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

Advice Memorandum

DATE: May 7, 2013

TO: Daniel L. Hubbel, Regional Director
Region 14

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

SUBJECT: Price Edwards & Company
Case 17-CA-92794

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This case concerns whether the Employer violated Section 8(a)(1) of the Act by: (1) interrogating an employee about work-related complaints posted on her Facebook page; (2) instructing that employee not to access Facebook at work or post similar comments on Facebook at any time; and (3) maintaining an electronic communications policy which prohibits emails containing salary information, "inflammatory" communications, and instant messaging with friends or surfing the Internet during working hours.

We conclude that the employee was not engaged in concerted activity when she posted her comments on Facebook and therefore that the Employer lawfully questioned her about the postings. However, we conclude that the Employer violated Section 8(a)(1) by forbidding the employee from accessing Facebook at work or posting similar online commentary at any time. We further conclude that the electronic communications policy's limitations on emailing about salary and making inflammatory communications unlawfully restrict employees' Section 7 activity,

notwithstanding the Board's decision in *Register Guard,*[1] because the Employer permits incidental personal use of its electronic communication systems and these restrictions do not constitute the type of Section 7-neutral line-drawing expressly permitted in *Register Guard*. The Region should also use this case as a vehicle to argue that *Register Guard* should be overturned, and that employees have a Section 7 right to use their employer's electronic communications systems. If *Register Guard* is overturned, the prohibition on instant messaging with friends and surfing the Internet during working hours is additionally unlawful because it is overly broad.

FACTS

The Charging Party worked as an administrative assistant for the investment division at Price Edwards & Company ("Employer"), a commercial real estate firm, until she resigned from her job in late October 2012 following an incident involving Facebook. On October 1, 2012, she posted a status update to her Facebook account from her work computer during lunch, stating:

> The next person who speaks to me as if I am somehow their servant, dumps an unlabeled cardboard box of files in my office, or directs me to do something that isn't my goddamn job (have we heard of asking?) is going to wish very heartily that they had not.

She wrote the posting, in part, because that morning she discovered that someone had left an unmarked box of files in her office, which upset her because she had been reprimanded for having boxes cluttering her office about a year and a half before. In later Facebook postings responding to online comments from nonwork friends, the Charging Party also suggested that she was looking for a new job. Although about ten coworkers were Facebook "friends" with the Charging Party, only one coworker responded to her Facebook remarks by "liking" her post. When that coworker asked her about the post at the office later that day, the Charging Party indicated that she was simply tired of the way people treated each other but also was tired of office gossip. Another coworker also asked the Charging Party about the post, but she responded that she did not wish to talk about it. After this conversation, the Charging Party made her Facebook post private so that only a select group of Facebook friends, including only two coworkers, could view the post.

A few weeks later, the Charging Party was called into a meeting with the owner of the company, who brought a printout of her Facebook postings with him. The owner opened the meeting by indicating that he heard she was looking for other work.

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[1] 351 NLRB 1110, 1117-18 (2007), *enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009).

She tried to reassure him that although she had some work frustrations, she did not intend to leave the company, and they agreed to have monthly meetings to discuss any problems. He indicated that some of her work habits, namely working with her door closed and with earphones in, left a bad impression and that she should "stay off of Facebook." The Charging Party understood from his comments that she was not to access Facebook at work. In response to this admonition, the Charging Party protested that she had not listed or otherwise mentioned the company on her Facebook page. But the owner responded that she should not post "stuff like this on Facebook at any time." After the meeting with the Charging Party, the owner sent an email to the brokers with whom she works, summarizing his instruction to the Charging Party as, "No more Facebook, period." About a week after the meeting, the Charging Party walked off the job because she felt betrayed that someone had turned in her Facebook postings to her Employer.

The Employer denies that the owner forbade the Charging Party from posting "stuff like this" on Facebook "at any time" and denies placing any restrictions on her use of Facebook at work during nonworking hours. It states that the owner merely told her to stop logging onto Facebook during "working hours" while her coworkers are waiting on information from her to avoid the perception of poor time-management. It states that the owner made these statements because the broker who turned in her Facebook posts commented that the Charging Party was logged onto Facebook virtually every time brokers enter her office.

The Employer's Electronic Communications Policy

The Employer's Corporate Handbook contains an Electronic Communications Policy. That policy provides, among other things, that:

> The facsimile machines, voice mail, e-mail and Internet systems are to be used primarily for business communications. Incidental brief personal use is permitted. Instant messaging with friends or surfing the net during working hours is not permitted. Priced Ewards [sic] & Company prohibits any communications that are obscene, harassing, discriminatory or inflammatory. No salary information can be transmitted via e-mail.

ACTION

We conclude that the Employer did not engage in unlawful interrogation by questioning the Charging Party about her Facebook comments because her postings about work complaints were not concerted. Nonetheless, some of the statements the owner made during that meeting unlawfully restricted the Charging Party's right to engage in protected concerted activities on Facebook during nonwork time. We also conclude that several of the prohibitions in the Electronic Communications

Policy—namely, the prohibitions on emailing salary information and making "inflammatory" statements—are unlawful, notwithstanding *Register Guard*, because the Employer permits personal use of its electronic equipment and the prohibitions are vague or overly broad. The Region should also urge the Board to overturn *Register Guard*'s holding that employees have no Section 7 right to use their employer's electronic communications systems, which would likewise make those handbook provisions unlawful. In addition, the Employer's prohibition on instant messaging with friends and surfing the web during working hours would be an unlawful, overbroad rule if employees enjoy a statutory right to engage in Section 7 activities using their employer's communications systems.

1. The Facebook postings were not concerted

Section 7 expressly protects employees' right to "self-organization . . . and to engage in other concerted activity . . . for mutual aid and protection." To fall within the ambit of this protection, an employee's statements must concern terms and conditions of employment and must be "concerted" in the sense that they "seek to initiate or to induce or to prepare for group action."[2] This is most clearly met when an employee group discussion expressly includes the topic of collective action.[3] But this requirement may also be met when the discussion does not include a current plan to act to address the employees' concerns. In this regard, the Board has long described concerted activity "in terms of interaction among employees."[4] Thus, the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]"[5] In addition, when employees express group concerns and one individual employee continues to express

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[2] *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), *affirmed*, 835 F.2d 1481 (D.C. Cir. 1987).

[3] *See, e.g.*, *Service Employees Local 1*, 344 NLRB 1104, 1105-06, 1108-10 (2005) (employee's discussions with fellow employees suggesting that they confront their employer regarding shared concerns about working conditions "clearly constituted concerted activity protected by Section 7 of the Act"); *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951) (conversations with coworkers urging them to unionize protected). Such conduct is protected even if the employee is unsuccessful in persuading other employees to join in group action. *See, e.g.*, *El Gran Combo*, 284 NLRB 1115, 1117 (1987), *enforced*, 853 F.2d 996 (1st Cir. 1988).

[4] *Meyers Industries (Meyers I)*, 268 NLRB 493, 494 (1984), *reversed*, 755 F.3d 941 (D.C. Cir. 1985), *on remand*, *Meyers II*, 281 NLRB 882.

[5] *Meyers II*, 281 NLRB at 886.

those concerns on his or her own, the Board will find that the employee was continuing a course of concerted activity.[6] As it has explained in a variety of circumstances, employees' discussion of shared concerns about terms and conditions of employment, even when "in its inception [it] involves only a speaker and a listener, . . . is an indispensable preliminary step to employee self-organization."[7] For example, the Board has found unlawful discipline imposed on employees for their discussion of common concerns about wages[8] or work schedules,[9] even when no specific group action was discussed, because "it is obvious that discussions of this kind usually precede group action."[10]

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[6] *See, e.g.*, *JMC Transport*, 272 NLRB 545, 545 n.2 (1984) (finding protected truck driver's lone protest to management regarding a discrepancy in his paycheck, where it "grew out of [an] earlier concerted complaint regarding the same subject matter, i.e., the change in the pay structure"), *enforced*, 776 F.2d 612 (6th Cir. 1985); *Alton H. Piester, LLC*, 353 NLRB 369, 372-73 (2008) (two-member Board) (finding protected truck driver's protest to management regarding fuel surcharge, where it was a "continuation of . . . earlier concerted employee complaints"), *enforced*, 591 F.3d 332 (4th Cir. 2010).

[7] *Meyers II*, 281 NLRB at 887 (quoting *Root-Carlin*, 92 NLRB at 1314).

[8] *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204, 212 (2007) (employee discussions about the effect of a new performance evaluation policy on wages held concerted, despite lack of evidence that employees contemplated group action), *enforced*, 519 F.3d 373 (7th Cir. 2008); *Trayco of S.C.*, 297 NLRB 630, 633-34 (1990) (employee discussions with other coworkers about apparent wage differential between new hires and more senior employees constituted concerted activity; object of inducing group action need not be express), *enforcement denied mem.*, 927 F.2d 597 (4th Cir. 1991).

[9] *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (employee discussions about scheduling changes found concerted even though no object of initiating group action), *enforcement denied on other grounds*, 81 F.3d 209, 214-15 (D.C. Cir. 1996).

[10] *St. Margaret Mercy*, 350 NLRB at 212. *See also Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3-4 (Dec. 14, 2012) (employee discussions about job security "inherently concerted"; "contemplation of group action is not required" to establish concerted nature of conduct).

On the other hand, comments made "solely by and on behalf of the employee himself" are not concerted.[11] Likewise, activities that involve only a speaker and a listener are not concerted if "what is being articulated [does not go] beyond mere griping."[12]

Here, the Charging Party's Facebook posting was merely an expression of an individual complaint. Her status update reflected frustration over unlabeled files being "dumped" in her office that morning and, apparently, a disrespectful request for assistance that fell outside of her job duties. There is no evidence that the Charging Party's coworkers shared these particular job-related concerns or had discussed these issues previously. The Charging Party refused to engage in serious discussions of her concerns with both coworkers who inquired about her post, including the one that "liked" her comments. Instead, she indicated that she did not want to gossip. Indeed, the Charging Party made her post private after being approached the second time, suggesting that she wished to cut off any further discussions with potentially concerned coworkers. In addition, the post contains no language suggesting that she sought to initiate group action or solicit group support for her individual complaint, nor is there any other evidence supporting such a finding. Under these circumstances, we find that a single coworker "liking" the Charging Party's Facebook post did not render that posting concerted within the meaning of Section 7.[13] Thus, the Employer did not interfere with the Charging Party exercising her Section 7 rights by questioning her about the Facebook postings.

2. Statements forbidding the Charging Party from using Facebook at work and posting work-related complaints at any time are unlawful

In determining whether an employer statement is unlawful, the Board applies an objective test of whether the statement tends to interfere with the free exercise of

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[11] *Meyers I*, 268 NLRB at 497.

[12] *Holling Press, Inc.*, 343 NLRB 301, 302 (2004).

[13] *Compare Lowe's HIW, Inc.*, Case 19-CA-32882, Advice Memorandum dated Oct. 12, 2011, at 2, 5-6 (Facebook posting not concerted although coworker "liked" posting and offered sympathy during follow-up conversation, where there was no extended discussion of working conditions let alone any indication of interest in group action), *with Triple Play Sports Bar and Grille*, Cases 34-CA-12915 and 34-CA-12926, Advice Memorandum dated Aug. 3, 2011 [FOIA Ex. 7(A)

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Section 7 rights.[14] The Board does not consider the speaker's motivation in making the statement or its actual effect on employees.[15] An employer violates the Act by making remarks that tend to discourage employees from discussing Section 7 matters with their coworkers, where they are entitled to do so.[16] And it is well established that the Act protects employees' right to discuss union representation or other Section 7 matters on nonworking time.[17]

Here, the owner effectively communicated during his meeting with the Charging Party that she should not access Facebook at work. Thus, absent further clarification, an employee would reasonably understand her boss's admonition to "stay off of Facebook" to be an instruction not to use Facebook even during nonworking time, such as breaks and lunchtime.[18] Even accepting the owner's version of the facts, i.e., that he merely told the Charging Party to avoid Facebook during working hours, the Employer has failed to demonstrate that the owner made a clear distinction between working hours and working time. In fact, the owner's post-meeting email to the brokers, in which he summarized his instruction to the Charging Party as, "No more Facebook, period[,]" only reinforces that he conveyed a total ban on Facebook at work. Thus, the owner's statements reasonably tended to interfere with the Charging Party's right to engage in Section 7 activity on Facebook during nonworking time, even using her own equipment, and is therefore unlawfully coercive.

In addition, the owner's admonition against posting "stuff like this on Facebook at any time" is similarly coercive. An employee would reasonably interpret "stuff like this" to include work-related complaints, since the thrust of the Charging Party's

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[14] *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006).

[15] *Id.*

[16] *See, e.g.*, *Holiday Inn-JFK Airport*, 348 NLRB 1, 3 (2006) (telling employee not to express support for the union during breaks unlawful); *Scripps Memorial*, 347 NLRB at 52 (statement constituting discriminatory prohibition on discussing the union at nurses' station during working time unlawful).

[17] *See, e.g.*, *Scripps Memorial*, 347 NLRB at 52; *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001); *Our Way, Inc.*, 268 NLRB 394, 394-95 (1983).

[18] *See, e.g.*, *Laidlaw Transit, Inc.*, 315 NLRB 79, 82-83 (1994) (employer failed to clarify ambiguous rule banning solicitation "on company time").

Facebook status update related to her frustrations with working conditions.[19] Thus, this statement also unlawfully prohibited the Charging Party from discussing working conditions with coworkers on Facebook during nonwork time in violation of Section 8(a)(1).[20]

3. Electronic Communications Policy under *Register Guard*

In *Register Guard*, the Board held, based upon its decisions regarding employer-owned equipment, that employees have no statutory right to use an employer's email system for Section 7 matters, and therefore that employer prohibitions on employee nonbusiness use of the employer's e-mail system are lawful.[21] In so holding, the Board rejected the General Counsel's argument that the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*[22] required the Board to balance the employer's business interest against the employees' equally important Section 7 interest in communicating at the workplace.[23]

Additionally, the *Register Guard* decision modified Board law defining discrimination in the Section 8(a)(1) context, concluding that unlawful discrimination requires disparate treatment of activities or communications of a "similar character" because of their union or other Section 7-protected status.[24] Thus, the Board adopted the Seventh Circuit's analysis in *Fleming Co.*[25] and

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[19] *See Holiday Inn-JFK Airport*, 348 NLRB at 3 (telling employee she could not "say those words" immediately after employee informed employer that she had been saying she wanted the union violated Section 8(a)(1)).

[20] We find it unnecessary to decide whether the owner's admonitions constituted the promulgation of a formal rule because his statements are unlawful regardless of whether they established such a rule. *See Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98, slip op. at 2 & n.4 (Apr. 25, 2013); *Galion Pointe LLC*, 359 NLRB No. 88, slip op. at 1 (March 28, 2013).

[21] 351 NLRB at 1110, 1114-16.

[22] 324 U.S. 793 (1945).

[23] 351 NLRB at 1112-13, 1115-16.

[24] *Id.* at 1118.

[25] *Fleming Cos. v. NLRB,* 349 F.3d 968 (7th Cir. 2003), *denying enforcement to* 336 NLRB 192 (2001).

Guardian Industries,[26] where the court found lawful policies that distinguished between "personal" postings on a bulletin board, such as for-sale notices and wedding announcements, and "group" or "organizational" postings, such as union materials.[27] Under this view of discrimination, an employer does not violate the Act if it distinguishes between charitable and non-charitable solicitations, personal and commercial solicitations, personal and organizational invitations, solicitations and "mere talk," and business-related use and nonbusiness-related use.[28] In each of these examples, the Board noted, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.[29]

More recently, the Board in *Costco Wholesale Corp.* determined that a rule prohibiting the electronic posting of statements that damage the company or any person's reputation while using the company's equipment was unlawful, even though the rule did not explicitly reference Section 7 conduct.[30] The Board found it sufficient that employees would reasonably construe the rule as prohibiting concerted communications protesting the employer's treatment of employees.[31] Although the rule only restricted employee communications on the employer's electronic system, no party argued that *Register Guard* applied. Nonetheless, the Board explained that the case did "not implicate the Board's holding in *Register Guard*" because the employer did not prohibit employees from using its electronic communications system for *all* non-business purposes.[32] Rather, the policy permitted personal use but in a way that employees would reasonably understand

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[26] *Guardian Indus. Group v. NLRB,* 49 F.3d 317 (7th Cir. 1995), *denying enforcement to* 313 NLRB 1275 (1994).

[27] *Register Guard*, 351 NLRB at 1117-19.

[28] *Id.* at 1118.

[29] *Id.*

[30] 358 NLRB No. 106, slip op. at 1-2 (Sept. 7, 2012).

[31] *Id.*, slip op. at 2 (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004) (work rule violates Section 8(a)(1) if it explicitly restricts Section 7 activity, it would be reasonably construed as doing so, it was promulgated in response to union activity, or it has been applied so as to restrict Section 7 activity)).

[32] *Id.*, slip op. at 2 n.6.

to prohibit the expression of certain protected viewpoints, while allowing other protected viewpoints.[33]

The Board in *Costco* thus clarified that when an employer permits some non-business use of its electronic communications systems, the *Register Guard* discrimination standard authorizes only the kinds of Section 7-neutral limitations listed in that case.[34] An employer cannot regulate the content of nonwork communications—such as their viewpoint, subject matter, or manner of speech—in a way that reasonably tends to chill Section 7 activity. Such a restriction would treat "communications of a similar character" differently due to their "union or other Section 7-protected status" because it would effectively suppress Section 7 communications while permitting other, comparable communications.[35]

This approach reflects the Board's historic disapproval of content-based limitations on communications in contexts where employees have no statutory right to engage in Section 7 communications using employer property or equipment. In the bulletin board context, for example, the Board has held that an employer may not impose "content-based restrictions that discriminate between postings of Section 7 matters and other postings" if it permits nonwork postings.[36] In *Vons Grocery*, the Board found an employer's rule against "negative notices" on the bulletin board it furnished for employees to post items of interest was unlawful

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[33] *Id.*

[34] *See Shadyside Hospital*, Case 06-CA-81896, JD–28–13 at 12-21 (NLRB Div. of Judges Apr. 19, 2013) (rule banning email solicitations lawful under *Register Guard*, but various other rules governing nonwork use of employer's email and technology systems overly broad and unlawful, notwithstanding *Register Guard*).

[35] *Register Guard*, 351 NLRB at 1118. For example, a rule against soliciting via email on behalf of organizations that might damage the company would reasonably tend to suppress union-related solicitation while permitting solicitation on behalf of other organizations of a similar character. Thus, such a rule would chill Section 7 activity on a discriminatory basis. *Cf. Costco*, 358 NLRB No. 106, slip op. at 1. In contrast, a rule prohibiting email solicitations on behalf of all organizations has the effect of banning solicitations for unions and other organizations alike. Such a rule would be lawful because, though it would also effectively curb Section 7 solicitations over email, it would not do so discriminatorily.

[36] *Vons Grocery Co.*, 320 NLRB 53, 55 (1995). *See also St. Joseph's Hospital*, 337 NLRB 94, 94-95 (2001) (unlawful prohibition on displaying pro-union screen saver message while routinely permitting a wide variety of personal messages).

because it was a "content-based policy directed to matters pertaining to workplace issues."[37] Likewise, in *NCR Corp.*, the Board adopted an ALJ's finding that a rule against bulletin board postings that contain "offensive language" was overly broad and violated Section 8(a)(1).[38] Given this analysis of employer rules that regulate the content of postings on employer bulletin boards, it is apparent that content-based restrictions on employee use of employers' electronic communications systems effectively treat communications of a similar character differently under *Register Guard*'s discrimination standard, and violate Section 8(a)(1) if they would reasonably be construed to restrict Section 7 activity.

Indeed, in *Register Guard*, the Board found discriminatory enforcement where an employee was disciplined for sending an informative, union-related email to coworkers that was not a solicitation.[39] While the employer maintained a no-solicitation rule, it had tolerated a "variety of nonwork-related e-mails other than solicitations."[40] In other words, the employer had not adopted any rules regarding "mere talk" over email, and it had not prohibited other "mere talk" emails.[41] Since the employer permitted emails of a similar character, the Board concluded that it could not single out this particular email simply based on its "union-related" content.[42]

In sum, the Region should argue that if an employer permits (or does not prohibit) nonwork communications in policy or practice, but regulates the content of those communications—that is, their viewpoint, subject matter, manner of speech, or otherwise—those content-based restrictions violate the Act if they tend to interfere with, restrain, or coerce Section 7 communications in a discriminatory manner.

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[37] 320 NLRB at 55.

[38] 313 NLRB 574, 574, 577 (1993).

[39] 351 NLRB at 1119.

[40] *Id.*

[41] *Id.* at 1118-19.

[42] *Id.* at 1119.

a. Restrictions on emailing salary information and making "inflammatory" communications are facially unlawful under *Register Guard*

Here, the Employer does not prohibit all nonwork-related use of its electronic communications system; its policy explicitly permits some personal use. Thus, applying *Costco*'s clarification of *Register Guard*, we conclude that the Employer's restrictions on using its electronic equipment to email salary information and transmit "inflammatory" communications violate Section 8(a)(1) because they are content-based restrictions that reasonably tend to chill employees' Section 7-protected communications in a discriminatory manner, by suppressing Section 7 communications while allowing non-Section 7 communications of a similar character.

The Board has developed a two-step inquiry to determine whether a work rule or policy reasonably tends to chill employees in the exercise of their Section 7 rights.[43] First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will nonetheless be found to violate the Act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[44] Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.[45]

Applying these principles, we conclude that the Employer's prohibition on emailing salary information over its electronic systems is a clear restriction on Section 7 wage discussions. The Board has long recognized that Section 7 includes the right of employees to ascertain the wages paid by their employer, "'as wages are a vital term and condition of employment.'"[46] Wages are at the "core of Section 7

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[43] *Lutheran Heritage*, 343 NLRB at 646 (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)).

[44] *Id.* at 646-47.

[45] *See, e.g.*, *University Medical Center*, 335 NLRB 1318, 1320-22 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003).

[46] *Parexel International, LLC*, 356 NLRB No. 82, slip op. at 3 (Jan. 28, 2011) (quoting *Triana Industries*, 245 NLRB 1258, 1258 (1979)).

rights" because they are the "'grist on which concerted activity feeds.'"[47] Thus, work rules expressly prohibiting the discussion of wages constitute explicit restrictions on Section 7 activity and are unlawful.[48] Here, the Employer's policy implicitly permits employees to share information about comparable subjects under the provision for incidental personal use, yet wage discussions are forbidden. Therefore, this rule is a content-based restriction that is not privileged under *Register Guard*.

The prohibition on "any communications that are obscene, harassing, discriminatory or inflammatory" is likewise unlawful. Although it does not explicitly reference Section 7 communications, "inflammatory" is the type of broad term that employees would reasonably construe to prohibit them from communicating with other employees or third parties about protected concerns because discussions about working conditions or unionism have the potential to become heated.[49] In addition, the surrounding context does not sufficiently clarify the meaning of "inflammatory" so as to avoid the reasonable impression that the rule bans protected activities. Although it appears in a list of other terms that describe unprotected conduct,[50] those other terms do not shed light on what is meant by "inflammatory," and the term is immediately followed by the clearly unlawful prohibition on emailing salary information, which could lead employees to reasonably believe that wage discussions are the type of inflammatory communications the rule was meant to target. As in *Costco*, the ban on inflammatory communications would tend to suppress certain protected viewpoints

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[47] *Id*. (quoting *Aroostook County*, 317 NLRB at 220).

[48] *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), *enforced in relevant part*, 414 F.3d 1249 (10th Cir. 2005). *See also Waco, Inc.*, 273 NLRB 746, 748 (1984) (prohibition on discussing wages with co-workers is "clear restraint" on Section 7 activity).

[49] *See McKesson Corporation*, Case 06-CA-066504, Advice Memorandum dated Mar. 1, 2012 (unlawful rule cautioning employees to avoid "topics that may be considered objectionable or inflammatory—such as politics and religion" when engaging in social media); *Laboratory Corporation of America*, Case 28-CA-23503, Advice Memorandum dated Nov. 16, 2011 (unlawful rule barring social media postings that "contain defamatory or inflammatory comments" regarding the company and its employees).

[50] *Cf. Tradesmen International*, 338 NLRB 460, 460-61 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or unprotected activity and the absence of any application against protected activity).

while permitting other protected communications, as well as other nonwork communications.[51] Thus, *Register Guard* does not privilege the ban on "inflammatory communications," which would reasonably tend to chill Section 7 activity in a discriminatory manner in violation of Section 8(a)(1).

Finally, the Region should not allege that the restriction on "[i]nstant messaging with friends or surfing the net during working hours" is unlawful under *Register Guard*. The restriction treats all "instant messaging" and "surfing" using the Employer's electronic systems during working hours the same. We construe the instant messaging component of the policy as effectively banning that activity altogether during working hours, since such real-time chatting services are ordinarily used only to talk with "friends" when not used for business purposes. Since the rule does not include content-based restrictions on the use of instant messaging or the Internet, and there is no other indication that it prohibits or otherwise suppresses Section 7-related use while permitting other use, it is a lawful restriction on employee use of the Employer's electronic communications systems under *Register Guard*.

4. The Region Should Urge the Board to Overrule *Register Guard*

This case also presents an opportunity to revisit *Register Guard*'s holding that employees do not have a statutory right to use an employer's email system for Section 7 activities.[52] The Acting General Counsel continues to take the position that employees have a statutory right to use an employer's electronic communications systems for Section 7 activities, subject only to the employer's need to maintain production and discipline,[53] relying upon *Republic Aviation Corp. v. NLRB*.[54]

Applying these principles, the provisions in the Electronic Communications Policy that we have already found to violate Section 8(a)(1) would also be unlawful if employees enjoy a statutory right to utilize employer communications systems for Section 7 purposes.[55] Furthermore, the prohibition on "[i]nstant messaging with

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[51] 358 NLRB No. 106, slip op. at 2 n.6.

[52] *See Register Guard*, 351 NLRB at 1114-16.

[53] *See* Pre-Argument Brief of General Counsel at 14-18, *Register Guard*, 351 NLRB 1110 (2007) (36-CA-8743, 36-CA-8789, 36-CA-8842, 36-CA-8849).

[54] 324 U.S. at 803 n.10.

[55] The prohibitions on emailing salary information and communicating "inflammatory" statements would likewise be unlawful under the discrimination

friends or surfing the net during working hours" would be unlawful as well, because employees would reasonably construe it as prohibiting them from engaging in Section 7 activities during nonwork time.[56] Employees would reasonably construe the instant messaging rule to prohibit them from chatting online with co-workers or union representatives about employment concerns.[57] And the ban on surfing the Internet altogether would clearly prohibit employees from visiting websites with Section 7 content, such as union websites or the NLRB's website. Thus, if employees have the statutory right to access their employer's electronic communications systems for Section 7 purposes during nonwork time, this rule unlawfully infringes on that right.

Accordingly, the Region should dismiss, absent withdrawal, the allegation that the Employer unlawfully interrogated the Charging Party concerning her Facebook postings, but should issue complaint, absent settlement, alleging that the Employer's oral admonitions to the Charging Party regarding her Facebook usage and its electronic communications policy violate Section 8(a)(1).

/s/
B.J.K.

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standard prevailing prior to *Register Guard*, for the same reasons they are unlawful under *Register Guard*. *See Vons Grocery*, 320 NLRB at 55; *NCR Corp.*, 313 NLRB at 577. The Region should also use this case as a vehicle to urge the Board to return to that prior standard.

[56] The term "working hours" is overly broad because it does not clearly differentiate between work time and free time. *See Our Way*, 268 NLRB at 394-95.

[57] Webster's New World Dictionary (2d. College Ed. 1972) defines friend as "a person whom one knows well and is fond of," "a person on the same side in a struggle," and "a supporter or sympathizer."