

Canyon Ranch, Inc. and Gary Wayne Metz. Case
28-CA-12378

August 20, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On May 25, 1995, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

We disagree with our colleague's assertion that Metz' conduct was protected by Section 7. Rather, we agree with the judge's finding that Metz was snooping, i.e., reading a draft memo from one management official (Massage Administrator Trieste) to another (Company President Cohen). We will not extend Section 7 protection to such conduct.

In support of her assertion, our colleague argues that the subject of the memo was a term and condition of employment. Assuming *arguendo* that this is so, it does not follow that Metz' conduct was protected. Quite simply, management officials have the right to communicate in private with each other, even if (perhaps especially if) the subject of the communication is terms and conditions of employment.² Further, the fact that the communication may have dealt, in part, with meetings attended by employees does not diminish the importance of permitting management officials to confer privately, in writing, about such meetings.

Our colleague also asserts that a predecessor massage administrator sometimes left papers on her desk, with the purpose of having employees read them. She thought that employees would be more apt to read them on the desk than if they were posted. We fail to see the relevance of this evidence. Initially, whatever the practice of the predecessor, the current incumbent (Trieste) was not obligated to follow it. More importantly, Trieste did not leave the memo on her desk for the purpose of having employees read it. To the con-

trary, the memo was directed to the company president, and Metz knew it. As the judge found, Metz "undoubtedly knew from his first purview that the memo was not his business."

In sum, we believe that private communications between management officials or between union officials (or employees) are entitled to respect. We will not elevate Metz' breach of that privacy into the realm of Section 7 protection. Accordingly, we affirm the judge.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER BROWNING, dissenting.

Contrary to the majority's dismissal of the complaint, I find that employee Wayne Metz' conduct of reading and discussing the contents of his supervisor's "Massage Table Update" memorandum to management constituted protected concerted activity, in the circumstances of this case, and that the Respondent's discharge of him for doing so violated Section 8(a)(1) of the Act.

This case arises from the Respondent's decision to replace its heavy, wooden, rectangular-shaped massage tables with modern ones equipped with hydraulic lifts, in response to demands by the massage therapists during the preceding few years for relief from the onerous work of adjusting the table height by manually lifting or lowering it to insert or remove bricks or wooden blocks. The Respondent initially acquired two massage tables with hourglass-shaped, contour tops for the massage therapists and guests to try out, and then sought feedback from guests, in the form of evaluations. In addition, the Respondent held meetings with the manufacturer of the sample tables on July 12 and 13,¹ and required the therapists to attend the meetings in order to get their views on the different tables.²

Subsequently, at the monthly meeting of massage therapists held at noon on July 14, Massage Administrator Diane Trieste reviewed the results of the guest evaluations of the new tables with the 40-45 employees in attendance. After stating that she wanted to buy only one type of table top, Trieste asked for a show of hands to indicate whether or not the employees favored replacing the existing tables with the contour tables. When the therapists protested that limited choice, Trieste called for separate votes, with the result that: 16 favored the contour type; 14 favored the rectangular shape; and 10-15 employees abstained from either

¹The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²*Uniform Rental Service*, 161 NLRB 187 (1966); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990).

¹Unless otherwise specified, all dates are in 1993.

²Metz testified that some therapists at one of the meetings complained about difficulty in adjusting to the contour tops (which apparently led to a discussion of possible design modifications), and that he then proposed the idea of acquiring some contour and some rectangular tables. He testified that the Respondent's president, Jerry Cohen, appeared to be open to that suggestion.

vote, meaning that they could go either way. Then, at Metz' request, a vote couched in the form of splitting the purchase among both table types revealed that a clear majority of those present favored that approach. Trieste reiterated that she wanted only to go one way or the other, to avoid what she called "favorite room syndrome," but announced that they would be getting a sample rectangular table to try out. Spa Director Sharon Stricker interjected that she did not want to hear any complaints from the therapists if the Respondent split the purchase between both table types.

Later that evening Metz entered Trieste's office to use her telephone while waiting for a scheduled massage appointment and, noticing a paper entitled "Massage Table Update" on the desk, began to read it. He apparently found the following passage inaccurate and unfair:

Assuming we get the electric lift base, the majority of the staff leans towards contour tops vs. rectangular. There was also an option to have both types of table tops available (contour and rectangular).

Metz thereupon asked two therapists on duty to read the memorandum, and thereafter, telephoned a few others to tell them about what Trieste had written. The following week, an anonymous letter signed by "A Concerned Massage Therapist" was sent to management that, inter alia, pointed out Trieste's inaccuracies regarding employee table preferences and listed 13-named employees who purportedly favored the rectangular tables. The letter was passed on to Trieste who, in turn, enclosed a copy of it with a letter of her own to all massage therapists, expressing her disappointment that any staffer would write such things to management before discussing them with her.

When the Respondent subsequently discovered and obtained confirmation that it was Metz who had read and spread the contents of the memorandum, it discharged him for doing so, citing his violation of a company rule that broadly prohibits employees from discussing confidential matters with unauthorized personnel and is punishable by termination.

The judge found that Metz "undoubtedly knew from his first purview that the memo was not his business"³ and that "he should have honored Trieste's expectancy of privacy." He concluded that reading private intraoffice mail concerning a business decision relating to the purchase of equipment is not, and cannot lead to, mutual aid or protection. My colleagues have affirmed the finding that Metz' "snooping" of materials on his supervisor's desk removed his activity from Section 7 protection, without passing on whether those

³The judge found that about two-thirds of Trieste's memo relates to matters not discussed at the meeting.

materials dealt with terms and conditions of employment.

Contrary to my colleagues and the administrative law judge, I find this case involves neither "snooping," i.e., illicitly obtained information,⁴ nor improper dissemination of confidential information.⁵ The record clearly shows that Metz entered the administrator's office to use her telephone, in accord with the usual and accepted conduct of massage therapists who worked evenings, and that he had no reason to believe that it would be improper to look at written materials left on top of Trieste's desk.⁶ There is uncontradicted evidence that former massage administrator Pamela Macaulay established the practice of purposely leaving papers on her desk because they were more apt to be read by therapists than if she had posted them.⁷ There is no evidence that Trieste or any other Respondent official indicated in any way to employees that this practice of the recently replaced administrator had been discontinued. Contrary to my colleagues, I regard evidence of such a practice as not merely relevant but crucial for a proper resolution of this case. In view of this evidence, there can be no basis for finding that Metz was engaged in "snooping" when he read the memorandum on Trieste's desk, regardless of the identity of the person Trieste addressed the memo to.⁸ Furthermore, unlike the judge, I can find nothing in the nature of confidential information in the substance of Trieste's correspondence. Rather, the memorandum on its face reveals that it is almost exclusively devoted to the matters specifically addressed at one of the manu-

⁴Compare *Super One Foods*, 294 NLRB 462 (1989), enf. denied in pertinent part sub nom. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 361 (5th Cir. 1990).

⁵See *New Process Co.*, 290 NLRB 704, 733-734 (1988); *Ridgely Mfg. Co.*, 207 NLRB 83 (1973), enf. 510 F.2d 185 (D.C. Cir. 1975).

⁶Cf. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (in Fourth Amendment context, Court recognizes that expectation of privacy in employee or supervisor's desk, whether in government or private sector, may be diminished by actual office practices: "in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits.")

⁷Macaulay testified that she even told her assistant that she was leaving certain papers where they could be seen by therapists who worked primarily in the evening and used her desk and telephone. Macaulay further testified that she always placed personal papers inside her desk and kept confidential communications in a locked file cabinet. Trieste, who became Macaulay's assistant in October 1992, did not dispute Macaulay's description of how therapists used her office and telephone, and Trieste also admitted that when she took over from Macaulay in May she took no action to change that practice. Trieste, however, claimed to have no knowledge that therapists sat at her desk or used her telephone at night.

⁸In the circumstances, it would seem more extraordinary if Metz had refrained from reading about the "Massage Table Update" even if he had noticed that it was addressed to the Respondent's president.

facturer's meetings that the therapists attended or their own department meeting.⁹

Finally, as my colleagues implicitly recognize, the judge was clearly in error in suggesting that the decision as to which type of massage table to purchase was not a mandatory subject of bargaining because it was a "business decision" concerning a purchase of equipment, and was not a term and condition of employment. The type of massage table used by the massage therapists has a direct effect on their conditions of employment, because using the massage tables is their job, and the type of table they are required to use has a direct effect on the amount and difficulty of their work. For example, in order to adjust the heavy wooden tables they had been using, the therapists were required to manually lift or lower them in order to insert or remove bricks or wooden blocks. By seeking to involve the therapists in every step of the process of acquiring new tables, the Respondent recognized that the subject was of importance to them as a term and condition of employment. Accordingly, Metz' discussion with coworkers concerning what he perceived to be an unfair characterization of the preferences they expressed concerning the massage tables clearly had a protected object.¹⁰ I therefore would conclude that his conduct of reading and discussing Trieste's memorandum with his coworkers was protected concerted activity, and that his discharge for engaging in that conduct violated Section 8(a)(1) of the Act.

⁹Indeed, the only other matter mentioned (in the final paragraph on the second page of the memorandum) concerned the upcoming renovation of massage rooms, which has not been shown to be either a confidential matter or one about which the therapists were previously unaware.

¹⁰Unlike the judge, therefore, I would conclude that the cases concerning the right of employees to discuss allegedly "confidential" wage information are controlling here. See *Super One Foods*, 294 NLRB 462 (1989), *enfd.* in pertinent part 919 F.2d 361 (5th Cir. 1990).

Richard C. Auslander, for the General Counsel.
Gerard Morales (Snell & Wilmer), of Phoenix, Arizona, for the Respondent.

Jackson G. Gallup (Taylor & Cauthorne, Ltd.), of Tucson, Arizona, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Tucson, Arizona, on January 18–19, 1995, based upon a complaint issued March 22, 1994, by the Acting Director for Region 28 of the National Labor Relations Board. The underlying unfair labor practice charge was filed January 25, 1994, by Gary Wayne Metz, an individual. The complaint alleges that Canyon Ranch, Inc. (the Respondent) has committed certain violations of Section 8(a)(1) of the National Labor Relations Act.

Issues

Specifically, paragraph 4 of the complaint alleges that Respondent discharged Metz on July 30, 1993,¹ because he engaged in "concerted activities for the purpose of collective bargaining or other mutual aid and protection, and in order to discourage its employees from engaging in such concerted activities for the purpose of collective bargaining or other mutual aid and protection."

At the outset it should clearly be understood that, despite the language of the complaint, Metz was not engaging in any activity regarding collective bargaining. Respondent's employees are not represented by any labor organization, nor was Metz or any employee attempting to organize the employees on behalf of any union. The language of the complaint is simply overbroad.

In the main, the complaint alleges that Respondent discharged Metz because he had engaged in conduct which the General Counsel asserts is concerted, protected activity within the meaning of the mutual aid and protection clause of Section 7 of the Act. That statute reads in its entirety: "*Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).*" The italicized phrases constitute the mutual aid and protection portion with which we are concerned.

As played out, the General Counsel contends that Respondent fired Metz for one or more of the following reasons: (1) He had successfully, over the past several years, persuaded Respondent to correct certain work assignment systems which had allegedly discriminated against males; (2) He had, shortly before being fired, verbally supported, at a company-called meeting, the employees' right to choose the type of massage table which Respondent proposed to purchase; and (3) He had disseminated information in a letter from his supervisor to Respondent's president which he claimed was a misstatement of what had occurred at the aforementioned meeting.

The first question, therefore, is whether Metz' conduct was protected at all, for if it was not, then the General Counsel has failed to establish a prima facie case. Respondent does concede that Metz' efforts to obtain a fair work assignment system to have been protected under the Act. Its defense to that aspect of the complaint is that the conduct is too remote in time from the discharge to be probative of a connection to the discharge; moreover, it contends there is no evidence that it resented Metz' actions in this regard. Insofar as the other two contentions are concerned, it asserts Metz was acting only on his own behalf, not others, and that he was actually fired because he read a private letter from his supervisor to the company president and subsequently broadcast its contents to other employees in violation of a company rule.

Both sides, to some extent, miss a fundamental point: Was Metz' support of the employees' preferred massage table protected? Was his reading of his supervisor's letter and

¹All dates are 1993 unless otherwise indicated.

spreading its contents to other employees protected? The issue is not whether it was concerted; since for our purposes we may assume that it was. Yet not all concerted activity is protected by Section 7. To be protected, the conduct must have the purpose of mutually aiding and protecting fellow employees. In general, that does not include decisions governing how an employer exercises its entrepreneurial decisions regarding the best way to make a profit, i.e., what types of equipment it chooses to buy to run its business.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel and Respondent have filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Arizona corporation, operates a health resort, spa, and hotel near Tucson. It admits its annual gross revenues exceed \$500,000 and that it purchases and receives goods and materials from sources outside the state valued in excess of \$10,000. It therefore admits, and I find it to be, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The facts of this case are actually pretty simple. As noted, Respondent operates a hotel, spa, and resort near Tucson. Its clients' needs are assessed by employees known as program coordinators. They assist each client in determining the nature of his or her daily activities. A principal activity appears to be the use of Respondent's therapeutic massage facilities. In this regard, Respondent has approximately 22 rooms set aside for this therapy and employs between 50 and 60 men and women who provide that service. They are known as massage therapists.

These employees report to the massage administrator, who is an admitted supervisor within the meaning of Section 2(11) of the Act. During the period under scrutiny here, July 1993, that person was Diane Trieste. The massage administrator reports to the spa director, who was then Sharon Stricker. She in turn reports to Respondent's upper management, corporate vice president, Gary Frost, and president, Jerry Cohen. The owner is Mel Zuckerman.

Metz (known within the facility as "Wayne" to distinguish him from another therapist who already used "Gary") was hired in 1987 as a massage therapist. About one quarter of these therapists are male. It is undisputed that in the years preceding 1991, the male therapists had suffered a loss of earnings because the program coordinators steered clients to the female therapists instead of following the rotation system which they were supposed to use. Since each therapist earns \$18.25 for each therapy session, lost sessions can have a severe impact on a therapist's income.

B. *Metz' Conceded Protected Concerted Activity*

Metz was an outspoken critic of what he perceived to be discrimination against the male therapists. Ad hoc corrections were made over the years, but according to Metz, regressions commonly occurred. In 1991, he and others persuaded Respondent's massage administrator, who at that time was Pamela Macaulay, that their complaints were valid. As a result, the assignment computer was reprogrammed, placing all therapists in the same computer "bucket" which the program coordinators were to use. The single bucket replaced the male and female buckets which had caused the problem. Nonetheless, Metz continued to keep a weather eye on the assignments; he was suspicious of the program coordinators.

During Macaulay's tenure, Metz' views on any number of subjects were given respect. When she left in February for maternity leave, Trieste replaced her, at first in an acting capacity, but taking the job permanently when Macaulay chose not to come back. Trieste did not hold Metz in quite the same esteem which he had previously enjoyed. In fact, some of his behavior made her suspicious of him. She thought him to be a bit too aggressive and occasionally disruptive. Even so, she tolerated his perceived shortcomings.

On one occasion Metz complained to Trieste about what he perceived as another misassignment which should have gone to a male therapist, showing her a copy of the computer printout to support his contention. She responded by saying he should not have been in possession of that document, that it was not his business. She also told him she would look into his complaint.

Trieste did not approve of his possessing the printout, but by the same token, she did not pursue him over the matter either, saying only that he should not have them. She did not know that he regarded them as important to his watchdog role, so she did not know that he believed himself entitled to them. In fact, Metz had obtained the printout from the recycling bin which the program coordinator's desk used. During Macaulay's term he had been given access to such printouts, but shortly after she left, they had become unavailable, so he began retrieving them from the bin.²

In its brief, Respondent concedes that Metz' activity on behalf of his fellow male therapists constituted protected concerted activity. It does not agree, however, with Metz' view that he was entitled to access to company documents such as the printouts or intracompany memos. At least some in the hierarchy regarded those papers as, if not confidential, at least private. They were a management tool not intended to be readily accessible to rank-and-file employees such as Metz.

C. *The Massage Tables*

Sometime during the early summer of 1993, Respondent determined to replace its wooden massage tables with something more modern. It wanted to supersede them with tables having electric height adjustment capability. To adjust the heights of the older tables, employees had to either place or remove bricks under the table legs.

Respondent discovered, as it looked at the market for more modern tables, that contour table tops were an available op-

²The printouts had been removed from view supposedly to protect the privacy of the clients, particularly those whose visit to Respondent might attract the interest of the gossip press.

tion. All of its older tables were rectangular. Therefore, it invited several vendors to provide samples of each in order to test them out and to assess both the guests' and the employees' preferences. Some samples were provided and at a regular monthly employee meeting conducted on July 14, Massage Administrator Trieste held a discussion among approximately 40 of the massage therapists. Metz attended, as did fellow therapists Geary Clemmons, Heather Salon, and Barbara Grandstaff.

After an open meeting about the two types of tabletop, Trieste asked for the opinions of the group, saying she wanted to buy only one type. She took at least four "votes" via a show of hands. These were: (1) those favoring the contour; (2) those favoring the rectangular; (3) those with no preference; and (4) those who wanted to purchase both on a 50-50 basis. The last was a Metz suggestion from the floor.

Metz, apparently in the belief that these were final "votes" on what the Company was going to buy, testified that the vote on a 50-50 approach was unanimous. Yet, he is mistaken in his contention that this was anything beyond a straw poll. Clearly all those present could vote any way they liked on any question. They could, and did, vote on more than one question. Therefore, it is clear that opinions on the various options were being sought. Trieste was not asking the employees to make a decision about which tables to buy. Even she did not have authority to decide what to acquire. The final decision was to be made at a much higher management level.

After that meeting was over, Trieste prepared a handwritten draft memo to be sent to President Cohen. She gave it to a clerical, Jacqueline Moss, for typing. Moss's desk is located in the office, not the massage department. She did not finish the typing until after Trieste had left for the day. After she did so, she left it on Trieste's desk in the massage office, supposedly face down.

Trieste's desk is located in an open office next to the massage therapists' breakroom. She shares the space with an assistant who also has a desk there. Therapists' mail cubbyholes and a bulletin board are located there, as well as telephones which are used by all department personnel. There is also at least one metal file cabinet there as well.

About 9 p.m., Metz entered the office to make a telephone call. While on the phone at Trieste's desk, he noticed the memo and read it. He says he thought it was the routine minutes which are prepared after each monthly employee meeting and which are posted on the board. Yet he must have quickly recognized that it was not, but instead was a business memo from Trieste to Cohen. (The minutes, when prepared, are for the purpose of informing employees unable to attend the meeting of what transpired).

The memo (G.C. Exh. 4), consists of two typewritten pages, on its face addressed to Cohen. At the bottom of the second page, persons to be copied were owner Zuckerman, Vice President Frost, Spa Director Stricker, and two other management persons. Clearly this memo was not directed to employees.

About two-thirds of the memo relates to matters not discussed at the meeting, including guest preferences, vendor cooperation, modifications which needed to be made in the tables, and other technical matters. The remainder dealt with who attended the meeting and described a need to look at a modified prototype. She concluded by discussing the ap-

proach to be taken in remodeling the 22 massage rooms. In only in two sentences, about four-fifths of the way into the memo, did she refer to the employee preferences: "Assuming we get the electric lift base, the majority of the staff leans towards contour tops vs. rectangular. There was also an option to have both types of table tops available (contour and rectangular) . . ."

After reading those sentences, Metz concluded that they inaccurately described the votes taken at the meeting. As he read the document, another therapist, Clemmons, came into the office. Metz showed it to him. Later, he saw fellow therapist Salon in the parking lot, told her about it, and they returned so she could read it. Later that night he telephoned Grandstaff and another employee to tell them about it as well.

About a week later, an anonymous letter from "A Concerned Massage Therapist" was sent to Zuckerman, Frost, and Cohen. It was a relatively temperate disagreement with Trieste's assessments of guest and employee preferences. It asserted that Trieste preferred the contour tops contrary to the employees' expressed preference for a 50-50 split, and that she was misinforming higher management of the facts. It listed 13 therapists by name who supposedly preferred the rectangular table.

The letter was referred to Trieste who on July 21 wrote a response, attached a copy of the anonymous letter to it, and distributed both to the entire massage therapy staff. The contents of her response are of little concern here. Suffice it to say that she expressed disappointment in persons who would not talk directly to her and invited anyone who wished to come talk to her. However, the anonymous letter attracted Grandstaff's attention. She told Trieste that her name had been used without her permission and she did not want Trieste to think that she had been involved in writing it.

During the course of their talk, they speculated about who might have done so. Grandstaff told her that Metz had telephoned her about the topic about a week earlier when Metz told her he had read Trieste's memo. Even so, they both agreed that it was unlikely Metz was the "Concerned Massage Therapist." Indeed, Metz testified that he had not written it and did not know who had.

Nonetheless, Trieste now knew Metz had read the memo. She advised Stricker who thought that was a serious matter which should be discussed with Personnel Director Oliver McKinney. The next day they spoke to McKinney. He agreed with them that Metz' actions warranted discharge, but told them they needed better corroboration of what had happened before action could be taken.

The corroboration came a few days later when Salon told Trieste about her encounter with Metz on the night they read the memo. As a result both Trieste and Stricker went back to McKinney. He agreed that there was enough evidence to warrant discharge unless Metz had a good explanation for what he had done.

On July 30, McKinney called Metz to his office to meet with Trieste and Stricker. He says Trieste told him that a serious charge had been leveled against him, reading private company intraoffice mail. There is really no dispute that Metz denied having done so or that Trieste countered his denial by saying they had two witnesses who had reported he had read the memo to Cohen. At that point Metz sought to explain the matter privately to McKinney. But McKinney,

who may or may not have been earlier prepared to listen to an explanation, refused, as he had decided Metz' denial had rendered him unworthy of belief.

Metz says he was given three reasons for the discharge: (1) he had read private correspondence; (2) he had made attacks on program coordinators; and (3) he had undermined supervision. McKinney says only two reasons were given: (1) reading the private correspondence and (2) making attacks on employees.

III. ANALYSIS AND CONCLUSIONS

There are some other factual matters to which I have not alluded, but I omit them as not being germane to the fundamental decision which is whether or not the General Counsel has established that Metz had engaged in any protected concerted activity in this set of circumstances leading up to Trieste's and Stricker's decision to take him to McKinney for discipline. The only incident which triggered their concern was evidence that he had read the memo to Cohen and had told others about it. Nothing else prompted any action.

It is true that he had engaged in protected activity earlier when he successfully complained on behalf of the male therapists to correct inequities in work assignments. Indeed, his possession of the printouts in early 1993, might also be a continuation of that effort. And, had his use of those printouts triggered any disciplinary response, or even anger, the issue of mutual aid and protection might be worthy of concern. Yet the only evidence that his history might be of concern is his testimony that one of the three reasons allegedly advanced for his discharge was "attacks on the program coordinators." That statement is certainly vague, if credited, and does not lead one to conclude that it is inextricably connected to the perceived inequitable work assignments which happened once in a while.

Respondent's references to "attacks" which he had made were to those on employees, not program coordinators, and dealt primarily with an incident involving one therapist training another in an entirely different field, hydrotherapy. Metz had lost his temper in that incident.

On balance, I do not believe Respondent made a reference to his past protected activities. Moreover, there is no evidence that it held him in negative esteem for that conduct. Indeed, Macaulay could not have obtained the computer changes without higher management's concurrence. That concurrence demonstrates fairly conclusively that Metz' previous concerns with equitable work distribution was not a significant concern to Respondent. In fact, it is unlikely that Trieste knew much about it, having been hired well after those changes had been made. And, on the one occasion which she knew about, she agreed to look into the complaint without evincing any concern over Metz' interest.

Therefore, the only reason for Metz' discharge which is left is his having read Trieste's memo to Cohen. That simply raises the question of whether that conduct was protected by the mutual aid and protection clause of Section 7. I conclude it does not. Therefore, the General Counsel's evidence of disparate treatment, lack of a progressive disciplinary system or unclear company rules regarding prohibiting such conduct are not material to the case.³ Instead, what is material is

³In fact, Respondent did discipline Clemmons and Salon for reading the document. Their punishment was less, warnings and admon-

whether by that act, Metz had taken any essential step toward aiding and protecting employees. See, e.g., *Whittaker Corp.*, 289 NLRB 933 (1988).

The simple answer is that he had not. With little credibility, he defends his conduct on the ground that he thought the memo was an advance version of the meeting's minutes, that no one told him he couldn't read such material, and that it was a normal place to find company announcements.⁴ Whether or not that is the case, he undoubtedly knew from his first prurvy that the memo was not his business. That is true whether or not the secretary failed to seal it or otherwise secure it. It is true even if it had somehow been turned right side up by someone else. Once he saw it, he cannot say it was his business any more than it was his business to look in the mailboxes of fellow therapists. He should have honored Trieste's expectancy of privacy.

Instead, he was seen, reasonably, by Respondent's officials, as snooping, not too dissimilar from his possession of the printouts. That the letter might have contained information of interest to employees does not change that. He was not seen as arguing over which type of table was appropriate or what their preferences were. But even if he was, there is significant doubt that those concerns would be protected. It is Respondent's entrepreneurial right to determine the nature of the equipment it chooses to buy to try to make a profit. Employees do not have that as a matter of right. Therefore, his decision to read Trieste's mail would not lead him to a protected purpose, i.e., one involving the mutual aid and protection of employees.

Thus, the parties' citations of confidential wage information cases are really inapposite. Depending on the fact patterns, these cases can lead to findings of interference with employees' right to discuss wages among themselves [*Super One Foods*, 294 NLRB 462 (1989)] or findings that an employee improperly obtained the information no matter what his purpose was. E.g., *Bullock's*, 251 NLRB 425 (1980). Those cases follow the premise that discussion of wage information is a mutual aid and protection matter, a premise which I do not dispute. Unlike those cases, however, reading private intraoffice mail having to do with a business decision relating to procurement of equipment has no, and can lead to no, mutual aid and protection matter. Thus, many of the issues raised by the General Counsel are of no significance to the appropriate analysis. These include: whether Metz can be forgiven for mistaking the memo as the meeting's minutes; whether the penalty is too harsh for the transgression; whether there was a rule prohibiting Metz from snooping; whether the memo was or was not confidential; and whether Metz could properly broadcast its contents to other employees in the guise of concerted conduct. Since the object of Metz' snooping could lead to no mutual aid and protection end, Section 7 of the Act offers him no refuge from discipline.

The case which seems to offer the closest fact pattern to this is *Uniform Rental Service*, 161 NLRB 187, 190 (1966). In that case the Board refused to reinstate an employee who

ishments, due to Respondent's perception that Metz had led them to read the document. Disparate treatment as a plaintiff's argument is problematic in that circumstance.

⁴Macaulay agrees that she placed the minutes on that desk for reading and also used the desk on six occasions to disseminate other material of interest to the therapists.

had entered a manager's private office and pilfered a letter concerning the union to employees from the desk and broadcast its contents to fellow employees. The Board said the fact that the employer later distributed it to the employees as intended was unimportant. Instead, it observed that an employee does not have the right to enter a private office and obtain what was then still a private document. It is true that here Metz was not prohibited from using the desk for certain purposes, but he exceeded his authority by reading the letter and broadcasting its contents. Similarly, see *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990): "Quite simply, wrongfully obtaining information from a company's private files is not a protected activity." Metz' conduct here was not significantly different. Once he recognized that the memo was not addressed to him or to employees, he should have stopped. His failure to do so does not pull him under the protective umbrella of Section 7.

Thus, I conclude that the General Counsel has failed to establish a prima facie case that Metz has engaged in any activity protected by the Act. The complaint should be dismissed.

Based on the foregoing findings of fact, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The General Counsel has failed to make out a prima facie case that Respondent has violated Section 8(a)(1) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The complaint is dismissed in its entirety.

⁵If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.