and failure to follow instruction or to perform assigned work [2, at 247].

Markwitz e-mailed all employees on the day he fired Leinweber. While he made no mention of the latter's dismissal, he did caution against using sarcasm or disrespect, wrote about the inefficiency of long or provocative e-mail messages, and told them that the "right way" to handle a grievance was to discuss it with a team leader or himself. Markwitz admitted in his e-mail that he had made a mistake in his explanation of the new vacation policy, and he told the employees that they should notify him if they changed their minds and that he welcomed dissent as long as it was courteous [2, at 247].

PROTECTED CONCERTED ACTIVITY

Leinweber took his case to the NLRB. There was very little dispute about the facts outlined above, although Markwitz claimed that his objection was to the "tone" of Leinweber's e-mail rather than to its substance. He testified that he had no objection to simple e-mails and personal telephone calls being made by employees because a certain amount of time during the workday is not related to strictly "work activities."

The administrative law judge (hereafter ALJ) concluded that Leinweber's e-mails constituted "concerted activity as that term has been defined by case law" [2, at 247]. Leinweber's effort to incite the other employees to help him preserve a vacation policy that he believed best served his purposes and perhaps the interests of other employees "unquestionably qualified his communication as being in pursuit of mutual aid or protection" [2, at 248]. The board agreed.

The board argued that as early as 1964, the federal courts had agreed that "mere talk" was protected under section 7 but *only* when it was looking toward group action [2, at 247, citing 3]. The "objective of inducing group action need not be express" [3]. For instance, higher wages are often a matter of discussion at work. But higher wages are at the same time a frequent objective of organizational activity, and because of this, discussions of this nature are protected under the act. In the case at hand, Leinweber was trying to correct his fellow employees' false impression about Markwitz's vacation plan and rally his fellow workers to oppose

the proposal. Because Leinweber was attempting to rally his fellow workers against a policy change that he believed was in his best interests as well as perhaps theirs, his e-mail was “in pursuit of mutual aid or protection” [2, at 248], and was protected. The ALJ also noted that one employee responded to Leinweber. This response surely turned Leinweber’s e-mail into concerted activity, but it is not necessary to receive a response to establish a sender’s e-mail as protected concerted activity [2, at 248].

The ALJ also reported that Markwitz found the sarcastic tone of Leinweber’s e-mail objectionable, but the ALJ also believed that Markwitz was offended by the fact that Leinweber was rallying the other employees to his point of view. The law of protected concerted activity requires that the employer is aware that the conduct of being disciplined is concerted. The ALJ had no trouble finding that Markwitz’s decision to fire Leinweber was as much motivated by his recruitment of fellow workers as it was by the e-mail’s sardonic tone [2].

Leinweber’s e-mail was protected despite its “flippant and grating” tone. Language can be so intolerable that it loses its section 7 protection. The rule is that communications occurring during the course of otherwise protected activity are protected unless these communications are “found to be so violent or of such serious character as to render the employee unfit for further service” [4]. Compared to the epithets employed by other employees, Leinweber’s protestations were quite mild. And, as the ALJ noted, Markwitz was willing to retain Leinweber if the latter submitted an apology [2, at 248, citing 5, 6, 7].

The company also argued that Leinweber took over the e-mail system. This charge was dismissed because Markwitz did not make an issue of it in his e-mail message to the employees, nor did he cite it as a problem in Leinweber’s termination letter. Markwitz also conceded at the NLRB hearing that employees were permitted to send e-mails to each other, to make personal telephone calls, and to spend some time on nonwork matters [2, at 249]. Leinweber’s message could not be characterized as overly burdensome to the company e-mail system, nor was it a public insult to the company.

ANALYSIS

The key aspect of the Leinweber case is the ALJ’s reliance on the *Wright Line* analysis, which relies on employer motivation in determining section 8 violations [8]. Under this form of analysis, the board has to show that the employer’s decision to terminate was caused “*by the protected concerted activity* and not some unrelated reason” (italics supplied) [2, at 149]. Once that is shown, the case is essentially over. The ALJ was convinced in *Timekeeping Systems* that there was no evidence that Leinweber would have been discharged “in the absence of the protected conduct” [2, at 149]. Markwitz had made this clear in many ways. He had expressed his willingness to keep Leinweber on if he apologized; he had urged

him to write the apology because he did not want to fire him; and he had, in an e-mail, described him as “talented and intelligent” [2, at 250].

Unlike many other cases brought against employers regarding e-mail, Leinweber made no allegation of invasion of privacy. There was nothing surreptitious about Leinweber’s communication. In fact, he had responded to Markwitz’s invitation to comment on the vacation policy. Was Leinweber’s e-mail offensive? The administrative law judge found that it was “flippant,” but it fell far below the egregious levels of other communications that had been found protected under section 7.

SUMMARY: SECTION 7 AND E-MAIL

Section 7 of the National Labor Relations Act provides a limited but very real form of protection to employees who are disciplined because of their use of the employer’s e-mail system. Section 7 is not restricted to union organizing activities that occur in the workplace. This section of the NLRA gives employees the right to organize and to act together for other mutual aid or protection. These provisions of section 7 are separate from the rights to join or assist any union and to bargain collectively [2, at 248]. Therefore, employees who are not pursuing union membership or who are members of a union are still covered by section 7.

The NLRA protects the right of all workers to communicate freely with one another about the terms and conditions of employment including compensation, vacations, and job security. With regard to these communications, including e-mail, the NLRB is willing to tolerate a certain amount of disrespect, flippancy, or even name calling or vulgarity. The NLRB, however, will not offer section 7 protection in cases “when the concerted behavior has been truly insubordinate or disruptive of the work process” [9]. Thus, unless the statement is disruptive to the workplace, it is protected, and the NLRB has allowed employees wide latitude in the language used to communicate about such topics as management practices or working conditions.

The law of “protected concerted activity” requires that the general counsel prove that the employer *knows* that the employee’s conduct is concerted. If the employee is using e-mail to contact other employees about changes in vacation policy, compensation, or other work-related issues, this communication is in pursuit of “mutual aid or protection,” and is, therefore, protected.

REFERENCES

1. B. L. Scott, Employee E-Mail: A Protected Right to Privacy, *Journal of Individual Employment Rights*, 9:1, pp. 27-38, 2000-2001.
2. *Timekeeping Systems, Inc.*, 343 NLRB 244 (1997).
3. *Mushroom Transportation Co. v. NLRB*, 300 F 2d 683 (3d Cir. 1964).

4. *Dreis Krump Mfg. Co. v. NLRB*, 544 F 2d 320, 329 (7th Cir. 1976); *Caterpillar Inc.*, 321 NLRB 1178 (1996)
5. *Postal Service*, 241 NLRB 389 (1979) (Letter characterized supervisors as “a–holes.”).
6. *Harris Corp.*, 269 NLRB 733 (1984) (Letter described management as “hypocritical despotic and tyrannical found not to disqualify employees from section 7 protection despite a boorish, ill-bred and hostile tone.”).
7. *Growth Truck and Trailer* 281 NLRB 1194, 1195 (1986) (statement to fellow employees called CEO a cheap s.o.b.). All of these statements were considered to be protected activity.
8. *Wright Line*, 252 NLRB 1083 (1980), enforced 662 F 2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).
9. M. J. McCarthy, “Your Manager’s Policy on Employees: E-Mail May Hit a Weak Spot,” *Wall Street Journal*, Apr. 25, 2000, pp. A1 and A10.

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