

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-11-04

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
STATE OF OREGON,)	CONCLUSIONS OF LAW
JUDICIAL DEPARTMENT,)	AND ORDER
)	
Respondent.)	
_____)	

Neither party objected to a recommended order issued on April 6, 2005 by Administrative Law Judge (ALJ) Vickie Cowan, following a hearing on November 10, 2004, in Salem, Oregon. The hearing closed on January 10, 2005, upon receipt of the parties' post-hearing briefs.

Elizabeth Baker, Attorney, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Complainant.

Linda J. Kessel, Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

On February 26, 2004, SEIU Local 503, OPEU (SEIU) filed this unfair labor practice complaint against the State of Oregon, Judicial Department (OJD) alleging that OJD violated ORS 243.672(1)(a) by warning employees that use of the "reply all" function of the computer could violate the Department's policy against using company property for personal use. OJD filed a timely answer.

The issue is whether State Court Administrator Kingsley Click's memo directing employees not to use the "reply all" option when responding to agency-wide e-mails constitutes a violation of ORS 243.672(1)(a)?

RULINGS

The ALJ's rulings were reviewed and are correct.

FINDINGS OF FACT

1. SEIU is a labor organization and OJD is a public employer.
2. OJD is a statewide agency consisting of 27 judicial districts. Each judicial district has a presiding judge appointed by the chief justice. Each judicial district also has a trial court administrator who carries out the local administrative duties of the court.
3. Click is the state court administrator and is responsible for the administration of the statewide court system. Among other things, her office oversees the personnel department. Although Click has no direct supervision over the trial court administrators, each local court must comply with agency-wide policies. The local courts, however, may apply the policies based on local conditions and circumstances.
4. Gary Martin is OJD's personnel manager. Martin and his department are responsible for personnel rules, agency policies, compensation, employee discipline, and other matters relating to employment at OJD. The personnel department develops and issues policies which must first be approved and signed by either Click or the chief justice.
5. OJD has a policy on the use of publicly owned equipment which sets out guidelines for the use of electronic mail for personal use. Generally, the policy permits only business use of publicly owned equipment, with some exceptions that allow personal use. The policy provides, in relevant part:

"I. Allowable Personal Use

"OJD recognizes two narrowly defined exceptions to the general policy of 'business use only.'

“A. Personal Use During Nonwork Time

Personal use is allowable during nonwork time if all of the following conditions are clearly met:

- “• the use is not improper (as defined in Section II. below),
- “• the use does not result in economic benefit,
- “• the use results in no cost, or in de minimis additional cost (excluding reimbursement cost) to the OJD or state, and
- “• the use is minimal and insignificant in terms of time or quantity.

“B. Personal Use During Work Time

“Personal use is allowable during work time only if all the above conditions are clearly met, and

- “• the use is essential and brief,
- “• the use cannot reasonably wait until nonwork time, and
- “• the administrative authority has not prohibited the type of use.

“* * * * *

“II. Improper Use

“Improper use at any time (work time or nonwork time) includes:

- “• violating any law or OJD rule or policy;
- “• conducting any illegal activity or unlawful communication;

“* * * * *

- “• personal lobbying, soliciting, recruiting, selling or persuading, for or against, commercial ventures, products, religions, or political causes or organizations;

- “• personal (nonwork-related) publishing or posting to personal web pages, Internet groups, chat rooms, web pages, or ‘list servs’;

“* * * * *

- “• causing congestion, overload, delay, or disruption of service to any OJD system or equipment (such as may occur by downloading video or music);

“* * * * *

- “• using equipment or technology in any other way that results in an appearance of impropriety or discredit to the OJD.

“This list is intended to provide examples of improper use; it is not necessarily exhaustive or complete.”

6. The e-mail policy was enforced differently at different locations. Clackamas County prohibited the personal use of e-mail. Multnomah County prohibited personal use of e-mail during work hours, but allowed limited personal use outside of work hours. Washington County allowed employees to use e-mail for personal reasons just as they would a telephone.

7. Beginning in the summer of 2003, SEIU campaigned to organize and represent OJD employees statewide ¹

8. Many employees had questions regarding the organization process and compensation issues. In response to these questions, State Court Administrator

¹SEIU instructed its organizers not to use the employer’s e-mail system to contact coworkers because SEIU officials believed that it was a violation of the employer’s policy.

Click sent several memos regarding these issues to all employees by means of a group e-mail with a link to memos which were located on OJD's intranet site

9. On January 27, 2004, Click sent an e-mail to all OJD employees regarding SEIU's organizing drive. The memo stated:

"First, I want to be very clear that this entity has the right under Oregon collective bargaining law to attempt to organize the judiciary's employees. The Chief Justice and I fully respect their right and also the right of each and every eligible employee to choose whether to become represented or not. It is, and it will remain, your individual decision to make."

The memo went on to discuss various compensation topics including PERS and judges' compensation. Included in the memo was a comparison of salaries and benefits between OJD and SEIU-represented employees at other agencies.

10. OJD uses the Lotus Notes program for its e-mail system. To avoid excessive use of its e-mail system, OJD disables the "reply all" function to an agency-wide e-mail. If the "reply all" function were not disabled, a reply could be sent automatically to approximately 1800 persons. Normally, if employees try to use the "reply all" function, they receive a note on the computer screen informing them that they are not authorized to use that function. The restriction on the use of the "reply all" function has been in place for approximately 15 years.

11. In late January or early February 2004, OJD installed an updated version of Lotus Notes. The "reply all" function was not disabled at the time of installation.

12. On February 18, 2004, Click sent another OJD-wide e-mail addressing questions about the organizing process and union dues. That e-mail states, in relevant part:

"Last month, I sent you a memorandum about the Service Employees International Union's (SEIU) interest in organizing the Oregon Judicial Department employees statewide into its membership. As I wrote, SEIU has the right by law to attempt to do so, and every employee also has a right by law to choose freely whether to become represented or not. I emphasized my interest in providing staff with

available factual information so you can independently reach your own conclusions.

“Some of you have written to me or the Personnel Division with requests to address topics that you believed employees statewide would want to hear about and that would be useful to you (and them) in making your decisions. These topics involve both elements of the personnel rules and comparisons and questions about employee participation. I have requested that Personnel pull that information together to send to you in the near future.

“For this memorandum, however, I thought it important to respond to the immediate questions from staff about the process steps involved in an organizing effort and to respond to the question about monthly union dues. I asked the OJD Personnel Division to prepare the following factual information for distribution as explained below.

“A. Organizing Process Steps

“Attached is a written outline of the major steps in the process of creating a bargaining unit, summarized from the relevant statutes or administrative rules. These steps are overseen by the Employment Relations Board (ERB), a state agency that administers Oregon public sector collective bargaining.

“* * * * *

“B. Union Dues

“Union dues rates are not controlled or set by the employer, but are set through the union’s internal processes. The SEIU current dues rate, as quoted by SEIU in its January 2004 flyer to OJD employees, is 1.7 percent of gross base pay, plus \$2.75 per month. Examples for our three most commonly used employee classifications at the top step would result in the following potential dues scenarios if the incumbent was at the top step:”

13. Several employees responded to Click's e-mail by using the "reply all" function. As a result, every OJD employee, including judges, managers, supervisors, and classified staff (approximately 1800 individuals) received each of the employees' personal messages. Some of the employees and judges received the messages while they were in the courtroom. OJD then disabled the "reply all" function.

14. The following day, February 19, 2004, Click sent an agency-wide e-mail to all employees with a link to a memorandum on Business Use of OJD Lotus Notes System. Although the "reply all" function had once again been disabled, Click did not want silence on her part to be read as approval to use the "reply all" function for sending personal messages. Click's memo stated:

"While I'd prefer not to send a clarification memorandum to everyone on the topic, I think it matters that I do so. As you know, I recently sent an informational memorandum to 'all OJD Lotus Notes users' on the OJD e-mail system. This is the primary method that OJD (and particularly this office) internally uses, whenever feasible, to transmit business-related memoranda, advice, and communications to judges and staff on a wide variety of administrative and management issues. Very few materials need regular mailing as a result. Occasionally someone responds to a 'Notes_ALL USERS' message or to other 'broadcast' type list-serv we have created. This can generate a cycle of ongoing responses creating problems; some to our IT system and some to others because of volume, frequency, or content.

"A widespread and ongoing 'all Lotus Notes users' (or other large group) dialogue can congest our electronic information system and be very distracting and disruptive to other users (who are trying to do other work). The list should not be used (and are not intended to be) for 'chat' type activity. We think we've corrected the system for now, but I ask your understanding in not using 'reply all' to these or similar 'large group' situations unless requested to do so. There is usually a 'reply sender' option or a contact person listed for questions or comments, because we do want to hear from you if you need or wish to contact us.

"Secondly, I do need to provide a cautionary reminder on the use of the OJD e-mail system regarding 'purpose' or 'content'

issues. The OJD policy on this topic, 'Use of Public Owned Equipment' (Volume 1, Chapter 1, Section 6) is clear that '... OJD's general policy is to use publicly owned equipment for business purposes only and in a cost effective manner.'

"The policy allows a narrow exception for personal (defined as nonwork) use on work time (i.e., use must be essential, brief, cannot reasonably wait, not prohibited, not improper). There are also provisions which allow for personal use on nonwork time (i.e., use is not improper, no economic benefit, no cost to OJD, etc.) 'Improper use' under the policy includes, among other things: 'personal lobbying, soliciting, recruiting, selling or persuading, for or against, commercial ventures, products, religions, or political causes or organizations.' When you hit 'reply all' to Lotus Notes users (or to other broadcast type OJD lists), or even in regular ordinary use, content and comments, such as occurred in some replies today, could fall into the inappropriate use category or into a violation of other rules, whether intended or not.

"If you have any questions about whether your e-mail use or content is appropriate or not, please contact your supervisor or human resources manager. My goal in sending out this reminder is to not have anyone run afoul of the policy or rules. Thank you for your understanding and consideration."
(Emphasis in original)

15. No employee was disciplined or threatened with discipline over the e-mail usages.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.

2. OJD did not violate ORS 243.672(1)(a) by prohibiting employees from using the "reply all" function.

ORS 243.662 gives public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose

of representation and collective bargaining with their public employer on matters concerning employment relations.” ORS 243.672(1)(a) makes it an unfair labor practice for a public employer to interfere with, restrain, or coerce employees *in or because of* the exercise of those rights. Subsection (1)(a) establishes two independent claims, a “because of” violation, and an “in” violation. *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03, 20 PECBR 767, 772 (2004). SEIU alleges that the State violated both prongs of subsection (1)(a).

Standards

A violation of the “because of” prohibition can occur when the employer takes action directed at an employee in response to the employee’s exercise of protected rights. In analyzing a “because of” claim, we look beyond the employer’s actions and focus on the reason for the employer’s conduct. If the employer’s reason for its action was to interfere with, restrain, or coerce employees because of their exercise of ORS 243.662 rights, the employer’s actions are unlawful. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 348 (2003). It is not necessary to show that the employer acted with antiunion animus. *ATU v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 788, n. 8 (1998).

To analyze an “in” claim, we determine whether the natural and probable effect of the employer’s conduct would tend to interfere with, restrain, or coerce employees in the exercise of their Public Employee Collective Bargaining Act (PECBA) rights. The union need not prove antiunion motivation, actual interference, restraint, or coercion. *Tri-County Metropolitan Transit District, supra*, 17 PECBR at 789 and n. 10. The subjective impressions of employees are not controlling, and the possible effects of the employer’s actions are not sufficient to establish a violation. *Tri-County Metropolitan Transit District, supra*, 17 PECBR at 789.

Employer threats and interrogation in response to protected activity can violate both the “because of” and the “in” prohibitions. *Washington County Police Officers Association v. Washington County*, Case No. UP-99-89, 12 PECBR 910 (1991).² However, not all employer action related to protected activity is unlawful. When an employee’s protected activity causes a situation that the employer legitimately needs to address, the employer can take corrective action directed at the employment-related problem without violating subsection (1)(a). *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, Case No. UP-72-96, 19 PECBR 284 (2001), *on remand from* 171 Or App 616, 16 P3d 1189 (2000).

²Generally, noncoercive and nonthreatening communications about protected activity do not violate subsection (1)(a).

A union and its members do not have a statutory right to use the employer's equipment to communicate. However, if the employer has a rule regulating such use, it must not be applied in a discriminatory fashion. *OUS v. OPEU*, Case No. UP-61-98, 19 PECBR 431, 434 (2001) (Order on Reconsideration), *rev'd on other grounds* 185 Or App 506, 60 P3d 567 (2002).

A rule prohibiting union-related speech and distribution of materials in working areas or during work time is presumptively valid. This presumption can be rebutted by showing that the rule was discriminatorily promulgated or enforced. In other words, if an employer allows its employees to use its equipment for personal or nonwork-related matters, the employer may not restrict only those uses related to union activity. *SEIU v. State of Oregon, Judicial Department*, Case No. UP-3-04, 20 PECBR 864, 873 (2005).

By contrast, a rule that prohibits union-related speech or distribution of union-related material in nonwork areas or on nonwork time is presumptively invalid. This presumption can be rebutted by showing the rule is necessary to maintain production or discipline and that these circumstances outweigh the employees' interest in engaging in union-related activity. *Id.* at 872.

E-mail policy

We apply these standards to the case before us. OJD has a longstanding policy prohibiting use of its e-mail "reply all" function to respond to agency-wide e-mails. The "reply all" policy on its face applies to both work and nonwork times.

The policy is presumptively valid to the extent it regulates employee activities during work time, and SEIU has not overcome the presumption. OJD management regularly uses e-mail to disseminate business information to all OJD employees throughout the state. For 15 years, the "reply all" function has been disabled. There is no evidence that Click or other managers ever used the "reply all" function. Nor is there evidence that OJD ever intended to allow its employees to use the "reply all" function.

Based on the evidence in the record, we conclude that OJD's "reply all" policy is valid. The policy was not promulgated in response to actual or anticipated union activities, and it was not discriminatorily enforced.

The policy is presumptively invalid to the extent it controls union activities during nonwork time. The State has overcome the presumption. When the "reply all" function is used to respond to an agency-wide e-mail, it sends the response to

1800 employees. The evidence indicates that regular use of the “reply all” function in these circumstances would result in a volume of mail that could create congestion in the system and hamper legitimate and necessary business uses. Further, the fact that judges and other staff receive these e-mails while they are in the courtroom constitutes an interruption of critical work that the State can legitimately control.

Under these circumstances, we conclude that the State’s policy which prohibits the use of the “reply all” function is lawful.

Click’s e-mails

SEIU alleges that Click’s e-mails to employees were intimidating and coercive. We disagree. A review of those e-mails indicates that their content was neutral and factual in nature, and did not discourage or encourage union membership or activity. As such, we find that they did not have the probable effect of discouraging the exercise of rights protected under the PECBA. In *OSEA v. Aumsville School District*, Case No. UP-90-91, 13 PECBR 509 (1992), we found that the employer’s dissemination of memos regarding union dues, which were straightforward and contained no threats or promise of benefits, did not have a natural and probable tendency to coerce or intimidate employees. There, as here, the method of delivery was consistent with the delivery of memos on other topics of employer business.

The state court administrator’s job duties include communicating a variety of business-related topics on an agency-wide basis. SEIU has not alleged that any of the potential bargaining unit employees have any job duty that requires them to send e-mails to all 1800 OJD employees. Rather, the evidence shows that the employees were using “reply all” to send personal e-mails.

SEIU argues that OJD’s policy of allowing OJD to use its own e-mail system to inform employees about the union is discriminatory unless SEIU is allowed to use the employer’s system as well. SEIU misses the point. In determining whether a policy is discriminatory, we ask whether the policy (a) places more or different restrictions on union activities than it does on other personal, nonwork-related activities, or (b) was adopted for the purpose of restricting union activity. We do not compare union activities to legitimate employer business-related activities. Further, the union does not contend that it lacked other available channels of communication to carry its message to the employees.

OJD did not violate ORS 243.672(1)(a) by providing neutral, factual information to employees regarding the organizing campaign, or by reminding employees that use of the "reply all" function in response to agency-wide e-mails was prohibited. We will therefore dismiss this complaint.

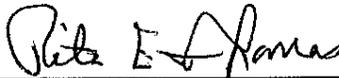
ORDER

The complaint is dismissed.

DATED this 28th day of September 2005.



Paul B. Gamson, Chair

* 

Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482

*Board Member Thomas Specially Concurring:

I concur with this Order, but do not agree with the application of *SEIU v. State of Oregon, Judicial Department*, Case No. UP-3-04, 20 PECBR 864, 873 (2005). In my dissent in that case I argue, I believe correctly, that an employer may apply a policy prohibiting employee solicitation during work time. Solicitation to purchase goods or to join an organization of any kind is quite easily distinguished from personal conversations about nonwork related matters such as discussing families, plans for vacations, and other social interactions. An antisolicitation policy which makes this distinction, and which is applied uniformly by an employer, does not violate the PECBA.