

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

DATE: November 19, 2012

TO: Cornele A. Overstreet, Regional Director  
Region 28

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

SUBJECT: Clark County Education Association  
Case 28-CA-087287

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This case was submitted for advice as to whether the Employer's rule prohibiting the use of its equipment (including copiers, paper, emails, and phones) for union business unlawfully discriminates against union activity under the *Register Guard* discrimination standard. We conclude that the rule violates Section 8(a)(1) under *Register Guard*.<sup>1</sup> We also conclude that this case is an appropriate vehicle to argue that *Register Guard* should be overturned.<sup>2</sup>

**FACTS**

The Union (Clark County Staff Organization) represents the UniServ directors working for the Employer (CCEA) in a unit of six employees. The parties' most recent collective-bargaining agreement is effective through August 31, 2013. In October 2011, CCEA hired a new executive director. According to the associate executive director, at a meeting between the two some time prior to February 14, the executive director stated that they were no longer doing things the way they did prior to his arrival. He then said that the associate executive director needed to have a meeting

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<sup>1</sup> 351 NLRB 1110 (2007), enforcement denied in part, 571 F.3d 53 (D.C. Cir. 2009).

<sup>2</sup> The Region has also determined that the rule's prohibition against employees engaging in union activities on CCEA premises or on CCEA time is overly broad in violation of Section 8(a)(1); and that the Employer's failure to notify or give the Union the opportunity to bargain about the rule violated Section 8(a)(5). Those issues were not submitted for advice.

with the Union president and inform him that effective immediately there would be no Union business conducted on company time without CCEA's permission, and no use of CCEA equipment for Union business without CCEA's permission.

On February 14, 2012, the associate executive director and the Union met to discuss a number of issues. At the end of the meeting, the associate executive director announced that the Employer was implementing a new rule providing that no Union business will be conducted on CCEA premises or on CCEA time without permission. In addition, CCEA equipment (e.g. copiers, paper, email, phones) could not be used for Union business. The Union requested that the Employer put the rule in writing, and on February 15, the associate executive director handed the Union president the following letter:

The current organizing effort requires that we devote CCEA staff time and energy as well as CCEA resources to meet the needs of the membership. It is imperative that we focus on the goals that have been established by the Executive Board and Association Representative Council of CCEA. Therefore as stated in our meeting on February 14, 2012 effective immediately no union business will be conducted on CCEA premises or on CCEA time without permission. In addition CCEA equipment (e.g. copiers, paper, emails, phones) cannot be used for union business.

According to the associate executive director, prior to the announcement of this rule, employees could conduct personal business at work, so long as they completed their assigned tasks. The Union has presented evidence that since implementation of the above rule, the Employer continues to permit employees to use its computer and email equipment for personal business, such as to view football games, play video games, and make personal airline reservations. However, the rule has prevented employees from using the email system to communicate about Union-related topics, including grievances and the instant unfair labor practice charge.<sup>3</sup>

### ACTION

We conclude that the rule unlawfully discriminates against union activity, on its face and as applied, under the *Register Guard* discrimination standard.<sup>4</sup> We also conclude that this case is an appropriate vehicle to argue that *Register Guard* should be overturned.

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<sup>3</sup> On March 6, the Union filed a grievance regarding the new rules. The Employer rejected the grievance and it is still pending.

<sup>4</sup> 351 NLRB at 1116-1117.

The *Register Guard* decision modified Board law concerning discriminatory enforcement of employer policies, holding that an employer violates the Act only if it discriminates along Section 7 lines by treating activities of “a similar character” disparately because of their union or other Section 7 status.<sup>5</sup> The Board thus adopted the Seventh Circuit’s analysis in *Fleming Co.*<sup>6</sup> and *Guardian Industries*,<sup>7</sup> 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.<sup>8</sup> 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, solicitation and “mere talk,” and business-related use and non-business related use.<sup>9</sup> Instead, the Board redefined discrimination under Section 8(a)(1) as the “unequal treatment of equals.”<sup>10</sup>

We conclude that the Employer’s rule is unlawful both on its face and as applied. First, the rule explicitly discriminates along Section 7 lines by prohibiting the use of its computer and email system solely for Union business; no other communications of any nature are prohibited. Second, the rule is discriminatorily applied. Thus, the evidence shows that as a result of the rule, the Union has been prevented from using the Employer’s phone, facsimile and email system for Section 7-protected communications, including discussions about the instant unfair labor charge. At the same time, the Employer continues to permit employees to use its computer and email system for any other purposes, such as to view football games, play video games, or to make personal airline reservations. Thus, the rule is clearly the “unequal treatment of equals.”

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<sup>5</sup> *Register Guard*, 351 NLRB at 1118.

<sup>6</sup> *Fleming Co. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), *denying enforcement to* 336 NLRB 192 (2001).

<sup>7</sup> *Guardian Indus. Group v. NLRB*, 49 F.3d 317 (7th Cir. 1995), *denying enforcement to* 313 NLRB 1275 (1994).

<sup>8</sup> *Register Guard*, 351 NLRB at 1117-18.

<sup>9</sup> *Id.* at 1118.

<sup>10</sup> *Id.* at 1117.

There is no merit to the Employer's contention that, although the rule explicitly singles out Union activity, it has applied the same policy to all employee communications. Most significantly, the Employer never announced, either orally or in writing, any other rule prohibiting or limiting employees' use of its email system. To the contrary, as discussed above, the Employer continues to permit employees to use its email and computer system for their personal use. Further, although the Employer claims that it has disciplined two employees for using the email system for their personal use, the Region has determined, contrary to the Employer's assertion, that both of those employees were disciplined for other reasons. Thus, one employee was, inter alia, performing outside employment on working time. The other employee stated that he was terminated because he was on the executive director's "hit list," and that after he threatened to sue, he and CCEA ultimately reached an agreement whereby he retired early with a large settlement payment.

The Region should also argue for a return to the pre-Register Guard discrimination standard.

In addition to alleging that the Employer violated Section 8(a)(1) by discriminatorily promulgating and applying its email policy under the standard detailed in *Register Guard*, the Region should use this case as a vehicle to urge the Board to return to the discrimination standard prevailing prior to *Register Guard*, and argue that the Employer unlawfully restricted the Charging Party's Section 7 communications under that standard.

The discrimination standard adopted in *Register Guard* fails to recognize that the essence of a Section 8(a)(1) violation is interference with Section 7 rights, not discrimination.<sup>11</sup> An employer's discriminatory treatment of Section 7-related communications is relevant not because it is unlawful in the sense embraced by anti-discrimination statutes, but because allowance of other nonwork communications undermines the employer's business justification for interfering with Section 7 rights.<sup>12</sup> Thus, prior to *Register Guard*, the Board consistently held that when an employer permits employees to engage in nonwork-related communications or postings using employer property, it must similarly allow Section 7 communications or postings.<sup>13</sup> And under this pre-*Register Guard* standard, we conclude that the

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<sup>11</sup> *Id.* at 1129 (Liebman and Walsh dissenting).

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., *Benteler Industries*, 323 NLRB 712, 714 (1997), *enforced*, 149 F.3d 1184 (6th Cir. 1998); *Saint Vincent's Hospital*, 265 NLRB 38, 40 (1982), *enforced in part*, 729 F.2d 730 (11th Cir. 1984); *Sunnyland Packing Co.*, 227 NLRB 590, 596 (1976), *enforced*, 557 F.2d 1157 (5th Cir. 1977). There were two exceptions. First, an

Employer violated Section 8(a)(1) when it permitted employees to send nonwork-related emails, but prohibited employees from sending Union communications using the same system.

The Region should also argue that employees have a statutory right to use their employer's email system for Section 7 activity.

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.<sup>14</sup> 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,<sup>15</sup> relying upon *Republic Aviation Corp. v. NLRB*.<sup>16</sup> In that case, the Supreme Court held that the legality of workplace rules turns upon a balancing of the employees' Section 7 rights with the employer's interest in maintaining discipline and order.<sup>17</sup> According to the Court, the Act protects "the right of employees to organize for mutual aid without employer interference"<sup>18</sup> absent an employer demonstration of "special circumstances."<sup>19</sup>

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employer could allow business-related communications—those involving an integral part of an employer's necessary functions, such as activities related to its business or regular benefits package. Second, an employer could allow a small number of charitable activities without violating the Act. See *Lucile Salter Pack Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587-88 (D.C. Cir. 1996), enforcing 318 NLRB 433 (1995).

<sup>14</sup> See *Register Guard*, 351 NLRB at 1114-16.

<sup>15</sup> 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).

<sup>16</sup> 324 U.S. 793, 803 n.10 (1945).

<sup>17</sup> *Id.* at 797-98 (1945).

<sup>18</sup> *Id.* at 798.

<sup>19</sup> *Id.* at 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943)).

Here, the Employer has not presented the Region with any evidence of special circumstances necessitating its rule prohibiting Union-related emails.<sup>20</sup> Accordingly, we conclude that the Employer's policy interferes with employees' Section 7 communication at work and is therefore unlawful.

Accordingly, the Region should allege in its complaint that its rule prohibiting the use of its equipment for union business unlawfully discriminates against union activity.

/s/  
B.J.K.

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<sup>20</sup> The Board has held that "general, speculative, isolated or conclusory evidence of potential disruption does not amount to 'special circumstances.'" *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990). Also, compare *Bureau of National Affairs*, Case 5-CA-28860, Advice Memorandum dated October 3, 2000, at 6-7 and n.20 (employer did not present any evidence demonstrating that email restrictions were necessary for production, efficiency, or disciplinary reasons; "mere speculation" as to burden on computer resources insufficient to establish "special circumstances" defense under *Republic Aviation*) with *TXU Electric*, Cases 16-CA- 20576, 20568-2, Advice Memorandum dated February 7, 2001, at 9-11 (employer submitted sufficient evidence demonstrating a substantial business justification for an email policy limiting the number of employees to whom a particular email may be sent, where rapid email communication was a critical component of employer's business and employer had in the past experienced system crashes, an overloaded server, and several instances of the server freezing).