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labor@joneswalker.com

YOU'VE GOT MAIL, A PINK SLIP, AND A LAWSUIT!

by: Jennifer L. Anderson

With the explosion in electronic communications technology, many employers have implemented e-mail, voice mail, and internet policies to keep their employees' use of their electronic systems in check and reduce potential liability the improper use of their systems. An effective policy identifies the conduct prohibited, the avenues for seeking redress for policy violations, and the consequences for violations. But, a policy is only good if it's communicated to employees and actually enforced when violated. In other words, without the dissemination and consistent enforcement of such a policy, an employer could face a grievance, lawsuit, or liability for firing an employee who commits even the most egregious of violations, for example, viewing and transmitting pornography, particularly when the employee is a union member. Seem counterintuitive? A case from the U.S. Court of Appeals for the Fifth Circuit in New Orleans shows just how realistic this scenario is.

"Snapshot" of employees' e-mail is revealing

A company took a "snapshot" of its e-mail server to determine whether its employees were complying with its e-mail policy. Unfortunately, the company discovered that more than 250 employees had sent, received, or saved pornographic, violent, and non-business related material on its system. Instead of firing each employee who violated its policy, the company developed a ratings system by which to gauge the severity of the violations.

The ratings are in, and it doesn't look good

Based its system of rating the e-mail policy violations, the company fired twenty employees. A dozen of them, however, belonged to a union, which filed grievances on their behalf. Freddie Bonner, one of the twelve, was serving a three-year probation under a last chance agreement with the company when he was fired. Interestingly, Bonner's probation resulted in part from his prior involvement with sexual materials in the workplace.

Panel gives ratings system a "thumbs down"

Almost two years after the terminations, a three-person panel of arbitrators heard the former employees' grievances. While the panel found that the employees had violated the company's e-mail policy by sending "garbage through Company email," it also found that the company didn't have just cause to end their employment. The panel concluded that some similarly situation employees, including supervisors, had received less punishment, that the company's policy was unclear, and that the company inadequately trained its employees about its policy. As a result of the arbitration, the terminations were converted into suspensions without pay, but the panel awarded each employee full benefits as if the terminations had never occurred.

Displeased with the panel's decision, the company first asked the panel to reconsider reinstating Bonner, the employee who had been disciplined previously for an infraction involving sexual material in the workplace. After the panel declined, the company then asked the panel to clarify its meaning of "benefits." The panel explained that, in its opinion, the employees were entitled to (1) the same performance award received by other employees who had not been disciplined, (2) vacation time and pay for three years, and (3) maximum 401(k) benefits that would have vested during the termination period.

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Employer asks court for second opinion

Not surprisingly, the panel's decision and explanation was not acceptable to the company, which then filed a complaint in federal court asking to set aside the benefits awarded by the panel and to reject Bonner's reinstatement. Of course, the union asked to the court to uphold the decision of the panel. Both parties filed motions to dismiss the other side's case. For the company, the court vacated Bonner's reinstatement. However, for the union, the court upheld the benefits given to each employee, except Bonner. Both parties appealed the rulings to the federal appeals court in New Orleans.

The appeals court began its analysis of the case by noting that the panel's decision enjoys deferential treatment, which means that it's pretty darn hard to get a court to overturn or modify a panel's decision. The appeals court also explained that it must affirm the panel's decision if the award "draws its essence from the Collective Bargaining Agreement" (CBA). Of course, the company argued that the panel exceeded its authority by formulating an award not supported by the CBA. But the appeals court rejected this argument.

In reviewing the CBA, the appeals court discerned no language limiting the ability of the panel to award vacation and 401(k) benefits to the wrongfully terminated employees. The court also discovered no prohibition against the panel awarding the employees a performance honor received by employees who were not disciplined. Essentially, the court concluded that the relevant provisions of the CBA were either silent or ambiguous on the issues confronted by the panel, but that the CBA in no way limited the panel from fashioning the relief it provided. Accordingly, the court considered itself bound to affirm the panel's decision.

As for Bonner, however, the appeals court approved of his discharge. The court explained that the last chance agreement signed by Bonner after his prior infraction served as a supplement to the CBA. The agreement gave the company the power to fire Bonner for any future performance problems, which included "possessing sexually oriented materials on [the company's] property." During the "snapshot" taken by company, it discovered that Bonner forwarded a sexually explicit cartoon, which violated the e-mail policy and the last chance agreement. Accordingly, the appeals court rejected the union's argument that Bonner should be reinstated, and upheld the lower court's decision in that regard.

Dow Chemical Co. v. Local No. 564, International Union of Operating Engineers, 2003 U.S. App. LEXIS 25424.

Practical lessons for new technologies

Despite having an e-mail policy that allowed the company to fire employees for violations, the company found itself defending its decision to fire employees who possessed or transmitted sexually explicit or other improper material over its electronic system. And, despite its best efforts on appeal, the company was successful in having only one of those decisions reversed. Why?

Some might argue that the panel and the courts just got the decision wrong and, from the employer's perspective, it's easy to see that view. Others might argue that the vagueness of the CBA allowed the panel to much leeway in fashioning a remedy, thereby tying the

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courts' proverbial hands. While both of these views are appealing and may have some merit, it can't be denied that one major reason for the decision, specifically according to the panel, was the company's inconsistent application of its e-mail policy. If other employees committed similar infractions but received no discipline, the company's explanation for firing the employees at issue was susceptible of challenge.

The inconsistent application of a policy to discipline or discharge employees will almost assuredly result in unhappy employees and thus likely lead to litigation. This is true regardless of whether your workforce is unionized. Most e-mail and internet policies state that the company's e-mail and internet systems are for business purposes only, and that any other use is prohibited. But we know that many employees, sometimes even management, use their employer's e-mail and internet systems for a number of personal reasons. And, sometimes, those personal reasons are improper or in conflict with the employer's policies or standards of conduct.

The problem arises, however, when an employer is not consistent in applying its e-mail and internet policies and disciplines or fires some employees for violations for which others have received less or no discipline. When you enforce your policy, you must make sure that similarly situated employees—those with the same or similar violations—receive the same discipline. By looking both behind and ahead of the situation at hand and asking how you've dealt with similar situations in the past, and how you wish to deal with them in the future, you'll be well on your way to minimizing potential complaints by employees who might otherwise feel they're just not being treated fairly and who might speculate that your motivation in disciplining them is unlawful.

SEMINAR ANNOUNCEMENT

EXECUTIVE FORUM

E-Technology: How E-Communication Impacts Your Career and Your Organization

Jones Walker and DBM, Outplacement and Change Management Specialists invite you to a free executive forum on E-Technology on Thursday, April 14, 2005, 201 St. Charles Avenue, 52nd Floor. Registration begins at 8:30 and the presentation runs from 9:00 until 11:30.

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Jones Walker's Labor Relations, Employment & Employee Benefits Attorneys

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ROBERT B. WORLEY, JR[6]
ALIA S. ZOHUR

[1] Also admitted in Mississippi
[2] Also admitted in Florida
[3] Only admitted in Texas
[4] Also admitted in Virginia
[5] Also admitted in Tennessee
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