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

Advice Memorandum

DATE: February 24, 2005

TO : Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: Express Scripts, Inc. 512-5012-3300
Case 28-CA-19605 512-5012-0133-1100
512-5012-1725-8800

The Region submitted this Section 8(a)(1) case for advice as to whether the Employer discriminatorily enforced its email rules that limit personal use and ban chain emails when it denied the Charging Party's request to send a mass email to notify employees of upcoming Union meetings and activities.

We agree with the Region that the complaint allegation regarding discriminatory enforcement of the email policy should be withdrawn, and that portion of the charge should be dismissed, because the Employer's email rules that limit personal use and ban chain emails are warranted based on legitimate business justifications, and were not discriminatorily applied against the Charging Party.

FACTS

Express Scripts (Employer) is engaged in the pharmacy benefit management business and is a distributor of pharmaceutical products and services. The Employer has 10,000 employees worldwide. The Charging Party is an employee at the Employer's Tempe, Arizona facility. The Tempe facility is a mail-order pharmacy operation and requires employees to handle confidential medical information.

Virtually all of the Employer's employees have access to and routinely use the Employer's email system in the course of performing their duties. The Employer maintains a company-wide email rule that concerns the use of its email system by employees, which reads in pertinent part as follows:

> Policy: 302 – Use of Company Property: Email & Internet Usage
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> The use of email is provided for the conduct of business at [the Employer]. Personal use of

> email to correspond on the Internet should be kept to a minimum unless it is related to an approved [Employer] business activity. Email may not be used to solicit for commercial ventures, religious or political causes, outside organizations or any other non-[Employer] related solicitations.
>
> The email system must not be used to create any offensive or disruptive messages such as chain letters or jokes. Among those which are considered improper and prohibited are any messages or jokes which contain sexual implications, racial slurs, gender-specific comments or any other comment that offensively or inappropriately addresses someone's age, sexual orientation, gender, veteran status, race, religious or political beliefs, national origin or disability.
> ***

Beginning in March 2004,[1] the Charging Party and other employees engaged in protected concerted activities, including making complaints to the Employer regarding their wages, hours, and working conditions. On March 19, some employees at the Tempe facility wrote a letter to the Employer expressing their concerns and requesting a meeting regarding various working conditions. Thereafter, the Charging Party and other employees engaged in organizing activities on behalf of UFCW Local 99, AFL-CIO (Union). During March, the employees used the Employer's email system to communicate with one another and with the Employer about their working conditions and to arrange related meetings with the Employer. The Employer neither restricted these communications nor disciplined any employee for using its email system in this manner.

On August 19, the Charging Party sent an email to the Employer's Human Resources manager requesting permission to use the Employer's email system to notify employees of upcoming Union meetings and activities. The email read:

> I wanted to ask you [] if it would be ok to use the e-mail to send out information on the union. And also to let people know when there would be a meeting and where. And thank them for their support.

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[1] All dates occurred in 2004 unless noted otherwise.

By email the same day, the HR manager replied, in pertinent part:

> Thank you so much for asking about using Company email. I really appreciate you asking ahead of time. We would ask that you not use Company email. However, please feel free to continue to talk to employees, pass out literature etc [sic] on breaks and lunches in the pharmacy breakroom and in the main lunchroom. Please take a minute to review policies 310 Solicitation and Distribution plus 302 Use of Company Property [Email and Internet Usage] on Esinet [the Employer's intranet system].

After receiving the Employer's response, the Charging Party did not send out the email to employees.

Earlier in June, the Employer's Information Technology team had advised the then HR manager that chain emails and personal messages were interfering with the smooth functioning of the Employer's email system. On June 17, the Employer's HR manager sent an email reminder to all employees regarding the Employer's email system policy because of the IT team's warning and in response to several personal chain emails that were circulating in the system. The Employer also advised employees that chain emails should not be placed into the email system and included a link to the Employer's email policy. The email, which was sent by blind copy to numerous employees, stated in relevant part:

> It is nice that you have developed friendships with people at work, but as you know [the Employer's] systems are for business use. Many of you are either recipients or initial senders of emails that should not be sent or received using [the Employer's] systems. Some of those I'm sure are just meant as cute "thinking of you," some have inappropriate pictures or words, and some are chain mails. Additionally, they keep getting forwarded and are taking up vital space to the system. Most of you were in the meeting at the end of May when I spoke to the OP group about this (this was the meeting I also spoke about the changes to the attendance guidelines, etc.) Of course everyone attended new hire orientation when this was also addressed.

The Employer does not monitor every email; however, it claims that when misuse of the email system has come to its

attention, it has consistently enforced its email policy. The Employer has presented evidence to support its contention that it had enforced its email policy ten times prior to August, and five times thereafter. Further, three of these instances had occurred before the Union activity began in March. The Employer enforced its email policy against supervisors and employees for, inter alia, excessive personal use of the email system and the internet, and for sending chain emails containing sexual content and inappropriate jokes. The discipline for the infractions included the issuance of oral and/or written warnings, counseling, and group meetings. For example, in October 2003, the Employer issued written warnings to employees who sent a chain message with inappropriate sexual content. In February, the IT team had advised the Employer that it had to "respin" many computers because employees were downloading information from the internet and because of emails that contained viruses and contributed to the proliferation of "spam."[2] Also, in May or June, the Employer held a team meeting to counsel employees who had sent a chain email joke to other employees. The Employer also provided evidence that due to the increase in personal and chain emails, it had to increase its data storage capacity by 10% between the months of March and November.

ACTION

We agree with the Region that the complaint allegation alleging that the Employer discriminatorily applied its email rules at issue against the Charging Party in violation of Section 8(a)(1) should be withdrawn, and that portion of the charge dismissed, absent withdrawal.

An employer may not discriminatorily limit employees' use of email for Section 7 purposes.[3] Thus, where an employer has permitted employees to routinely use its email and/or computer systems to send a wide variety of nonwork related material, a prohibition against sending union-related email messages is discriminatory.[4] Here, the Employer has provided sufficient evidence to demonstrate substantial business justifications to warrant the narrow restrictions and that it had consistently enforced its

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[2] "Respinning" a computer requires erasure and reprogramming of the hard drive. The Employer asserts that the process is time-consuming and expensive.

[3] E.I. du Pont & Co., 311 NLRB 893, 919 (1993).

[4] Id.

email policy prior to the advent of Union to support the conclusion that the Employer did not discriminatorily enforce its email policy when it denied the Charging Party's request to send a mass email to employees.

In Boeing Co.,[5] we concluded that the provisions of the employer's email policy that precluded personal "chain letter" and "mass" messages did not violate Section 8(a)(1) because such restrictions did not unlawfully discriminate against union-related messages. We also noted that such restrictions are content-neutral and, therefore, do not raise issues of content-based discrimination. Further, we concluded that mere speculation as to a burden on an employer's computer resources would not suffice to establish the special circumstances necessary to maintain the employer's prohibition, but that evidence demonstrating a likelihood of significant interference with an employer's use of its computer resources might render such prohibition lawful.

The Employer's evidence establishes that the restrictions against excessive personal use of its email system and chain email are necessary to prevent significant interference with its business operations. The Employer's business requires employees to handle confidential medical information, and the inappropriate dissemination of such information is more likely to occur if there is no restriction against the use of multiple addressees. More importantly, in February – prior to the advent of Union activity and the Charging Party's request - the Employer was advised by its IT team that it had to respin many computers because employees were downloading information from the internet and from emails which in turn introduced viruses and spam into the system. Then in June, the IT team again advised the Employer that personal and chain messages were taking up vital space in the email system which was affecting the Employer's system. As a result, the Employer had to increase its mailbox data storage by 10% between the months of March and November. Accordingly, the Employer has presented sufficient evidence to support the need for the restrictions, i.e. ensuring the proper functioning of its email system, on which it heavily relies to conduct its business.

With regard to the issue of discriminatory enforcement of the email policy against the Charging Party, the Employer

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[5] Boeing Co., Cases 19-CA-28900 et al., Advice Memorandum dated May 4, 2004 (employer was privileged to discipline employee for sending mass email pursuant to its rule prohibiting mass and chain emails).

has provided evidence that it has consistently enforced the restrictions against excessive personal use of its email system and chain emails both prior to and after August. The evidence demonstrates that the Employer issued discipline to employees and supervisors both before and after August based on excessive personal use of the email system and internet, and on dissemination of chain emails. There is no evidence that the Employer has disciplined employees for using the email system to send individual Union-related messages. To the contrary, the evidence establishes that in March, the employees used the email system to communicate with one another and the Employer regarding their concerns about working conditions without facing discipline by the Employer. We therefore agree with the Region that the Employer did not discriminatorily deny the Charging Party's request to send out information about the Union to an undefined number of employees.

We further conclude that the Employer's email rules that ban chain emails and restrict excessive personal use do not unduly infringe upon the Charging Party's Section 7 solicitation rights because they do not address or restrict an employee's ability to send emails to a limited number of addressees - as shown by the employees' email communications regarding protected concerted activity in March.[6] As discussed, the evidence demonstrates that the Employer consistently enforced its email policy and that its denial of the Charging Party's request to send a mass email was in line with its past practice. Moreover, the Employer encouraged the Charging Party to use other legitimate methods at the Employer's premises to discuss or inform the employees about the Union, including passing out literature during breaks and lunch.

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[6] See TXU Electric, Cases 16-CA-20568, et al. Advice Memorandum, dated February 7, 2001 (an email policy that permits employees to use the email system for personal use but limits the length of the messages and the number of employees to which a particular email may be sent is lawful; such a rule addresses the employer's legitimate business concerns while adequately balancing employees' Section 7 rights).

Accordingly, we conclude that the Employer's email rules that limit personal email and prohibit chain emails are lawful restrictions because the Employer's legitimate business concerns outweigh any employee Section 7 rights; and that the Employer did not discriminatorily apply its email rules against the Charging Party in violation of 8(a)(1).

B.J.K.