OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 08-07 May 15, 2008

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Report on Case Developments

Attached is a report on case developments in the Office of the General Counsel involving the decision in The Guard Publishing Company, d/b/a The Register Guard, 351 NLRB No. 70 (2007).

/s/
R.M.

cc: NLRBU
Released to the Public

Report of the General Counsel

During my term as General Counsel, I have pledged to keep the labor-management community fully aware of the case handling policies of my office. It is my hope that this transparency will encourage compliance with the Act and cooperation with Agency personnel. Consistent with this goal, I have continued the practice of issuing periodic reports of my decisions on significant legal or policy issues.

This particular report discusses cases in which my office addressed various issues arising out of the Board's recent decision in The Guard Publishing Company, d/b/a The Register Guard, 351 NLRB No. 70 (2007). My contacts with practitioners around the country in the months since the Register Guard decision has evidenced a particularly high interest in the position that my office will be taking in post Register Guard cases. For this reason, the subject warrants expanded coverage in a report and I hope that it will provide valuable assistance to the labor law community.

/s/

Ronald Meisburg
General Counsel

The Register Guard Decision

In Register Guard, the Board, in a 3-2 decision, found that an employer did not violate 8(a)(1) of the Act by maintaining a policy prohibiting the use of the employer's e-mail system for all "non-job-related solicitations", which encompassed Section 7 activity.

The Board majority held that an employer's e-mail system is company property and "employees have no statutory right to use [the company's] e-mail system for Section 7 purposes."

The decision also modified extant Board law on what constitutes discriminatory enforcement by adopting the analysis of the 7th Circuit in Fleming Co.[1] and Guardian Industries[2], cases in which that circuit 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.

The Board majority found that the 7th Circuit's analysis better reflected the principle that discrimination means the unequal treatment of equals. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status.

Thus, although the employer permitted personal e-mail solicitation, the employer had not permitted e-mails soliciting support for any outside group or organization in the past. The Board viewed the union as an outside organization and determined that the employer lawfully enforced its policy against two e-mails by an employee that solicited support for the union was lawful.

After issuance of Register Guard, I directed all Regional Offices to submit discrimination cases related to the decision to the Division of Advice in order to assure a consistent approach to the interpretation of that decision. There have been five cases submitted thus far.

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[1] 349 F.3d 2968 (7th Cir. 2003), denying enf. 336 NLRB 192 (2001).
[2] 49 F.3d 317 (7th Cir. 1995), denying enf. 313 NLRB 1275 (1994).

Case 1

Applying the Board's decision in Register Guard, we decided that an employer's rule which barred union officials from sending e-mails to company managers outside of the facility to be lawful.

The employer and the union have a long-standing bargaining relationship at the facility at issue. The employer has allowed the union to use the company's e-mail system to conduct union business and to communicate with the employer about labor relation matters at the facility.

Recently, the employer sent a letter to the union stating that it had knowledge that the union was inappropriately using the company's e-mail system by sending broadly distributed e-mails to company managers outside the facility. The letter cautioned that sending these sorts of e-mails may result in immediate suspension of [the union's] e-mail account.

Thereafter, the union informed the employer that it would try to keep local issues in the plant and not send single issue e-mails to more than one manager if the employer rescinded the aforementioned letter.

The employer refused to rescind the letter, and instead, sent the union another letter reiterating its concerns.

We found the rule to be lawful because it concerned how the union was permitted to use the employer's e-mail system and did not otherwise prohibit the union from engaging in protected communications outside the plant or to broad groups of managers.

Since the rule solely involved company equipment, and did not discriminate against union or Section 7 activity, it was considered lawful.

Case 2

In this case, we concluded that the Register Guard decision does not present any bar to issuing a complaint alleging that the employer, a health care institution, discriminatorily enforced a facially valid no-solicitation rule.

Specifically, before and after the union's organizing campaign began, the employer maintained a no solicitation rule which, on its face, prohibits solicitation for any purpose during working time and in immediate patient care areas.

The investigation revealed, however, that the employer was inconsistent with its enforcement of this policy. For example, the employer warned and/or disciplined employees engaged in union solicitation activity. Yet it allowed non-union-related solicitation, including: institutional commercial solicitations (sales of Avon, Mary Kay cosmetics, Tupperware, and Pampered Chef products); individual commercial solicitations (sales of homemade foods, jewelry, and holiday crafts); and school fund-raising solicitations (sales of candy, candles, and wrapping paper items); and personal solicitations (collections of money for various families).

In Register Guard, the Board majority noted that the employer at issue in that case 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 Board said that the employer's enforcement of its policy regarding an employee's e-mails soliciting union support did not discriminate along Section 7 lines.

In the instant case, unlike in Register Guard, the employer allowed solicitations for a variety of groups and organizations other than the union. Given its permission for these solicitations, we found that the employer acted discriminatorily by prohibiting union-related solicitation.

Further, there were other Section 8(a)(1) and (3) violations alleged, which, if found, would indicate that the employer's motive in prohibiting the solicitations was anti-union. Thus, even if the employer made this distinction, its policy would be unlawful under Register Guard.

Case 3

In a similar case, we decided that the Register Guard decision does not bar a complaint alleging that the employer discriminatorily re-promulgated and disparately enforced an otherwise valid rule prohibiting non-business e-mail communications.

In this case, an employee sent e-mails about an off-site union organizing meeting to 20 other employees. Prior to sending the e-mail, the employee asked the employer's IT Director what was considered abuse of the employer's computer system. The IT Director did not mention e-mails, but did discuss Internet abuse in response to the question. Further, the IT Director stated that personal use of the computer was allowed in non-patient areas during non-work time, but clarified that, if employees really had to, occasional use during work time in a patient area would be permitted.

After sending the above-referenced e-mail communication about the union meeting, the employee received a written warning for using the e-mail system for solicitation purposes in violation of handbook provisions which state that the employer's e-mail system is intended for reasonable and responsible business purposes and is not intended for personal use, and that employees may not solicit during working time for any purpose.

The investigation revealed that the decision to discipline the employee was content based. Specifically, there was evidence that the employee was disciplined because of the employee's union activity and to chill other employees from engaging in union activity. Further, the evidence established that the managers, supervisors, and other employees frequently sent non-work related e-mails while at work and during working times, both before and after the discipline issued. Such e-mails included chain letters, jokes, and party invitations, as well as non-business related solicitations for cosmetics and candies.

The case settled when the employer agreed that it would not: (1) discipline employees because of their membership in, activities in support of, or affiliation with a union; (2) in response to employees' union activity, enforce a previously un-enforced rule that prohibits employees from communicating via e-mail about non-work matters; and (3) prohibit employees from sending e-mails or soliciting other employees about unions during working time, while permitting e-mails and solicitations about other non-work matters during working time.

Within a few months of approval of the settlement agreement, the employer disciplined the same employee for sending another e-mail with union-related content.

Using the Register Guard analysis, we decided that complaint should issue since the evidence showed that the employer re-promulgated its e-mail rule for anti-union reasons, and discriminatorily enforced the rule against Section 7 activity.

Specifically, the Board majority in Register Guard noted that "if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful". Further, the Board made it clear that it was not altering well-established principles prohibiting employer rules that discriminate against Section 7 activity.

In the instant case, the evidence established anti-union motivation (the reasons for the discipline were to retaliate against the employee's union activity and to chill other employees from engaging in union activity). Further, evidence demonstrated a discriminatory prohibition of union-related solicitations (the employer allowed all kinds of other e-mail communications before and after the employee's discipline).

We concluded that the discriminatory conduct in this case is similar to Salmon Run Shopping Center, 348 NLRB No. 31 (2006), a case cited approvingly in Register Guard and in which the Board found an employer's decision to deny the union access unlawful since it was based "solely on the union's status as a labor organization and its desire to engage in labor-related speech".

Case 4

We decided in another case that an employer discriminatorily enforced its electronic communications policy, unlawfully discharged an employee in reliance on that policy, and unlawfully discharged a supervisor for refusing to engage in related unfair labor practices.

In this particular case, the employer is an organization of medical professionals, which is governed by a Board of Directors (the executive body) and a House of Delegates (the legislative body) and is managed by an Executive Director.

For several months in early 2006, the employer's employees voiced frustration with certain working conditions, including but not limited to perceived issues of: disparate discipline of staff members, unsafe working

conditions, and unfair implementation of a paid time off policy. They were also dissatisfied with what they viewed as management's failure to respond to these concerns and with the lack of a proper reporting procedure.

After learning that a House of Delegates representative was sympathetic to their concerns, one employee, on behalf of a group of employees, sent e-mails seeking assistance in presenting an employee petition to the Board of Directors and the House of Delegates about their concerns. The petition sought the ability to voice employee concerns to an impartial outside source, free from retaliation or repercussion.

Thereafter, the House of Delegates representative broached this subject at an annual meeting and sought a resolution for adopting an employee complaint procedure. This resolution was voted down by the House of Delegates.

The employee then anonymously e-mailed the employee petition directly to the Board of Directors. Thereafter, the Executive Director initiated an investigation to determine which employee(s) were behind the communications because she felt that they were disruptive to the business. The Executive Director also asked all staff members to report to her any involvement in the communications, noting that she planned to discharge anyone that did not comply with her instructions since compliance was a condition of their employment.

The employer's investigation revealed the identity of the employee who had sent the petition to the Board of Directors and the fact that a particular supervisor had known of the employees' intent to send these communications.

In August 2006, with the Board of Directors approval, the Executive Director discharged the employee for insubordination for: participating in the "anonymous e-mail scheme", ignoring instructions to come forward with this information, inappropriately using the employer's computers in violation of its policy, and acting outside the scope of responsibilities.

The Executive Director also discharged the supervisor for insubordination because he failed to disclose knowledge of the e-mail communications and their authors.

We concluded that the employer unlawfully discharged the employee for engaging in protected concerted activities when seeking the support of the employer's governing bodies in addressing working conditions.

We considered that concerted employee protests of supervisory conduct that affects employee working conditions are protected under Section 7 of the Act[3] and did not lose that protection when employees reach outside an employer's "chain of command" to higher levels of management.[4]

Further, we noted that when employee conduct attempts to influence both the employer's management of its enterprise and terms and conditions of employment, the Board discerns the primary thrust of the activity and the extent of the relationship between the challenged management policy and employee working conditions.[5]

In the instant case, the primary thrust of the employee's e-mail was to enlist support of the Board of Directors and House of Delegates to improve employee working conditions. Further, the evidence demonstrated that the employees enlisted this support because the Executive Director refused to previously address them.

In finding the employee's discharge unlawful, we concluded that the employer's stated reason for his discharge – the e-mail had a disruptive effect on operations – not to be supported by the evidence. Further, with regard to the employer's claim of insubordination, we concluded that an employer may not rely on an employee's failure to adhere to a rule that prohibits protected activity as a basis for discipline.[6]

We rejected the employer's defense that the employee had improperly used its e-mail system. The employer's e-mail policy allowed reasonable personal use of the employer's computer and the employer permitted employees' extensive use of the internet, e-mail and other company equipment for their personal purposes. Thus, the employer disparately enforced its e-mail policy against protected concerted activity.

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[3] Trompler, Inc, 335 NLRB 478 (2001); Millcraft Furniture Co., 282 NLRB 593 (1987).
[4] Oakes Machine Corp., 288 NRLB 456 (1988), enfd. in relevant part 897 F.2d 84 (2d Cir. 1990); Memphis Chair Co., 191 NLRB 713 (1971).
[5] Oakes Machine Corp., 288 NLRB at 456. See also, Mitchell Manuals, Inc., 280 NLRB 230 (1986).
[6] Louisiana Council No. 17, 250 NLRB 880 (1980).

Using the 7th Circuit's discrimination analysis adopted by the Board's decision in Register Guard, the evidence demonstrated that the employer had not drawn a meaningful distinction between employee e-mails that it permits (jokes, baby announcements, offers of sports tickets) and those that it prohibits (Section 7 content).

In addition, while the Board in Register Guard suggested that employers can lawfully distinguish between "solicitations" and "non-solicitations", we found that the discharged employee's e-mails were not solicitations because they did not call for employees to take action in support of an outside organization or cause. Rather, they were direct communications to management seeking improvement in working conditions.

Hence, we determined that these e-mails were more job-related than the personal e-mails that the employer permitted. Based thereon, the discharge was unlawful because it was based on the employer's discriminatory enforcement of its e-mail policy.

Finally, we determined that the employer unlawfully discharged the supervisor for refusing to commit an unfair labor practice of informing the Executive Director about who engaged in the protected activity of participating in the e-mail communications at issue.

Case 5

In a fifth case, we decided that a previously-issued complaint should continue to allege that the employer discriminatorily prohibited use of its employee bulletin board to post union information since the facts were clearly distinguishable from those in Register Guard. The evidence revealed that the change in the employer's bulletin board policy was in direct response to union activities at the facility.

The primary employee organizer led a delegation of union supporters into a particular store of the employer. The group handed the store manager a letter containing an announcement of the formation of the union at that store, together with a written list of demands regarding wages and working conditions, on behalf of the union. Simultaneously, other union members and supporters distributed union leaflets outside of the entrance of the store.

At the time of this event, the employer maintained two bulletin boards. One was used for official employer announcements and the second was used by employees for all types of personal or general non-work-related matters, such as anti-war protest march and party announcements (the employee bulletin board). The employer does not have any written policy in its handbook or employee guide concerning the use of these bulletin boards.

The day after the aforementioned event, the primary union supporter posted on the employee bulletin board the list of demands that had been given to the store manager. He also posted the union leaflet that had been distributed.

The letter and leaflet were removed, yet other personal announcements remained. The employee re-posted the letter and leaflet. When he noticed that this re-posting had been removed, he posted another union related document on the bulletin board.

Thereafter, he noticed that all items that had been previously posted on the general employee bulletin board had been removed and employer materials were now posted there. The union organizer asked the store manager about this change. In response, the store manager informed him that employees were no longer allowed to post anything on the employee bulletin board.

We concluded that the facts established an anti-union motive as the timing of the employer's conduct and the actions themselves were directly in response to the union activity described above.

Moreover, we determined that the instant case was dissimilar to Register Guard in that there was no disparate enforcement of a written company-wide policy with facially neutral language at issue. Instead, there was an unwritten policy at this particular store that was abruptly changed in response to union activities.

We concluded that use of this type of evidence showing anti-union motive is not dependent on Board holdings reversed by Register Guard. Instead, this evidence supports the theory that the employer directly targeted the union and its members and supporters at the store in question and other stores.

Summary

The post Register Guard cases submitted to Advice thus far have given us the opportunity to apply those principles set forth in Register Guard in a variety of factual settings. We have concluded that if an employer permits a union representing its employees to use the employer's e-mail system, it can place reasonable limits on that use. We have also seen cases where an otherwise valid rule was promulgated for anti-union reasons, a situation that Register Guard specifically found to be unlawful. Finally, we have dealt with a case that did not involve solicitation, but rather, a direct communication with management seeking improvement in working conditions. We are continuing to bring Register Guard cases to Advice to assure a consistent approach to our casehandling.