

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

Advice Memorandum

DATE: June 19, 2008

TO : James Small, Regional Director
Region 21

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

SUBJECT: Uloop 512-0133-1100
Case 21-CA-38223 512-0133-2250

This case was submitted for advice as to whether the Employer unlawfully removed postings related to employees' wage structure and union organizing from its employee internal internet forum. We conclude that the Employer's actions violated Section 8(a)(1) because the postings' removal discriminated along Section 7 lines and was discriminatorily motivated. Further, even in the absence of discrimination, we conclude that the employees at this workplace have a Section 7 right to post on the forum because they are separated across the country, cannot communicate by traditional means, and would otherwise be "entirely deprived" of their Section 7 right to communicate at work on their own time.¹ [FOIA Exemptions 2 and 5 .]

FACTS

Uloop (the Employer), operates a free online classifieds website for the students, faculty, and staff of universities and colleges located across the country. The website allows the users to buy and sell items, promote functions, or trade services with each other online.

The Employer began its operations in January 2007 and now operates in 52 colleges and universities nationwide. The Employer employs about 130 students enrolled at the various campuses as Campus Representatives ("CRs") to promote the website, register users, and increase the number of classified ads.

Because the CRs work at the campuses where they are enrolled as students, they do not communicate in-person. The CRs' main mode of communication with CRs on other

¹ See The Register-Guard, 351 NLRB No. 70, slip op. at 6-7 (2007), quoting Republic Aviation v. NLRB, 324 U.S. 793, 801 fn. 6 (1945).

campuses is through email and an employee internet forum provided by the Employer.²

The Employer encourages its employees to communicate with each other via the forum. The Employee Training Manual provides that employees should "feel free to post any questions, comments, or recommendations" on the Uloop forum, as it is an "open forum" for employees to "discuss potential ideas, problems, successes, etc." and is a "great resource for sharing ideas and learning from one another." The Employer has no policies limiting the use of the forum. Only employees and managers (not the public) can access the Uloop forum.

On January 15, 2008, at around 7 p.m., a CR from the University of California Irvine posted a message on the forum asking if employees' wages had been reduced. About half an hour later, the Director of Campus Management, Scott Lewis, responded on the forum, explaining recent changes to the pay rate and bonus structure. Several more CRs from Ohio State, the University of Tennessee, and San Francisco State University posted questions on the issue, and Lewis again attempted to explain the changes. CR Sarah Doolittle from the California Polytechnic State University ("Cal Poly") campus posted a message expressing her surprise and frustration over the impact of the new pay and bonus structures. Two CRs from Ohio State and UCLA then posted heated messages, also disagreeing with the new pay structures. Around midnight, CR Austin Garrido, also from Cal Poly, posted a message noting that the CRs would make less money than they were promised when hired:

"Truly amazing how far Uloop has come in one year! . . . Yet Uloop can't pay [its] reps \$10 an hour with a bonus of \$1 per registration over 89? To get Cal Poly Pomona at the numbers it stands at now, it took massive amounts of work. (As discussed in detail Sarah Doolittle's comment above). With this new pay cut we WILL make LESS than what we made last quarter. . . . But it was a real slap in the face to find out we had a pay reduction. With this new system of payment schools similar to ours will not be able to make the same amount of money they did last quarter.

² It appears that, when using email, the CRs rely on private email accounts rather than their work accounts. Employees, at times, communicate by private cell phone.

The new schools were hired on this new pay rate. BUT WE (the old uloop reps) WERE NOT HIRED AT THIS PAY RATE! This pay was thrown on us without knowledge which is pretty unprofessional. How are we to know that next quarter our pay will not be lowered again? Well I guess you can't because 8 dollars is minimum wage. All schools should be paid at the RATE THEY WERE HIRED, no exceptions. Many of your employees if not all of them use their money for school. It is only fair to pay us at the rate we signed up for. To pay the old uloop reps any less is asking us to find a new job. If you want to talk to me please don't email me or call me. Put your response in writing here for all to see.

He ended his message with a caricature named "greedyuloop" - a cigar-smoking man in a business suit clutching money.

Within a few hours of Garrido's posting, the Employer removed this string of forum postings. The Employer claims that, although it believed Garrido's posting was "extremely hostile," it removed the postings because they were causing confusion and anxiety among the CRs and because the Employer wanted its managers to speak directly to the CRs about the changes. The Employer reposted all of the pay rate postings around January 17. Once reposted, employees could read but not add to the messages.

On January 17, Garrido sent emails to fellow campus representatives regarding the pay rate changes. One of the student representatives informed Lewis that campus representatives were emailing about the pay deduction, and Lewis again responded to the concern over pay rates on the forum. He informed employees that the Employer had disabled communications that were not "constructive and above belt" but that it was not "sensing the topic."

On January 18, Garrido contacted SEIU, the NLRB, and the NLRB website about organizing a union. He then sent an email to 15 campus representatives, stating that he had looked into creating a union. Between January 18 and 21, numerous campus representatives emailed Garrido expressing support for a union.

On January 21, Doolittle and Garrido spoke to Southern District Campus Representative Manager Ryan Commons during their regularly scheduled conference call. Commons asked

them questions about the new pay structure and their feelings on the January 15 pay rate topic but did not raise any job performances issues.

On January 22 at 7:32 p.m., Garrido posted a message on the forum advocating unionization:

It was not until recently that I felt like a drop in the ocean of Uloop. That my single voice had no value to this once small company. . . . Right now we are at the whim of the company What is your future with Uloop? With a Union we can have a say in regulating our pay, have a contract based relationship, creating what is the basis of being fired as well as many other issues. Whether you were hired at the beginning, middle or band [sic] new employee a Union can give us all voice in this expanding company. We can take control of our jobs and our future. Please let me know how you feel about this!

At 7:35 p.m., CR Doolittle posted, "I think that starting a union would be a great idea. What is the next step?"

At 7:36 p.m., the Employer removed both union-related posts from the Uloop forum. Fellow CRs immediately called Garrido and asked him why his postings had been removed. At 7:42 p.m., Garrido called his supervisor Ryan Commons to ask what had happened to the postings. Ryan informed him that he and Doolittle had been terminated.

The Employer claims that it removed the union-related postings temporarily "because it was unclear as to whether and how to respond." The Employer shortly thereafter reposted the union messages on the forum, but again, employees would have to start a new chain of postings if they wished to continue the union discussions.³

Uloop forum postings are generally "very specific to the employer," including discussions of how to increase user registrations and how to promote the website. The investigation uncovered one non-work related postings on

³ It is unclear from the file if employees posted more messages on this topic on the forum or if employees emailed each other from their private email accounts.

the Uloop forum on April 10, 2008, when a CR from San Diego State posted a message stating that the CRs at that campus were turning a birthday party into a fundraiser for San Diego State University and the California state school system. The CR solicited ideas to promote and network the fundraiser and stated that the performers at the event would be showing their disapproval of the proposed cuts to state schools.

The Region has authorized complaint alleging that the Employer violated Section 8(a)(3) by terminating Garrido and Doolittle in retaliation for their pay rate and union organizing postings.⁴

ACTION

We conclude that, absent settlement, complaint should issue alleging that the Employer's actions violated Section 8(a)(1) because the Employer discriminated along Section 7 lines and was discriminatorily motivated in removing the postings and because the employees, isolated from each other around the country, had a Section 7 right to communicate on nonwork time over the forum under the Supreme Court's Republic Aviation decision.⁵ We further conclude that the Region [*FOIA Exemptions 2 and 5* .]

In Register-Guard, the Board held that, since the employer's email system was company equipment, employees had no statutory right to use the email system for Section 7 matters.⁶ In so holding, the Board rejected the General Counsel's argument that the Supreme Court's decision in Republic Aviation v. NLRB⁷ required that Board to balance the Employer's business interest against the employees' equally important Section 7 interest in communicating at the workplace. The Board reasoned that Republic Aviation required the employer to yield its property interest only "to the extent necessary to ensure that employees" are not "entirely deprived" of their ability to communicate over Section 7 matters at work on their own time.⁸ Because the Register-Guard employees still communicated face-to-face at

⁴ The Region does not seek advice on the 8(a)(3) allegations.

⁵ See Register-Guard, 351 NLRB No. 70, slip op. at 6-7.

⁶ Id., slip op. at 5.

⁷ 324 U.S. at 801-802.

⁸ Register-Guard, 351 NLRB No. 70, slip op. at 6.

work, email had not "changed the pattern of industrial life" at the facility to the extent that traditional communication sanctioned in Republic Aviation "had been rendered useless," thereby requiring the employer to allow employees to use its email system.⁹

After concluding that employees had no Section 7 right to use the employer's email system, the Register-Guard Board considered whether the employer violated the Act by enforcing its communications policy in a discriminatory manner. In doing so, Board modified Board law concerning discriminatory enforcement, concluding that, to be unlawful, an employer must discriminate along Section 7 lines by treating activities of "a similar character" disparately because of their union or other Section 7 status.¹⁰ The Board thus adopted the Seventh Circuit's analysis in Fleming Co.¹¹ and Guardian Industries,¹² where the court found lawful policies that distinguished between "personal," non-work-related postings on a bulletin board, such as for-sale notices and wedding announcements, and "group" or "organizational" postings, such as union materials.¹³ Under this view of discriminatory enforcement, an employer does not violate the Act if it distinguishes between charitable and noncharitable solicitations, personal and commercial solicitations, personal and organizational invitations, and solicitation and "mere talk." In each case, the Board noted, the fact that union solicitation may be prohibited did not establish that the rule discriminated along Section 7 lines.¹⁴ The Board, however, noted, "if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful."¹⁵

⁹ Id., slip op. at 7. In a footnote, the Board noted that it was not passing on circumstances in which employees have no means of communication at work other than email. Id., slip op. at 7 fn. 13.

¹⁰ Id., slip op. at 9.

¹¹ 349 F.3d 2968 (7th Cir. 2003), denying enf. 336 NLRB 192 (2001).

¹² 49 F.3d 317 (7th Cir. 1995), denying enf. 313 NLRB 1275 (1994).

¹³ Register Guard, 351 NLRB No. 70, slip op. at 8-9.

¹⁴ Id., slip op. at 9.

¹⁵ Id., slip op. at 9 fn. 18.

We conclude that the Employer here clearly discriminated along Section 7 lines in removing the wage and union-related postings. Thus, unlike in Fleming, Guardian, and Register-Guard, the Employer here has no policy limiting the use of the forum in any manner, whether for non-work solicitation or solicitation on behalf of outside organizations. Rather, the Employer's policy encourages an "open forum" for employees to discuss issues and problems. Thus, the Employer discriminated where, in the absence of any policy – and a policy actually encouraging the expression of new ideas – it removed Section 7 postings.

Any argument that the Employer, in practice, only allowed postings related to how employees perform their daily CR functions, or that an implicit policy prohibited non-performance-related postings, is belied by the facts. First, the Employer's participation in the online discussions about wages for several hours before removing the chain and its informing employees that it did not mean to quell discussion over the topic by the removal, demonstrate that the Employer viewed the topic to be appropriate. Second, that the Employer reposted both the wage rate and union postings just days after removing them belies any argument that the postings conflicted with some internal policy. Third, the fact that Employer did not remove an April 2008, nonwork posting about raising money for California state school system shows the Employer's discriminatory enforcement. Thus, while the Board in Register-Guard recognized a distinction between charitable and noncharitable solicitations, the fundraiser for the California state school system was not akin to soliciting for the Red Cross or the Salvation Army. Rather, the posting expressed a political viewpoint on state funding and constituted a call to action in support of a cause.¹⁶ Thus, rather than having an actual or implicit rule prohibiting solicitation or non-performance-related postings, the Employer discriminatorily removed postings where it did not agree with the Section 7 content.¹⁷

¹⁶ The Board has held that an employer that has allowed only a small number of isolate "beneficent acts" as a narrow exception to a no-solicitation policy does not violate Section 8(a)(1) of the Act by forbidding union solicitation. Hammary Mfg. Corp., 265 NLRB 57 at fn 4 (1982).

¹⁷ Although not raised, it could be argued that the postings at issue lost their Section 7 protection due to the inappropriate tone of the messages. This argument lacks merit. Calling the Employer "greedy," posting a fat cigar

Even if the Employer attempts to argue that the forum was for limited work usage or some other proffered distinction, its conduct in removing the postings at issue is unlawful because it was clearly discriminatorily motivated. The Board in Register-Guard noted that "[o]f course, if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful."¹⁸ The Employer admitted that it took down the wage postings so that it could have an opportunity to talk to employees instead of allowing them to continue the dialogue among themselves and that it took down the union-related postings because it did not know if and how to respond to the postings. The Employer has thus admitted that its purpose in removing the postings was to quash employees' Section 7 communications. Further, the Employer's unlawful termination of Garrido and Doolittle in retaliation for their protected activity evidences the Employer's unlawful motive in removing the selected postings.

Finally, even absent evidence of discrimination, the Uloop employees had a Section 7 right to communicate on the forum under Republic Aviation and Register-Guard because traditional methods of employee communication are not available. While the Board in Register-Guard rejected the argument that, in evaluating workplace rules limiting Section 7 electronic communication, the Board must always balance Section 7 and employer interests, the Board did recognize that Republic Aviation requires the employer to yield its interest in its equipment so that the employees are not "entirely deprived" of their Section 7 rights to communicate at work.¹⁹ The 130 student employees working at

smoker, and advocating for a union, are not sufficiently egregious to lose the Act's protections. See Container Corp. of America, 244 NLRB 318, fn. 2 (1979) (posting on bulletin board implying that manager was a "slave driver" who expected a lot from his "chain gang" without giving anything back was not so egregious to lose the Act's protection; employer may not remove postings simply because it finds them "distasteful"). Any argument suggesting otherwise is refuted by the fact that the Employer itself reposted the messages within a few days.

¹⁸ Id., slip op. at 9 fn. 18; slip op. at 5 ("there is 'no statutory right . . . to use and employer's equipment,' as long as the restrictions are nondiscriminatory"), 7 ("Respondent may lawfully bar employees' nonwork-related use of its email system, unless the Respondent acts in a manner that discriminates against Section 7 activity").

¹⁹ Register-Guard, 351 NLRB No. 70, slip op. at 6.

52 campuses nationwide do not have the means to communicate in person and, therefore, would be "entirely deprived" of their Section 7 right to communicate at work if prohibited from using electronic communications.²⁰ Indeed, the January 15 string of postings concerning wages involved employees from six different campuses in three different states, demonstrating the employees' reliance on the forum to discuss Section 7 issues.

Moreover, any balancing of interests here clearly weighs in favor of employees' Section 7 right to communicate over the forum. Section 7 interests are paramount because the Uloop employees have no traditional methods of communicating with one another and because the forum is clearly the "natural gathering place" for employees to communicate – akin to a breakroom or lunchroom where none is available.²¹ The Employer, by contrast, has no countervailing business interest in prohibiting employees from using the forum, where its own forum-usage policy encourages employees to express their comments and recommendations. The removal of the postings thus violated the Act because it deprived employees of their right to engage in Section 7 communications with each other during nonwork time at the work place.²²

[FOIA Exemptions 2 and 5

.23]

²⁰ Clearly, some employees may work with one or two other CRs located on the same campus, but communications among employees overall is limited to electronic communications.

²¹ See Beth Israel Hospital v. NLRB, 437 U.S. 483, 495, 501-02 (1978) (noting that balancing of interests weighed in favor of allowing employees to solicit and distribute union materials in the hospital cafeteria where it was the "natural gathering place" for employees).

²² Republic Aviation, 324 U.S. at 801, fn. 6. Further, the temporary removal of the postings was not a de minimis violation, where employees can no longer respond to string of posts, thus stifling communication, and where the Employer has unlawfully terminated the discriminatees based on their protected activity.

²³ [FOIA Exemptions 2 and 5

Accordingly, as set forth above, absent settlement, complaint should issue alleging that the Employer violated Section 8(a)(1) by removing the employees' protected forum postings [*FOIA Exemptions 2 and 5* .]

B.J.K.

.]