

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

Advice Memorandum

DATE: October 11, 2012

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: Kaiser Permanente, Inc.
Cases 32-CA-065496
32-CA-076070

506-6090-3600
512-5012-0000
512-5012-3322
512-5012-5050
512-5012-8320-5033
524-0150-0100
524-5029-7533

These cases were resubmitted for advice regarding whether the Employer violated Section 8(a)(1) and (3) under the *Register Guard*¹ standard by discriminatorily enforcing its email and voicemail usage policies and by discriminatorily disciplining employee representatives of the Union. We conclude that the Employer did not discriminatorily apply its email and voicemail usage policies under *Register Guard*. **Exemption 5**



FACTS

In an election on November 18, 2010, the National Union of Healthcare Workers (“the Union” or “NUHW”) succeeded Service Employees International Union (“SEIU”) as the bargaining representative of 1203 employees of the Integrated Behavioral Health Services unit (“IBHS”) working at about 45 facilities in the Employer’s Northern California Region. Kaiser Permanente (“the Employer” or “Kaiser”) operates acute care hospitals and other medical facilities nationwide. The Employer has had an Electronic Asset Usage Policy (“the EAP”) in effect since January 2009. The EAP provides, in pertinent part:

- Kaiser’s Electronic Assets are business assets and personal use is prohibited, with limited exceptions. Electronic Assets are defined as the

¹ *The Guard Publishing Co., d/b/a The Register Guard*, 351 NLRB 1110 (2007), enforcement denied in part, 571 F.3d 53 (D.C. Cir. 2009).

Employer's computing systems/devices, including laptops, voicemail, email, cell phones, PDAs, instant messaging, faxes, pagers, and internet access.

- Employees may not use Kaiser's Electronic Assets in a way that may be insulting, disruptive, or offensive to others, harmful to morale, or that may harass or disparage others.
- Employees may not use Kaiser's Electronic Assets to solicit or proselytize for commercial ventures, religious causes, political candidates or parties, or outside organizations (such as cosmetics sales, churches, clubs) or other similar, nonjob-related solicitations.
- Employees may not use Kaiser'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 by the appropriate manager.
- Employees may not use voicemail to make unauthorized broadcast messages or solicitations.
- Personal use of Kaiser's Electronic Assets must be incidental, limited in frequency and scope, cannot incur additional costs to Kaiser, and cannot impact employee performance.

Though not defined in its policy, the Employer states that a message sent to 30 or more employees is considered a mass email. Employees who violate the policy are subject to discipline.

Although the Employer's EAP restricts the use of its email system for solicitation purposes, its practice has been to allow the unions to use the email system for contract administration and grievance resolution purposes, permitting them to send mass non-solicitation emails to groups of 30 recipients or more. This has included mass emails regarding internal union business, including notification of steward nominations and elections, announcement of steward council meetings, union mailing list updates, and distribution of union meeting minutes. The Employer states that it considers the use of its email system for contract administration and grievance processing to be business related.

NUHW contends that the Employer has discriminatorily applied the EAP by refusing to grant Union representatives in IBHS the same degree of use that it granted SEIU representatives in the IBHS unit prior to the Union's certification² and that it routinely grants SEIU representatives in other units. The Union also argues

² Some of the NUHW stewards/officers now complaining of unequal treatment were also union stewards/officers in the IBHS unit when it was represented by SEIU.

that it is not allowed the same email use as employees sending non-union-related emails.

The Employer contends that both SEIU and the Union have systematically violated the EAP while complaining that the other is doing so,³ and that it has consistently provided the same degree of electronic asset usage to both unions. It asserts that as early as February 2009, it has repeatedly advised both unions about the EAP's restrictions on employee solicitation. The Employer also states that it is not possible for it to monitor each of the thousands of emails daily sent using its systems for EAP violations, and that it takes appropriate action when it becomes aware of violations of its policy.

Both the Union and the Employer submitted emails, which fall into three basic categories: (1) non-union-related emails, (2) union-related emails sent by SEIU supporters in other units, and (3) union-related emails sent in the IBHS unit.

Non-union-related email

The Union maintains that unit employees are permitted to use the Employer's email system to send mass emails, including solicitations for nonwork, non-union-related matters. The Union submitted examples of emails that did not result in discipline from the period beginning in 2008 and ending in 2011. Except for a 2010 invitation to attend an employee's rose garden party, the emails were generally either work-related or informational, as opposed to clear solicitations. There is also no evidence that the Employer received any complaints regarding these emails. They included emails organizing a department holiday party and potlucks (August, September, and October 2011),⁴ a complaint about dirty dishes left in the department kitchen (October), a review of a local restaurant including discount pricing information (May), a recommendation for an acupuncturist (October), and information regarding a local farmers market (October). On August 11, however, an employee sent a mass email solicitation inviting employees, including a manager, to a fundraiser in his home for the film "Martin Luther King in Palestine." Afterwards employees complained to the Employer about the content of the film, and the employee who sent the email was counseled.

Union-related email sent by SEIU supporters in other units

³ Multiple unfair labor practice charges were filed in Region 20 and Region 32 by both unions alleging, inter alia, 8(a)(1), (2), and (3) violations. All of these charges were dismissed for insufficient evidence.

⁴ Hereinafter all dates are 2011 unless otherwise indicated.

SEIU supporters in other units sent numerous emails between July and October that did not result in discipline. There is no evidence that any of these emails were sent using global addresses that included supervisors or management, nor is there evidence that a complaint was made. Most of the emails were not solicitations and involved contract administration and representational issues, i.e., bargaining updates and information, requests for feedback on specific issues during negotiations, information regarding unit issues and employment terms, a Labor-Management Partnership (“LMP”) caucus report, and a notification that the employee had been added to SEIU’s unit email distribution list. One email contained a solicitation to participate in a petition drive related to an issue in negotiations. There is no evidence that the Employer was aware of this email.⁵

Solicitation emails sent by SEIU representatives in other units generally resulted in disciplinary action. In June and July, an employee in an NUHW-represented unit sent six pro-SEIU mass email solicitations. After an anonymous complaint, the employee’s email usage was investigated and he was subsequently issued a Notification of Level One discipline. On February 1, 2012, the Employer investigated an NUHW-represented employee for sending a pro-SEIU email to five employees. The employee received an oral reminder because he used the Employer’s email system for solicitation purposes. In March 2012, the Employer investigated a union-related mass email that included a picture of an SEIU steward and the Employer reminded the steward of the EAP’s prohibition on mass email.

Union-related email sent in the IBHS unit

The Union provided copies of emails sent to IBHS employees from both SEIU and NUHW.⁶ Prior to the election, supporters of both unions sent numerous solicitation emails and all but one led to disciplinary discussions with the Employer. Supporters

⁵ Although an employee testified that this email was sent to a manager, the initial email that the manager received regarded scheduling for future bargaining sessions, not the forwarded message containing the petition drive.

⁶ Some of those emails predate the Employer’s EAP, which has been in effect since January 2009. No union-related email sent between January 2006 and January 2009 produced by the Union resulted in discipline, and the content was largely non-solicitation, including emails regarding contract negotiations, union meetings, explanations of benefits in the collective-bargaining agreement, and various internal union-related subjects such as SEIU-sponsored classes, steward elections, and corrected language for an SEIU resolution.

of both unions also sent non-solicitation emails regarding issues related to working conditions, and those did not result in discipline.⁷

The Union also contends that since its certification, the following shop stewards and chapter officers have been discriminatorily told not to send Union-related, non-solicitation emails or have been disciplined for sending those emails.

Union Steward 1. Steward 1 sent three emails between December 13, 2010 and July 6 that resulted in oral reminders from the Employer, including an admonition to refrain from sending Union-related emails altogether, outside the 10(b) period.⁸ Steward 1 also sent three Union-related voicemail messages for which he was investigated, the last of which occurred within the 10(b) period. On August 24 and 29, outside the 10(b) period, Steward 1 sent broadcast voicemail messages urging employees, among other things, to join a leafleting action. On September 1, within the 10(b) period, Steward 1 sent a broadcast voicemail message notifying the unit that a fellow employee had been terminated. On September 21, after the Employer received an anonymous complaint, Steward 1 was called into an investigatory interview regarding the three broadcast voicemails. When Steward 1 received his annual appraisal in October he was rated “needs improvement” in following instructions and responding to management. The accompanying notation referenced Steward 1’s three EAP violations, indicating that he used Employer emails for “non-[Kaiser] business purposes” and sent mass communications without authorization from management.

Union Steward 2. On June 23 and 27, July 20, and August 8, Steward 2 sent Union-related mass emails soliciting employees to leaflet and/or join the Union’s informational picketing and wear stickers in support of the Union, and on August 18

⁷ One NUHW supporter and then-SEIU representative was disciplined for sending a bargaining survey in March 2010 because the Employer’s policy did not allow “blanket email.” This 2010 instance appears to be an outlier.

⁸ A December 13, 2010 email urged members to pay their dues, respond to a bargaining survey, and sign a petition indicating that they wanted Steward 1 to serve as their steward. On January 27, the Clinical Director told Steward 1 that his work email could not be used for Union business and gave him a copy of a management email trail discussing what constituted appropriate versus inappropriate email usage. Following a mass email on March 14 regarding upcoming steward elections, a manager on the distribution list told him that this type of email was not allowed. A July 6 mass email had an attached flyer containing a solicitation to join in preparing for a 2-day strike protesting alleged unfair labor practices. On August 31, Steward 1 was called into an investigatory meeting which resulted in an oral reminder of the EAP.

and 19, and September 8 and 13, Steward 2 sent emails soliciting employee participation in strike activity. After receiving an anonymous complaint, the Employer investigated Steward 2's email activity. On September 21, Steward 2 received a 4-page disciplinary "oral" reminder regarding her improper use of the email system.

Union Steward 3. Steward 3 sent informational mass emails on July 12 and 13, neither of which resulted in discipline. The July 12 email announced the postponement of a previously scheduled strike, and the July 13 email contained a bargaining update. On July 28, Steward 3 sent a mass email containing a flyer soliciting employees to wear red in support of the California Nurses Association during their contract negotiations with the Employer. At least one employee complained about the email, and Steward 3 was issued a disciplinary coaching memo stating that he violated the EAP by sending a mass email that was not business related.

Union Chapter Officer 1. In February, Officer 1's supervisor advised him that a complaint had been made about his email usage. Several managers were on his email distribution list. The supervisor did not specify any particular emails, and no disciplinary action was taken. On June 1, Officer 1 sent a mass email to the IBHS unit explaining the reasons for a strike and interim actions short of a strike. No disciplinary action was taken. On June 20, Officer 1 sent a mass email solicitation stating that the steward council endorsed strike action and recommended that employees institute the strike. Officer 1 was called into investigatory meetings over the next couple of months and subsequently was issued a Notification of Level One discipline for using "a [Kaiser] asset for mass emailing of non-work related activity regarding emails sent to 1048 unit employees."

Union Chapter Officer 2. In March and November 2010, prior to the Union's certification, Officer 2 received coaching for violating the EAP. Since the Union's certification on November 18, 2010, Officer 2 sent scores of non-solicitation emails to a group of 60 IBHS unit employees concerning a variety of subjects, including emails about steward meetings, bargaining surveys, updates for the Union mailing list, and steward elections. The Employer did not comment about these emails. On September 8, Officer 2 sent a mass email soliciting unit employees to sign up for the Union's September 22 strike. On October 6, Officer 2 was called into an investigatory meeting. On November 3, he was issued an Individual Action Plan, Level 2 because he had previously been coached for violating the EAP prior to the Union's certification.

ACTION

We conclude that the Employer did not violate Section 8(a)(3) and (1) under *Register Guard* because it did not discriminatorily apply the EAP or discriminatorily

discipline Union stewards under its EAP policy. Rather, it applied its non-solicitation policy to all employees and disciplined employees for violating the policy when it was made aware of violations.⁹ Additionally, this case is not an appropriate vehicle for revisiting the Board's *Register Guard* decision. Thus, the Region should dismiss the charge, absent withdrawal.

In *Register Guard*, the Board held that employees have no statutory right to use their employer's email system for Section 7 purposes, and therefore employer prohibitions on employee non-business use of the employer's email system are lawful.¹⁰ The Board also redefined discrimination under Section 8(a)(1) as the "unequal treatment of equals."¹¹ Under that standard, an employer violates Section 8(a)(1) if a policy, on its face, draws lines based on Section 7 activity but does not violate Section 8(a)(1) by distinguishing between business and non-business-related use, charitable and noncharitable solicitations, personal and commercial solicitations, individual and organizational solicitations, and solicitations and mere talk.¹² The Board also noted that an employer would violate the Act if it permitted employees to use email to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees.¹³

The Employer's policy here is not discriminatory under *Register Guard* because it does not differentiate along Section 7 lines. Rather, the evidence demonstrates that to the extent possible given the system's voluminous email traffic, the Employer has evenhandedly applied its policy, permitting email use for contract administration and grievance processing, and also for announcements or information gathering related to internal union business. Thus, the evidence demonstrates that when the Employer becomes aware of an email that violates its EAP policy against solicitation, it investigates and takes action whether the email is union-related or not, and whether it is from the Union or SEIU.

⁹ The Employer's contention that the charge is time barred by 10(b) due to its February 13, 2009 notification to the Union of the EAP is without merit because, if the allegation that the Employer is maintaining a discriminatory email policy were determined to have merit, it would be a continuing violation.

¹⁰ 351 NLRB at 1114-16.

¹¹ *Id.* at 1117.

¹² *Id.* at 1118.

¹³ *Id.*

First, the evidence does not support the Union's contention that the Employer discriminatorily applied its no-solicitation policy by permitting employees to send emails for non-work, non-union-related matters. Rather, the emails that did not result in discipline were generally either work related or were not solicitations. Work related emails included invitations to department holiday parties and potlucks and an email complaining about dirty dishes in the department kitchen. Nonwork-related emails were generally not solicitations; rather, they provided information to other employees about events or services, such as farmers markets, restaurant reviews, and acupuncturist recommendations. Although one 2010 email inviting fellow employees to a garden party could arguably be characterized as a solicitation, it was not typical, and there is no evidence that anyone complained to the Employer. Conversely, when a solicitation email was sent inviting employees to a fundraiser for the film "Martin Luther King in Palestine," a complaint was made about its content, and the Employer investigated the incident and disciplined the employee in accordance with its policy.

Second, the evidence does not support the Union's contention that the Employer allowed SEIU representatives in other units access to its electronic systems to send solicitations while punishing NUHW supporters in the IBHS unit for the same. As an initial matter, the evidence shows that the Employer did discipline SEIU advocates for violations of the EAP. Thus, in June 2011, a pro-SEIU employee received a Notification of Level One discipline for a mass email solicitation; in February 2012, an employee received an oral reminder for sending a pro-SEIU email to five other employees; and in March 2012, an SEIU steward received an oral reminder after a mass email including her picture was sent without prior consent. Further, of the SEIU-related emails sent in other units that did not result in discipline, only one was for solicitation purposes, and there is no evidence that a complaint was made or that the Employer was otherwise made aware of that email. Conversely, of the emails sent by NUHW representatives in the IBHS unit during that same time period, most were clearly for solicitation purposes. For example, NUHW supporters were disciplined for emails sent on June 23 and 27, July 20, and August 8 soliciting employees to join in a leafleting action, and for emails sent on June 20, July 6, August 18 and 19, September 8, 18, and 13 soliciting support for a strike. Thus, the Employer issued discipline based on violations of its policy, not based on union affiliation.

Third, contrary to the Union's contention, the Employer did not discriminatorily enforce the EAP against NUHW supporters in the IBHS unit. Prior to the election, the evidence indicates that the Employer permitted both SEIU and NUHW supporters to send informational emails, and disciplined both SEIU and NUHW supporters for sending solicitation emails when it became aware of them.

Furthermore, the evidence does not support the Union's contention that the Employer discriminatorily enforced the EAP against NUHW representatives after the Union was certified in the IBHS unit. As to Steward 1, although the Employer made two arguably unlawful statements to him (prohibiting him from sending Union-

related emails), those incidents took place outside of the 10(b) period. Further, although Steward 1 also received a “needs improvement” rating on his annual appraisal for sending three voicemail broadcast messages, two of those messages were for solicitation purposes, and the third, announcing the termination of a fellow employee, was not the sole basis for the negative rating. Thus, the evidence does not support the conclusion that the Employer discriminatorily disciplined Steward 1.

As to Steward 2, Steward 3, Officer 1, and Officer 2, they were disciplined for mass email solicitations that clearly violated the EAP, and over which the Employer has regularly issued discipline to SEIU representatives and supporters. Therefore, the evidence does not support the conclusion that the Employer violated Section 8(a)(1) or (3) under the current *Register Guard* standard by discriminatorily enforcing its policy regarding these emails.

Exemption 5



¹⁴ 351 NLRB at 1111, 1114.

¹⁵ See *Register Guard*, 351 NLRB at 1112-13, 1115. See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (upholding presumption that work rule banning solicitation during non-work time is “an unreasonable impediment to self-organization” absent special circumstances showing rule needed to maintain production or discipline).

Accordingly, we conclude that the charge alleging that the Employer violated Section 8(a)(1) and (3) by discriminatorily enforcing its electronic email and voicemail policies, and by discriminatorily disciplining employees pursuant to those policies, should be dismissed, absent withdrawal.

/s/
B.J.K.