

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

Advice Memorandum

DATE: August 6, 2009

TO : Alan Reichard, Regional Director
Region 32

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

SUBJECT: Kaiser Permanente
Case 32-CA-24388 524-8393-0155
524-8393-5088

This Register-Guard¹ case was submitted for advice as to whether the Employer discriminatorily enforced its email policy by disciplining an employee for sending emails soliciting support for a rival union where the Employer permitted employees affiliated with the incumbent union to send emails related to contract administration and grievance processing. We conclude that the Employer did not violate the Act because there is no evidence of discriminatory treatment.

FACTS

Kaiser Permanente (the Employer) operates an acute care hospital in Stockton, California, whose service and maintenance employees are represented by the SEIU - United Health Care Workers - West (UHW).

The Employer's email policy provides that the employees may not "use KP's electronic mail . . . in any way that may be insulting, disruptive, or offensive to other persons, harmful to morale, or that may harass or disparage others." That policy further provides that "[e]mployees may not use KP's Electronic Assets to solicit or proselytize for non-KP commercial ventures, religious causes, political candidates or parties, or outside organizations or other similar, non-job related solicitations."

¹ The Guard Publishing Co., d/b/a The Register Guard, 351 NLRB 1110 (2007), enf. denied in part No. 07-1528 (D.C. Cir. July 7, 2009).

The policy also prohibits unauthorized mass mailings:

Employees may not use KP's Electronic Assets to send chain letters or other unauthorized mass mailings. Employees may not initiate or forward chain email . . . Employees may only send messages to large numbers of recipients when there is a clear business need to do so, and only as authorized.

The policy provides that "personal use" of email must be "incidental, limited in frequency and scope, and cannot incur additional costs to KP and cannot impact employee performance." Employees who violate the email policy are subject to discipline.

From September 2007 to March 2009, the Charging Party was a UHW shop steward. While in the position, the Charging Party received and sent messages that concerned contract administration and grievances, but also messages that encouraged employees to support UHW's organizing efforts.

On January 27, 2009, the SEIU placed the UHW in trusteeship, prompting then-UHW representatives to immediately form a rival union, National Union of Healthcare Workers (NUHW). On that day, the Charging Party, who supported NUHW, sent an email to other UHW stewards informing them that the UHW's former executive board had formed NUHW and that employees should decertify SEIU and bring in NUHW.

Two days later, an employee used the Employer's email system to send a pro-NUHW message to Stockton shop stewards describing "talking points" concerning NUHW's efforts to replace UHW. The Employer learned of the email and immediately told the employee that she was not to use the Employer's email or intranet system to send such messages and that if she wanted to organize the stewards, she had to do so on her own time and not use Kaiser email addresses.

In early February, the Charging Party forwarded a letter from a former UHW Kaiser employee to the Kaiser shop stewards. The former employee was leaving his job to

become an NUHW volunteer and encouraged employees to sign petitions to decertify UHW and join NUHW.

Later that week, the Charging Party sent additional emails, some to stewards, and some to his work unit. The messages advised employees how to obtain more NUHW petitions, informed employees of NUHW's website, and included NUHW flyers.

Later in February, UHW trustees sent emails to Stockton bargaining unit employees, stating UHW's intent to protect employees' contractual rights and warning employees not to fall victim to "union-busting outsiders" (i.e. NUHW) and their "lies" about how the employees could decertify the UHW and still keep with contract with the Employer. There is no evidence that the Employer learned of these UHW emails.

Finally, on February 24, the Charging Party sent an email, which contained a message from another NUHW supporter in which he described a new SEIU representative as a "worthless piece of shit," accused her of "sleeping with one of the members," and called her lazy and incompetent.

Around this time, the Employer began receiving complaints from employees about the Charging Party's emails. The Employer scheduled a meeting with the Charging Party to discuss his violation of the Employer's electronic use policy. At the meeting, the Employer told the Charging Party that NUHW is not the recognized union and that he should not be using the Employer's email system to send NUHW materials.

The Employer has allowed UHW representatives to use its email system for contract administration purposes. This includes allowing UHW representatives to use the email system to schedule grievance meetings with the Employer and to communicate with employees concerning contract administration and grievance handling matters. While this policy is not codified, the email usage policy permits the use of email for business purposes, and the Employer asserts that the use of the email system for contract administration and grievance processing constitutes business purpose use. The Employer points out that various portions of the parties' collective bargaining agreement

refer to "union business" and that the contract provides that the Employer will establish a union office at each facility for use by stewards and contract specialists, which will include a telephone, copier, computer, and email for union communication. Thus, the Employer asserts that the collective bargaining agreement clearly contemplates that such Union work is business-related.

The Employer claims that the Charging Party's email usage violated its policy in several respects: First, his emails solicited and proselytized for an outside organization; second, it constituted excessive personal use of the email system; third, it constituted unauthorized mass mailings; and finally, at least one of his emails was insulting or offensive or disparaged other persons.

The Employer asserts that it is unaware of any instance where SEIU or UHW used the email system for nonbusiness purposes, and the Region's investigation has uncovered no evidence of the Employer knowingly allowing employees to utilize the email system to solicit or proselytize on behalf of non-work commercial ventures, religious causes, political candidates or parties, or outside organizations.

ACTION

We agree with the Region that, absent withdrawal, the charge should be dismissed because there is no evidence of disparate treatment.

In Register Guard, the Board held that employees had no statutory right to use email systems for Section 7 matters and modified Board law concerning discriminatory enforcement.² In modifying discriminatory enforcement law, the Board held that unlawful discrimination is disparate treatment of communications of a similar character because of their union or Section 7 status.³ The Board thus adopted the 7th Circuit's analysis in Fleming Co.,⁴ and Guardian

² Id., at 1116.

³ Id., at 1118.

Industries,⁵ where the court 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.⁶ In clarifying its new policy, the Board noted that an employer would violate the Act if it permitted employees to use email to solicit for one union but not another.⁷ Applying its new standard, the Board majority in Register Guard noted that the employer there had permitted a variety of personal, non-work-related e-mails, but had not permitted e-mails to solicit support for any group or organization. Thus, the employer's enforcement of its policy regarding an employee's e-mails that solicited support for the union did not discriminate along Section 7 lines.

The D.C. Circuit recently denied enforcement of the Board's decision in Register-Guard with respect to two of the emails at issue in that case. The court reasoned that, regardless of the propriety of drawing a line barring access based on organization status, the evidence in Register-Guard indicated that the line drawn was a "post hoc invention." Thus, the company never invoked the distinction before the General Counsel issued complaint; the policy itself did not make the distinction; and the company's disciplinary warning did not invoke the organization-versus individual line.⁸

Here, we agree with the Region that the evidence revealed no discrimination. The Employer's policy allows employees to use the email system for business purposes. The evidence indicates that the Employer viewed contract administration and grievance handling on behalf of the

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

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

⁶ Register Guard, 351 NLRB at 1117-18.

⁷ Id., at 1118.

⁸ The Register-Guard v. NLRB, No. 07-1528 (D.C. Cir. July 7, 2009).

incumbent Union as a business purpose. Further, we have previously found that employer rules against mass emails strike a reasonable balance between employees' Section 7 rights and the Employer's legitimate business interest in ensuring the proper functioning of its email system.⁹ Finally, the Charging Party's February 24th email clearly violated the Employer policy against disparagement.

While the Charging Party claims that the SEIU or its supporters had sent and were sending similar types of email solicitations, there is no evidence that the Employer had actual or constructive knowledge of any such emails. Thus, while an employer would violate the Act by permitting employees to solicit for one union but not another, there is no evidence here that the Employer permitted any union solicitation. In these circumstances, there is no basis to argue that the Employer disparately enforced its policy against the alleged discriminatee. Accordingly, the Employer's employment policies are facially valid, and there is no evidence of disparate treatment.

Accordingly, the Region should, absent withdrawal, dismiss the charge.

/s/
B.J.K.

⁹ See, e.g., The Boeing Company, 19-CA-30745, Advice Memorandum dated September 12, 2007.