MID-SOUTH NOTES
News from and about NLRB Region 26

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Inside this issue:

Director's Notes

This is the first of periodic newsletters Region 26 will issue to keep our users informed of developments both in the Region and Agency wide with regard to casehandling procedures and legal decisions. In this first issue I will give a historical review of the creation of the regional office, give a brief summary of what we do and basic case processing procedures and provide basic details about how to contact us and obtain forms and information.

Ronald K. Hooks, Regional Director, Region 26

Who Are We?

We are Region 26, Memphis, of the National Labor Relations Board (NLRB) which is charged with administering the National Labor Relations Act (the Act). We were established as a regional office on April 19, 1960. The First Annual Report of the NLRB for the fiscal year ending June 30, 1936 listed twenty-one (21) regional offices. At that time the state of Tennessee was under the geographical jurisdiction of Region 10, Atlanta and the states of Arkansas and Mississippi were under the geographical jurisdiction of Region 15, New Orleans. In the fiscal year that ended June 30, 1941 the western half of Tennessee came under the geographical jurisdiction of Region 15 while the eastern half of Tennessee remained under Region 10. In 1946 Memphis was established as a Subregional Office to be close to the source of cases that had been handled by the more distant Region 10 and Region 15 offices. In the fiscal year ending June 30, 1949 Memphis was designated as Subregional Office No. 32, assigned an Officer in charge and given specific geographical jurisdiction over parts of Arkansas, Mississippi and Tennessee. Currently our jurisdiction includes all of Arkansas except Miller County (Texarkana), north Mississippi (39 counties down to but not including Hinds County), west and central Tennessee (64 counties to about 50 miles east of Nashville), western Kentucky (40 counties), and southeast Missouri (4 counties). In order to better serve such a large geographical area we have historically maintained Resident Offices in Little Rock, Arkansas and Nashville, Tennessee. We currently have a staff of 27 employees in the three offices.

What Do We Do?

Under the Act the NLRB has two principal statutory functions: (1) to determine and implement, through secret-ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful acts called unfair labor practices, by either employers or unions or both. We do not initiate cases in the exercise of either of these two functions. We process only those petitions for elections and charges of unfair labor practices filed in either our Memphis, Little Rock or Nashville offices or that have been properly referred or transferred to us from other regional offices. Since our inception as a regional office, Region 26 has processed over twenty-eight thousand (28,000) unfair labor practice charges and over ten thousand (10,000) representation petitions. Historically this represents the filing on an annual basis an average of approximately 583 unfair labor practice charges and 208 representation petitions in the 48 year history of the regional office.

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Our Service Standards

- We will treat you courteously
- We will attempt to answer your questions about the case, consistent with the confidentiality rights of other persons and the Privacy Act.
- If necessary we will provide bilingual services if we are given sufficient notice of that need.
- We will provide the same treatment to all persons regardless of race, sex, religion, national origin, age, political affiliation, sexual orientation or disability.
- Our facilities are accessible to persons with disabilities. We will attempt to accommodate persons with disabilities. Please let us know if you will need an accommodation.
- If you wish, you may be represented by an attorney or other representative of your own choice.

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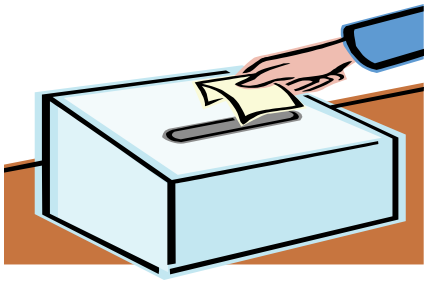
Our Procedures

Representation Cases

The Information Officer in any of our three offices can answer your questions regarding representation petitions and can assist you in completing the petition forms. If you file a petition, you should be prepared to tell us the name and address of the employer and any labor organization(s) involved. In addition, you must describe the bargaining unit that is the subject of the petition, and the approximate number of employees in the unit. You will also need to tell us whether there is any collective-bargaining agreement in effect and provide a copy of any such agreement if available. You will need to state your current address on the petition form as well as sign it. A copy of the petition will be served on all parties involved. The petition must be supported by the dated signatures of 30 percent or more of the employees in the bargaining unit.

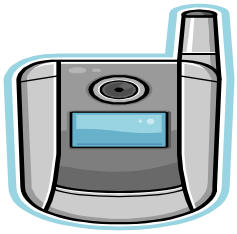
It is our goal to hold elections within forty-two (42) days from the date of the filing of the petition.



Unfair Labor Practice Cases

The Information Officer can be of valuable assistance in evaluating whether your concerns raise potential violations of the Act. Charges may be filed by individual employees, unions or employers. When a charge is filed a Board agent is assigned to investigate. Sworn statements are taken from the charging party's witnesses. The employer or union is asked to provide its defense. A decision is made to dismiss or issue complaint. If I decide to issue complaint an attempt to settle the case will be made before a complaint issues. If the case does not settle a hearing is held before an administrative law judge to decide the issues. A review of the judge's decision is available first by the Board and then by the appropriate United States Circuit Court of Appeals. If I decide to dismiss the charge, review of my decision may be obtained from the Office of Appeals in the Office of the General Counsel in Washington. Copies of complaints and dismissal letters are served on all parties.

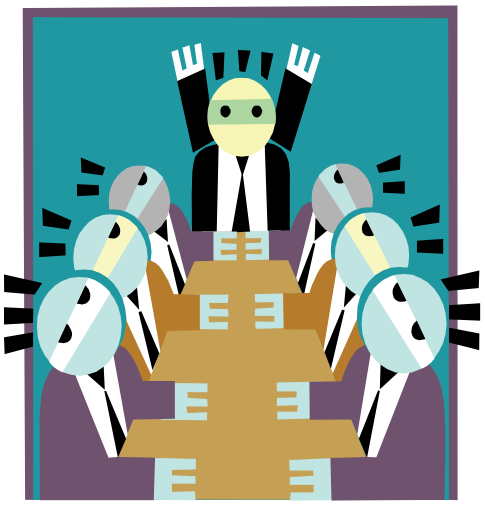
Depending on the type and nature of the allegations, it is our goal to complete our investigation within either 7, 9 or 11 weeks from the filing of the charge.



How to Access Us

Representation petitions and unfair labor practice charges may be filed with us by mail, fax, overnight delivery service or hand delivery. While petitions and charges may not be filed electronically the respective representation petition and unfair labor practice charge forms may be obtained electronically at the Board's official website, www.nlrb.gov. You may also obtain specific information and instructions as to what documents may be filed electronically with the regional offices and with the NLRB in Washington, D.C., by accessing the official website; selecting the **E-Gov** on the home page and clicking on **E-Filing**. General information inquires may be directed to any of our three offices where you will be able to speak to the assigned Information Officer of the day. The telephone numbers are: Memphis (901-544-0018), Little Rock (501-324-6311) and Nashville (615-736-5921). The NLRB also maintains a toll-free national information hotline at 1-866 667-6572.

Board Vacancies



As you may be aware, the Board is currently operating with only two members, Members Wilma Liebman and Peter Schaumber. Chairman Robert Battista's term expired on December 16, 2007 and the recess appointments of Members Peter Kirsanow and Dennis Walsh expired December 31, 2007.

On December 20, 2007, in anticipation of the loss of members, Members Liebman, Schaumber, Kirsanow and Walsh unanimously delegated to the General Counsel authority on all court litigation matters that otherwise would require Board authorization. This delegation gives the General Counsel full and final authority on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j), or Section 10(e) and (f), of the National Labor Relations Act. The Board issued a similar delegation of authority to the General Counsel in 1993 and 2001. The Board also delegated its powers to Members Liebman, Schaumber, and Kirsanow. This action will permit Members Liebman and Schaumber, as a quorum of the three-member group, to issue decisions and orders in unfair labor practice and representation cases. In 2005, a three-member Board issued a similar delegation permitting a two-member quorum to issue decisions. The temporary delegations will be revoked when the Board returns to at least three members.

Although the President has submitted the nominations of former Chairman Battista, former Member Walsh, and Phoenix attorney Gerald Morales to serve as members of the Board, they have not been given recess appointments.

FROM THE R-CASE DESK

Representation cases, specifically conducting elections, are the primary area in which the face of the National Labor Relations Board is shown to the public. Nationally each year the Agency conducts thousands of secret-ballot elections in which tens of thousands of employees exercise their democratic right to choose whether or not to be represented by a labor organization and, if so, by which union. For example, in fiscal year 2007 NLRB conducted 2080 initial representation elections while in fiscal year 2006 2,430 initial elections were conducted among some 122,730 employee voters.

Within Region 26, as well as nationally, there has been a marked decrease in the number of petitions filed in recent years. In fiscal year 2005, 59 representation petitions were filed within Region 26. However, in fiscal years 2006 and 2007 that number dropped to 36 and 34 petitions respectively. Thus far five months into fiscal year 2008, a total of 23 representation cases have been filed within the Region indicating that the filings will be more in line with FY 2005 rather than the low points of FY's 2006 and 2007.

While the majority of elections conducted by Region 26 agents are "on-site" during working hours, in some instances mail-ballot elections are utilized. Mail-ballot elections are particularly useful when the employees' work locations are scattered over a broad geographical area or when their hours of work are so diverse as to make an on-site election impractical. In mail-ballot elections, voting kits are mailed to each employee voter with instructions that the ballots must be returned to the regional or resident office within a specified period, usually two weeks from the date the ballots are mailed to the voters. A pre-stamped return envelope is provided in the voting kit as well as instructions regarding the procedure. At the expiration of the voting period, the ballots are counted in front of the parties at a mutually agreeable location. As with on-site elections, strict secrecy of the ballot is maintained in the Board's mail-ballot election procedures.

Whether an election is on-site or mail-ballot, the Agency's target is to conduct the election within 42 days from the date a petition is filed. In FY 2007, the median time to proceed to an election from the date of filing nation-wide was 39 days. In over

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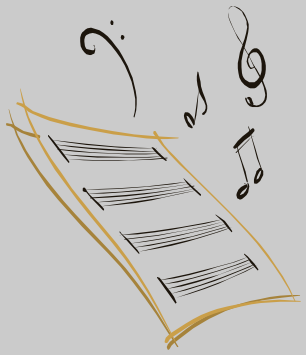
What's New?

The NLRB's website now allows the public to track certain information about cases filed in all regional offices and cases pending with or decided by the Board. For example, if you want to know if a case involving a certain party is still pending in Region 26, you would go to www.nlrb.gov, click on **E-Gov,** and then click on **Regional Office Case Search**. At that point you specify whether you want to search for an unfair labor practice case (C case) or a representation case (R case) and whether you want to perform a Basic or Advanced search. When you have clicked on the appropriate choice, you enter a portion of the case name, party name, or whatever other information you want to specify and you will be provided with a list of cases that match your criteria. You can then click on each of those cases to get more detailed information such as the status, the type of allegations involved, and, if closed, when and how the case was closed.

You can also track cases pending before or decided by the Board. To look at a case pending or decided by the Board, go to www.nlrb.gov, click on **E-Gov,** and then click on **Board Cases.** Then enter part of the case number or case name and click on the Search button. A list of cases will appear that match your criteria. Then click on a case and see a detailed case docket and view any documents issued by the Board or ALJ or e-filed by a party in the case.



91% of the cases nationally in which initial representation elections were conducted, the elections were held pursuant to agreement of the parties as opposed to being directed by the regional director after holding a pre-election hearing.

In the future, look for something new at on-site elections conducted by a Board agent. Memorandum OM 08-28 dated February 13, 2008, announced that an American flag will be displayed at our elections. The Agency has purchased a number of table-top American flag kits which will be set up by the Board agents during the pre-election conference. The Memorandum states that the display of the flag will lend dignity to the election process and communicate to all participants that they are involved in an official activity of the Government of the United States.

Finally, I would like to mention a recent Board decision which has already resulted in five "voluntary recognition" case filings within Region 26. On September 29, 2007, the Board issued *Dana Corporation*, 351 NLRB No. 28, which instructs that in order for an employer's voluntary recognition of a union to serve as a bar to the processing of a representation election, unit employees must receive notification from the NLRB about the employer's recognition of the union and the employees' right to petition for a secret-ballot representation election within 45 days of the posting of the Board's notice. Since *Dana*, five employers or unions have notified us that the employer was voluntarily recognizing the union to represent a specific unit of employees. When this occurs, the Region immediately sends the parties a Notice to Employees which is then posted in the facility for 45 days. The Notice advises the employees of the voluntary recognition in the specified unit and advises that anyone may file a petition for an election within that time period. If no petition is filed within 45 days from the date of posting of the Notice, then the union's status as collective-bargaining representative may not be challenged for a reasonable period of time to allow the parties an opportunity to negotiate a collective-bargaining agreement. The employer is required to complete a certification of posting and return it to the Regional Office after the 45 day posting period expires.

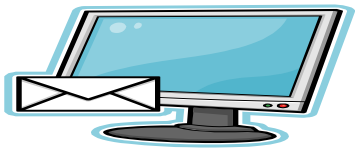
In Region 26 the first four voluntary recognition posting periods have been completed and no petitions for elections were filed. In the event a petition is now filed in any of these cases, it could not be processed as the parties must be allowed a reasonable period of time to negotiate a collective-bargaining agreement. The remaining voluntary recognition posting period is currently underway.

In the event you have any comments or questions regarding Region 26's processing of representation cases, do not hesitate to call me. Until next time from the R-Case desk, I wish you the best.

Tom Smith
Assistant to the Regional Director

LITIGATION NOTES

Maintenance and Enforcement of Policies Restricting Solicitations by E-Mail



Does an employer violate Section 8(a)(1) of the National Labor Relations Act by *maintaining* a policy prohibiting the use of e-mail for all "non-job-related solicitations?" No, answered the National Labor Relations Board by a 3-2 vote on the last day of Chairman Battista's term, December 16, 2007. The answer came in *The Guard Publishing Company, d/b/a The Register-Guard,* 351 NLRB No. 70, a case in which the Board had heard oral argument and received amicus briefs from numerous groups including the United States Chamber of Commerce, the National Employment Lawyers Association, the HR Policy Association, and the National Workrights Institute. In this case, the Board also considered whether the Employer violated Section 8(a)(1) by discriminatorily *enforcing* that policy against union-related e-mails while allowing some personal e-mails. In addressing the enforcement of the policy, the Board majority announced and applied a new standard for determining whether an employer has violated Section 8(a)(1) by discriminatorily enforcing its policies.

In addressing the lawfulness of the policy, the Board majority of Chairman Battista and Members Schaumber and Kirsanow rejected the General Counsel's argument that the case should be decided by applying *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), in which the Supreme Court held that a ban on solicitation during nonworking time was unlawful absent special circumstances. The Board majority noted that *Republic Aviation* involved face-to-face communication rather than use of the Employer's equipment and noted that the use of e-mail had not "changed the pattern of industrial life" at the Employer's facility to the extent that the forms of workplace communication sanctioned in *Republic Aviation* have been rendered useless. Consequently, the majority applied "the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." Therefore, the majority concluded, the maintenance of the policy did not violate Section 8(a)(1).

In addressing the lawfulness of enforcement of the policy, the Board majority held that "discrimination under the Act means drawing a distinction along Section 7 lines." The majority adopted the reasoning of the United States Court of Appeals for the Seventh Circuit, noting that in two cases involving the use of employer bulletin boards, the court had distinguished between personal nonwork-related postings such as for-sale notices and wedding announcements, on the one hand, and "group" or "organizational" postings such as union materials on the other. The Board majority found that the court's analysis, rather than existing Board precedent, "better reflects the principle that discrimination means the unequal treatment of equals."

Applying its new standard, the majority found that although the Employer had permitted a variety of personal, non-work-related e-mails, including e-mails about parties, jokes, breaks, community events, births, lunch meetings, and poker games, the Employer had never permitted e-mails to solicit support for a group or organization. Here an employee received two warnings for sending e-mails related to the Union. The Board majority said that one of the warnings was unlawful because it was not a solicitation, but simply a clarification of facts surrounding a recent Union event. Accordingly, the enforcement of the policy with respect to that e-mail was unlawful. The majority said that the other warning was lawful because it was based on two e-mails that were solicitations to support the Union.

In a strongly worded dissent, Members Liebman and Walsh argued that given the unique characteristics of e-mail and the way it has transformed modern communication, e-mail should not be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper. In their view, where an employer has given employees access to e-mail in the workplace for their regular and routine use, a ban on "non-job-related solicitations" should be unlawful absent a showing of special circumstances.

Regarding the alleged discriminatory enforcement of the policy, the dissent would adhere to Board precedent, under which they would find a violation as to both warnings. The dissent argued that the majority erred in focusing on what types of activities are "equal" to Section 7 activities, because in 8(a)(1) cases, the essence of the violation is not "discrimination" but the interference with employees' Section 7 rights. The dissent argued that the Board's existing precedent on discriminatory enforcement is merely one application of Section 8(a)(1)'s core principles: that employees have a right to engage in Section 7 activity, and that interference with that right is unlawful unless the employer shows a business justification that outweighs the infringement. The dissent stated that "discrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification."

Dorothy Wilson, Regional Attorney

Compliance Corner

The Region's compliance function is responsible for ensuring that terms of settlement agreements are accomplished and that Respondents (Employers or Unions) take all the remedial actions required by Board Orders. The remedies may include payment of backpay, reinstatement of discharged employees, requirement to engage in good faith bargaining, modification of hiring hall rules and procedures, and posting of a notice to advise employees of the violations found by the Board and their rights under the National Labor Relations Act. During the 2007 calendar year, the Region collected and disbursed $1,464,918.00 in backpay and obtained offers of reinstatement for 60 individuals.

The Board has recently issued several decisions that will have a significant impact on backpay investigations and compliance litigation of cases involving discharge or refusal to hire union "salts" (paid or unpaid union organizers).

Oil Capitol Sheet Metal, 349 NLRB No. 118, which issued May 31, 2007, altered the burden of proof requirements to establish the length of a salting discriminatee's backpay period. Prior to *Oil Capitol*, there was a presumption that all discriminatees, including salts in the construction industry, would have continued employment with the employer indefinitely. The burden was on the employer to prove a reduced backpay period for the union salt. Employers could rebut the presumption of continued employment by producing evidence that the union salt would have left the job before the end of the project, or that it would not have transferred the salt to other projects after the completion of the initial project, based on guidelines established in *Dean General Contractors*, 285 NLRB 573 (1987). The *Oil Capitol* decision removed the presumption of continued employment of salts in all discharge, refusal-to-hire, and layoff cases. It also specifically overruled the *Dean General* presumption of continued employment of union salts, and shifted the burden of proof to the General Counsel to affirmatively prove that the salt would have worked the entire claimed backpay period. The new burden of proof requirements apply not only to new cases involving union salts, but also to ongoing compliance cases based on unfair labor practices that were litigated prior to *Oil Capitol*. A comprehensive discussion of the background and impact of the *Oil Capitol* decision can be found in Operations-Management Memo OM 08-29 (CH) dated February 15, 2008. The memo is available at the Board's web site, www.NLRB.gov. in the "Memo" section under the "Research" tab.

Toering Electric Company, 351 NLRB No. 18 (September 2007) was another salting case that changed the burden of proof requirements to establish that a job applicant is entitled to protection against refusal-to-hire discrimination under Section 2(3) of the Act. Prior to *Toering*, it was presumed that any individual who applied for employment was protected as a Section 2(3) employee. In *Toering* the Board held that an applicant must be "genuinely interested in seeking to establish an employment relationship with the employer" in order to receive protection as a Section 2(3) employee. The decision also shifted the burden to the General Counsel to prove the applicant's genuine interest in establishing an employment relationship. General Counsel Memo GC 08-04 at www.NLRB.gov contains additional information concerning the *Toering* decision.

St. George Warehouse, 351 NLRB No. 42 (September 2007) was another Board decision (not involving union salts) that shifted the burden of proof of a compliance issue from the employer to the General Counsel. Traditionally, in compliance litigation an employer could rebut the General Counsel's claim of backpay for a discriminatee by establishing that the discriminatee failed to mitigate his damages by making a reasonable effort to find work. To meet its burden an employer had to prove (1) there were substantially equivalent jobs within the geographical area, and (2) the discriminatee unreasonably failed to apply for those jobs. In *St. George Warehouse* the Board shifted the burden of establishing the second element to the General Counsel. Now, when an employer produces evidence that substantially equivalent jobs were available, the General Counsel has the burden through testimony of the discriminatee or other evidence to prove the discriminatee engaged in a legitimate search for interim employment.

William Yarbrough, Supervisory Field Examiner

SPEAKERS AVAILABLE

Under General Counsel Ronald Meisburg, the Agency is making special effort to reach community groups with information about the NLRB. Members of the Region's staff are available to make presentations before any group, such as classroom groups, employee and employer groups, professional associations, local, state and federal agencies, worker advocacy groups, community organizations, and other members of the general public, to describe what the Act's protections cover, how the Region investigates and resolves unfair labor practice charges, or any NLRB topic of interest.

To arrange for a speaker and to discuss possible topics, please don't hesitate to telephone our Regional Outreach Coordinator, Rosalind Eddins in the Memphis Regional Office, (901) 544-0026; Resident Officer Joe Artiles in our Nashville Resident Office, (615) 736-5921; or Resident Officer Bruce Hill in our Little Rock Resident Office, (501) 324-6311.

Confidential Information: What It Is and What It Is Not

by

Jill Adkins, Field Examiner, Nashville Resident Office

Section 7 of the National Labor Relations Act affords employees, whether they are represented by a union or not, the right to discuss their wages, hours and working conditions. Of course, there are always exceptions.

It is not uncommon to find that an employee's employer unlawfully prohibits the discussion of wages. It is less common to find a workplace rule or policy that prohibits the discussion of hours. However, I have come across rules and policies that could be viewed as prohibiting the discussion of working conditions where, for example, an employee is prohibited from discussing his or her discipline. The majority of this article's focus will be on the subject of the discussion of wages as it is the most common unlawful prohibition I encounter.

Typically I find confidentiality policies in an employee's handbook; however, they can also be found in the form of memoranda or as unwritten word of mouth policies. Let's start with an example of a common unlawful confidentiality policy:

> *The protection of confidential business information and trade secrets is vital to the interests and success of _____(insert employer name). Such confidential information includes, but is not limited to, the following examples:*
>
> *Compensation Data…*

As the above-example illustrates, wages can be called many different things. In the example, wages are referred to as compensation data. I have also found wages referred to as salary, pay, commission, hourly rate, benefits package, etc. It is important to note that while the Act does not protect supervisors as defined in the Act, employees who are in salaried positions may still have the Section 7 right to discuss their salaries because they do not possess statutory supervisory indicia. Such examples of salaried, but not supervisory, positions include professionals and engineers.

In order for an employee's actions to be protected by the Act, there must be an element of concerted activity. The employee must have engaged in the discussion of his or her wages, hours and working conditions in a concerted manner. Concerted activity can be seen where an employee complains about or simply talks about wages in general, or about some other working condition that is of interest and concern to other employees, or where an employee speaks on behalf of a group of employees either formally or informally. You also want to consider whether the employee's discussion of wages, hours and working conditions prompts group action. To complain solely about one's own working conditions does not constitute concerted activity, and is thus, not protected by Section 7 of the Act.

Below I reference some cases that I invite you to review. Many can be found on our web site at www.nlrb.gov. The first group sets forth some examples where the Board found employees who were not protected by Section 7 of the Act when they violated their employer's confidentiality policy. The latter group provides some good examples of Board cases wherein the Board found the employee's conduct protected.

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Confidential Information Con't.

UNPROTECTED

International Business Machines Corp., 265 NLRB 638, 638 n. 4 (1982) (disclosure of Respondent's salary program guidelines by an employee who innocently received the data in the mail from an anonymous source held unprotected.)

Bullocks 251 NLRB 425 (1980) (unprotected where an employee had wrongfully obtained and copied her fellow employees' evaluations and thereafter discussed the evaluations with those employees.)

Canyon Ranch 321 NLRB 937 (1996) (unprotected where an employee's conduct – consisted of reading a draft memo from one management official to another, who's subject was terms and conditions of employment.)

PROTECTED

Amtech, Inc., v. N.L.R.B. 165 Fed.Appx 435 (6th Cir. 2006), 179 L.R.R.M. 2320, 342 NLRB 1131. (unlawful where respondent maintained a confidentially rule in its employment handbook which prohibited "Unauthorized disclosure of business secrets or confidential information…… which is defined in the handbook as including compensation data.")

N.L.R.B. v. Main Street Terrace Care Center, 218 F.3d 531, 534 (6th Cir. 2000), 164 LRRM 2833, 327 NLRB 522 (the 6th Circuit recently joined several other Unites States Courts of Appeal (8th in 1993 and 3rd in 1976), in determining that a rule prohibiting employees from discussing their wages constitutes an unfair labor practice under Section 8(a)(1) of the Act. Employer violated the Act when it promulgated a rule prohibiting employees from discussing wages with one another, despite Employer's contentions that the rule was not written or acknowledged, that managers did not have authority to promulgate such a rule, and that the rule went unenforced.)

N.L.R.B. v. Automatic Screw Products Co., Inc., 977 F.2d 582 (6th Cir. 1992), 142 L.R.R.M. 2232, 306 NLRB 1072 (it is a violation of Section 7 of the National Labor Relations Act to restrict employees' rights to discuss their wages, hours and terms and conditions of employment.)

Gray Flooring 212 NLRB 668 (1974) (protected where an employee copied names and telephone numbers of employees from the Employers records because the names and numbers were not in any meaningful sense, private records, where the Employer did not treat the information as confidential or private.)

Ridgeley Mfg. Co., 207 NLRB 193 (1973) (protected where an employee copied and memorized the names of fellow employees from openly displayed timecards for organization purposes.)