UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE GUARD PUBLISHING COMPANY
d/b/a THE REGISTER GUARD,
Respondent,

and

Cases 36-CA-8743-1
36-CA-8789-1
36-8842-1
36-8849-1

EUGENE NEWSPAPER GUILD
CWA LOCAL 37194,
Charging Party.

BRIEF *AMICUS CURIAE* OF THE NATIONAL WORKRIGHTS INSTITUTE, IN SUPPORT OF THE CHARGING PARTY

The National Workrights Institute respectfully submits this brief *amicus curiae* in the above-captioned cases dealing with the legality of rules that restrict employees' use of company-proved electronic mail ("e-mail") systems. The brief argues that the restrictions imposed by the employers in these cases violate section 7 of the National Labor Relations Act. It also argues that the restrictions imposed by these employers are typical of those imposed by most employers in the United States today, and that permitting such restrictions would adversely affect the rights of employees nationwide.

STATEMENT OF INTEREST

The National Workrights Institute is a not-for-profit organization that conducts research and advocacy on issues of human rights in the workplace. The Institute's

mission is to develop models that extend protection for human rights into the workplace in a manner that is consistent with the legitimate needs of management and the demands of a market economy. The Institute's founder, Lewis Maltby, is a former corporate general counsel and operating officer. In this capacity, Maltby was a leader in developing corporate policies that were both effective and respectful of employee rights. The Institute was founded to extend that vision and advocacy onto the national stage.

The Institute is nationally recognized for its expertise in workplace human rights. Congress has called upon the Institute for advice and testimony on numerous occasions regarding employer policies about e-mail and other electronic communications tools, arbitration of statutory employment disputes, drug testing, and the right to organize. State legislators, employers, labor unions, academics, the media, and individual members of the public have also called upon the Institute for information and guidance.

E-mail is rapidly becoming the predominant method of communication in the United States, including workplace communication. Employer restrictions on the use of e-mail have profound implications for the rights of employees, especially their rights under the National Labor Relations Act. Because the right to freedom of association, including the right to organize, is one of the Institute's core principles, the Institute has deep interest in the decision in these cases.

STATEMENT OF THE CASE

The relevant facts have been summarized by the briefs of the parties and are not reiterated in this brief. We note, however, that the evidence clearly supports the decision of the administrative law judge that the employer in this case permitted employees to use the company e-mail system for a wide variety of personal purposes, and used the system itself for non-business purposes, while prohibiting employees from using the system to discuss union matters.

ARGUMENT

E-mail is rapidly becoming the dominant method of business communication. More than 50 million Americans use e-mail at work, and the number is increasing rapidly. In one year alone (2001) the number of employees using e-mail nearly doubled.[1] An estimated 25 billion business-related e-mails are sent every day.[2] A 2003 study by the Bentley School for Business Ethics found that 100% of the companies surveyed had e-mail systems.[3]

Employers have responded to the growth of e-mail by issuing corporate policies governing the use of e-mail by employees. By 2005, 84% of employers had established a policy regarding employee use of company e-mail systems.[4]

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[1] *Survey of Companies' E-mail and Internet Monitoring*, Center for Business Ethics, Bentley University, 2003, published in *Business and Society Review* 108:3 285-307 and at www.bentley.edu/cbe

[2] International Data Corporation, quoted in Shaw and Sussman, *Can We Control Blogging, Instant Messaging, and Other Employee Communication Inside the Workplace and Beyond*, report to the American Bar Association Committee on Employee Rights & Responsibilities, 2001

[3] Ibid, at p. 291

[4] *Electronic Monitoring and Surveillance Study*, American Management Association and E-Policy Institute, 2005, published at www.amanet.org and www.epolicyinstitute.com.

Initially, most employers adopted policies stating that e-mail was exclusively for business use and that personal e-mail was not allowed. Employers quickly learned, however, that such policies are impractical. Today, virtually all employers allow employees to send and receive personal e-mail. According to a survey conducted by the Center for Business Ethics at Bentley University, 92% of employers officially allow personal use of company e-mail.[5]

Employers, however, do not allow unrestricted use of e-mail for personal purposes. According to the Bentley Center for Business Ethics, 92% of employers allow only "reasonable" personal use.[6]

This restriction is not merely theoretical; it is enforced. Employees found to be using e-mail in "unreasonable" ways are subject to discipline. The American Management Association found that the majority of employers (56%) have disciplined employees because of their e-mail.[7] Often, the discipline was termination; 25% of employers reported having fired employees for e-mail misuse.[8] A study by Forrester Research found that 32% of employers had fired employees for e-mail use in a single year.[9]

The limits on "reasonable use" are not only quantitative in nature, they also relate to subject matter. For example, 44% of the companies participating in the Bentley Survey engage in keyword monitoring, in which monitoring software reviews every e-mail

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[5] Bentley, supra note 1 at p. 293
[6] Ibid, at p. 293
[7] American Management Association, supra. note 2 at p. 10.
[8] Ibid, at p. 10
[9] Kristina Dell and Lisa Kullen, *Snooping Bosses*, Time Magazine, September 3, 2006

message and identifies the messages that contain specified words or phrases.[10] This is most common form of monitoring.[11] The most common keywords involve sexual or scatological language.[12] Employers use such software to identify e-mail that contains sexual harassment.

But not everyone who is disciplined because of their e-mail is a sexual harasser. An AT&T employee was disciplined for sending a love note to his wife.[13] An air force machinist was placed under legal investigation for forwarding an e-mail lampooning the President.[14] Michael Smyth was fired by the Pillsbury Baking Company for sending a fellow employee a scathing message about his boss from his home computer (over the company e-mail).[15] Heidi Arace and Norma Yetsko, employees of PNC Bank, were fired for forwarding jokes they received on company e-mail to other employees.[16]

Even e-mail that does not use potentially inappropriate language is subject to monitoring and discipline. According to the Society for Human Resources Management (the leading national professional association for human resource managers), 30% of employers randomly review employee e-mail.[17]

What makes matters worse is that most employees don't know what the company considers reasonable use. "Reasonable" is one of the most vague words in the English

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[10] Bentley, supra note 1 at p. 295
[11] Ibid, at 296
[12] Ibid, at 295
[13] *Privacy Under Siege*, National Workrights Institute, 2004, at p. 10, published at www.workrights.org
[14] Ibid, p. 11
[15] Ibid, at p. 12
[16] Ibid, at p. 12
[17] Society for Human Resource Management, Alexandria, Va. 1996

language. It is completely subjective. What one person thinks is reasonable is frequently considered unreasonable by others. Many people, for example, think sending jokes by e-mail while working is perfectly reasonable (as long as the jokes aren't x-rated and the employee isn't spending too much time). The management at PNC Bank, however, considered it unreasonable and fired Arace and Yetsko.

In order to comply with company policy, employees need to know what types of messages the employer considers reasonable. Most companies, however, do not give employees this information. The majority of companies (58%) provide employees no definition of "reasonable use".[18] Employees in these companies are left completely in the dark about what is permitted in company e-mail and what will get them fired.

Some companies inform employees that certain subjects are considered reasonable. These subjects include messages to family (86%), 401(k) dealings (77%), and job searches (25%).[19] While this information is useful, it still leaves employees largely in the dark. Telling employees they can talk about these subjects provides no information about the company's policy regarding jokes, politics, messages to friends, social events, and a host of other subjects people commonly discuss using e-mail. There is even ambiguity regarding the topics employers do mention. Do the 14% of employers who do not say that e-mail to family members is permitted believe it is unreasonable and grounds for discipline? Do the 23% of employers who don't explicitly authority e-mail about 401(k) plans consider such messages to violate their policy? Employees have no way to know.

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[18] Bentley, supra note 1 at p. 293
[19] Ibid, at p. 294

Some times, even when employer policy permits certain subjects to be discussed on e-mail, employees are disciplined for messages on this subject. Even though e-mail to family is almost universally allowed[20], AT&T fired an employee for sending an e-mail to his wife.

What examples like AT&T reveal is that most companies do not have a genuine e-mail policy that informs employees what is and is not permitted. Instead, they issue a policy allowing "reasonable" personal use and then decide what is reasonable on an ad hoc basis and apply the decision retroactively. In essence, companies tell employees, "We can't tell you what the rules are in advance. Go ahead and send e-mail you think is reasonable. We will tell you after the fact if you were wrong and fire you." Employees must constantly guess what rules the employer will make up, knowing they may be fired if they guess wrong.

In such an environment, the only safe course for an employee is to avoid sending e-mail about anything that might be controversial or irritate their boss. This includes any discussion of unions. Most employers make no secret of their antipathy toward unions. Employees who attempt to organize are frequently harassed and even fired. The National Labor Relations Board received 23,080 complaints in 2006 about employers retaliating

[20] It is highly probably that the 14% of employers who do not explicitly allow e-mail to family do not consider such e-mail a violation of policy.

against employees who tried to organize. The Board found 8,500 of these complaints to be valid.[21]

With the rules concerning e-mail totally vague, or even non-existent, and knowing employers feelings about unions, any employee who sends a union related e-mail is risking their job, and they know it. The vagueness of the rules combined with their ex post facto application operates as a de facto policy against any discussion of unions by company e-mail.

This creates a monumental obstacle to employees who want to exercise their right to organize. E-mail is by far the most cost-effective method of most workplace communication. What would take hours to communicate to all employees orally, or through communication on paper, can be accomplished in minutes using e-mail. Denying this tool to employees makes it far more difficult for employees who want a union to organize. Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer to "interfere with" or "restrain" employees exercising their rights under Section 7. Lack of access to company e-mail interferes with efforts to organize and even more clearly restrains employees. In the absence of any harm or cost created for employers by the use of e-mail to discuss unions, banning union oriented e-mail, either officially or in practice, is in conflict with section 8(a)(1) and should not be allowed.

Respectfully submitted,

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[21] National Labor Relations Board Annual Report for 2006 at www.nlrb.gov

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