

N.I.C.E. News

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President's Message

BY STEVE DEVORE



Steve DeVore

If you have been in circulation for a while, you should remember that Sales, Service and Collections used to be the primary measurements of a circulation department. Sales were mostly the result of sales crews and carrier contests. The higher percentage of youth carriers gave us the resources for this type of sales. Service was measured in complaints per thousand. We still use this measurement but we also have attempted to improve service to customers in other ways such as earlier delivery deadlines. Finally, there were collections. Carrier collect customers meant that carriers had bills and their payment needed to be monitored. Some motor routes had bills of several thousand dollars per month.

Our business was pretty straightforward "back in the day." Then the information market exploded with new competition from multiple cable news channels and the Internet which caused circulation to decline nationwide. (Actually the decline had begun before cable news channels and the Internet, but the competition served as a wakeup call.)

Our NICE members have responded and have experienced successes with many great programs to address the decline. First and foremost are retention programs to keep our valued readers as subscribers. EZ Pay, kiosking, earlier delivery, customer incentive programs, improved service, improved content and websites are a few examples of the other responses we have implemented. NICE members have implemented many programs that are on the cutting edge of circulation operations. Through innovation, combined with strong product and service, circulation departments are experiencing success.

There is no better place to find out what is working in our region and what national trends are developing, than to attend our 84th Annual NICE Sales Conference. Hear what the nation's most sought after speakers on circulation have to say, and hear the latest successes from your colleagues. Mark it on you calendar, May 2nd through 5th, 2007.

I would like to thank First Vice President, Russ Davis, for lining up three of the most knowledgeable and popular speakers in the country today for our conference:

Steve Wagenlander Director of Circulation at The Post & Courier will share "25 Ideas to Grow Circulation and Revenue."

Mark Henschen, Circulation Director of the North County times will show us how to "Unleash the Power Within."

Mike Zinzer will present "Master Circulation Legal Strategies."

Congratulations to Keith Foutz

The Newspaper Association of America has selected NICE member Keith Foutz, corporate circulation director for Western Communications Inc. and The Bulletin as the 2007 Circulation Sales Executive of the Year. Keith received the top award for newspapers with circulation under 75,000 as well as the overall award which includes newspapers in two other categories, (75,000 – 150,000 and over 150,000). Keith will be presented with the award at the NAA federation Awards Luncheon on January 29 in Las Vegas.

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Legally Speaking

by *L. Michael Zinser* • NICE General Counsel

This month's column reports on a new U. S. Supreme Court case that makes it easier for employees to make out retaliation claims under the discrimination laws and a new Court of Appeals case upholding management's right to discharge an employee for disloyalty.

1. U. S. Supreme Court expands "retaliation" definition

White, a forklift operator for Burlington Northern & Santa Fe Railroad Co. ("Burlington") complained about sexual harassment by her supervisor. Although the supervisor was removed from his position, White was later transferred (at no change in pay) from her forklift position to standard laborer tasks. She filed a discrimination complaint regarding the transfer; she was then suspended for 37 days insubordination pending the Company's investigation into the insubordination issue. White was reinstated with back pay after a union grievance was sustained by an arbitrator, holding she had not been insubordinate. White filed retaliation charges against Burlington, and a jury awarded White compensatory damages. The U. S. Court of Appeals for the Sixth Circuit affirmed.

In a surprise unanimous decision, the U. S. Supreme Court affirmed the Sixth Circuit's ruling, holding that Title VII's anti-retaliation provision, unlike its discrimination provision, permits recovery for discriminatory acts that are unrelated to employment and/or that do not occur in the workplace. The Supreme Court further held that Title VII's anti-retaliation provisions only cover alleged retaliatory acts that are "materially adverse to a reasonable employee or applicant," meaning acts that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."

The Court stated:

We speak of material adversity because it is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American Workplace'... An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.

The Court also stated that whether an action is materially adverse must be judged from an objective standard, rather than from the employee's subjective point of view.

Applying its holding to White's circumstances, the Supreme Court affirmed that a reasonable person might well have been dissuaded from pursuing her discrimination claims by her suspension, even though she was awarded back pay. The Court reasoned that 37 days would be a long time for any person to go without pay not knowing whether back pay would be dispensed and that such a hardship could cause a reasonable person to consider forgoing a discrimination claim in exchange for returning to work and getting paid. As to the transfer, the Court reasoned that although not every transfer is materially adverse, the transfer from a more prestigious, highly skilled forklift operator job to a "more arduous and dirtier" position, which was objectively considered a demotion by Burlington employees, constituted a materially adverse reassignment.

Editor's note: This case is a surprise gift to plaintiff law-

yers. In many jurisdictions before this case, courts had ruled that retaliation had to involve tangible or ultimate employment decisions such as "hiring, granting leave, discharging, demoting, or pay reduction." To quantify the impact, White's damages before this decision would have been zero since she suffered no reduction in pay and was reinstated with back pay. The plaintiff, by virtue of this decision, received \$43,000 plus attorneys' fees. Retaliation claims will mushroom!

2. Disloyalty is cause for discharge of union activist

Instigated by CWA Local 1701, a union activist attempting to organize Endicott Technologies said the following in a published newspaper article:

'There's gaping holes in this business', said Rick White, an employee with twenty-eight years at the Endicott plant who, with nearly 2,000 other people, recently transferred from IBM to Endicott Interconnect. White, who kept his job, said development and support people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business.

The employee was specifically warned about his disparagement of the Company in the article, which violated the Company handbook, and he was warned that he would be fired if it happened again. Just two weeks later, the same employee posted a message on a website that the newspaper maintained as a public forum and stated in part: "...This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past that were saved..."

Consistent with the warning, the Company fired the employee. He filed an Unfair Labor Practice Charge. Guess what the NLRB did? You guessed it. In a 2-1 decision (with Bush appointee Chairman Robert Battista dissenting), the NLRB ruled that the employee had engaged in protected activity.

The U. S. Court of Appeals for the D.C. Circuit strongly disagreed. That court ruled that the employee's "communications were unquestionably detrimentally disloyal." The court went on to say that the critical nature and injurious effect of the employee's newspaper article comment alone gave the Company "cause" to immediately discharge him. The court noted that he was given a second chance, and just two weeks later, he claimed that management lacked "good ability to manage," was causing the business to be "tanked," and was going to "put it into the dirt."

The court ruled that "the disloyal, disparaging, and injurious nature of [the employee's] attacks on the company has deprived him of the protection of [NLRA] when read in the light and context of the purpose of the Act." The fact that the same employee was simultaneously trying to unionize the Company was of no matter. The court relied upon the U. S. Supreme Court's decision in *Jefferson Standard*, which ruled that whether or not an employee is engaged in a concerted activity wholly or partly within the scope of the Act, the attack on the Employer will deprive the employee of Section 7's protection if it constitutes "insubordination, disobedience, or disloyalty." The fortuity of the coexistence of a labor dispute affords the employee no substantial defense.

Circulation Sales and Retention Ideas

Here are four sales and retention ideas used at The Oregonian.

By: Jodie Krueger, The Oregonian, NICE Third Vice President

Single Copy: Goal was to develop a program to encourage independent wholesalers to re-supply and re-merchandise their papers at newsstand locations. Most customers don't buy the top copy on the shelf, and we all know what the stacks look like by the afternoon when you get your second wave of buyers. We wanted to encourage our independent wholesalers to go back out in the afternoon between 1 p.m. and 4 p.m. The program focuses on Sunday distribution, both the bulldog (put out on Saturday) and the Sunday final edition. On Saturday and Sunday between 11 a.m. and 1 p.m. representatives from the paper go to store locations and place a single sheet flyer in the bottom of the stack that says, "Congrats! This certificate is worth a \$25 shell gas card! Redeemable only by an Oregonian Publishing Company Independent Wholesaler who finds this certificate and reports the finding to Gary Skidmore (Single Copy Manager) before 4:00 p.m. on today's date. Original certificate must be turned in as property of The Oregonian". The locations for the certificates are randomly selected from the high volume stores. Any location with a draw of 25 or more is a potential target. 16 flyers are left each weekend, and are rotated throughout the independent wholesaler's areas. We also frequently put more than one flyer in an independent wholesaler's area to make sure they keep looking even if they find the first one. The program has been around for about 3 years. The first weekend, the Single Copy manager put out 16 flyers and got 0 calls. Now we put out 16 flyers and get 14 calls most weekends. We give the contractor an incentive to make that second trip to their major outlets, displays look a lot better, and we've seen improvement in sales.

Territory Sales Associate (TSA) program: This program has been in existence for 13 months and replaced our youth crewing program. TSA's are adult solicitors who go door to door selling subscriptions. They sell full-rate Easy Pay orders with a \$25 gift card. They may also give a \$10 gift card to a current customer if they upgrade to Easy Pay. They are paid on a commission only basis and are paid based on the retention of their orders vs. per sale. They currently earn \$1.50 per week up to 52 weeks for each account they sell that remains active. TSA's go through a three-week training program before they go in the field alone. Week

1: They spend time in customer service, telemarketing, verification, and stop savers. Week 2: In house classroom training including video presentations of themselves. Week 3: Shadowing successful TSA's in the field. We currently have 27 TSA's averaging 330 orders and 40 upgrades per week. Six -month retention has improved from approx. 14% with kid crews to 45% with the TSA's.

Summer "Sellabration": Between June 4th and August 26th, we designated two individual weeks where our 12 Sales Representatives could achieve extra commissions depending on how many new net 7-day Easy Pay orders their sections sold. We provided each of them with a 15-passenger van; they gathered up their 10 independent distributors and hit the streets. Four levels were established: Level #1 = \$250 for 50 or more 7-day Easy Pay orders, Level #2 = \$500 for 75 or more, Level #3 = \$1,000 for 100 or more, and Level #4 = \$2,000 for 150 or more Easy Pay orders. We had 6 level #1 winners, 8 level #2, 7 level #3 and 1 lucky level #4 winner for a total of \$14,500. We wrote 3,335 full rate Easy Pay orders in this 12-week period. We also ended the summer with an all out "Sales Blitz" with all twelve Sales Reps out selling with their independent distributors! We gave out another \$17,000 in prizes to Sales Reps during this final week and wrote 1,321 Easy Pay orders in one week! A total of 4,656 orders were written by independent distributors and Sales Reps in 13 weeks, for an average of 358 orders per week. Even better, our most recent nine-month measurement shows distributor order retention at 54.5% compared to a year ago when it was 16.2%, making these orders even more valuable!

Stop Saver program: The phone system prompts customers wishing to permanently stop their subscription to our retention department. 6 part-time staffers (4 FTE's) answer these calls from 6 a.m. to 6 p.m. daily and 6 a.m. to 2 p.m. on weekends, our regular customer service hours. Stop savers receive an hourly wage and commissions and can earn as much as a good telemarketer. They do offer a discounted rate of \$2.00 per week, but even with this, the cost per unit is very competitive. 25% of all customers transferred are saved. And the 12-month retention on these orders is 43%, comparable to voluntary starts at 45%.

Passport Requirements Eased Slightly

The Department of Homeland Security recently eased passport requirements due to go into effect in January 2007. US and Canadian citizens will still be able to cross the US/Canadian boarder by land or sea with either a passport or a certified birth certificate, along with picture ID such as a driver's license until 2009, unless changed sooner. However, if you plan to travel by air into or out of the United States, you will then need a passport.

For those of you without passports and planning to attend our cruise conference in May, you can meet our shuttle bus in Seattle at the Holland America cruise terminal; and park and leave your car there. Make sure you have your passport or certified birth certificate with you. Our bus will leave around 9:30 AM, Wednesday, May 2nd and proceed directly to the Vancouver cruise terminal where you can embark

the MS Oosterdam. The NICE shuttle to Vancouver is included in the conference registration. The conference will start at 3:30 PM, Wednesday May 2nd. Vendor set-up will be noon to 3 PM. The ship will arrive in Seattle May 5th and disembarkation will start around 7:30 AM.

If you haven't yet booked your cabin, please do so right away. Contact Theresa Kehrli at AAA Washington (360) 848 2085 for information. Theresa can also tell you how to obtain a certified birth certificate or what information is required for a passport. Booking before December 31 will save \$25 per cabin. Send your conference registration form before December 31 and save another \$25 per person on conference registration. Visit our website: www.nicex.org for registration forms, costs and additional information.

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