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

DATE: April 9, 2015

TO: Olivia Garcia, Regional Director
Region 21

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

SUBJECT: St. Joseph Hospital
Case 21-CA-142162

512-5012-0125
512-5012-1725-0150
512-5012-1725-7100
512-5012-1725-8800
512-5012-1737-0183
512-5012-3322

The Region submitted this case for advice as to whether the Employer's computer and telecommunications network usage policy is unlawfully overbroad in violation of Section 8(a)(1) of the Act. We conclude that the policy in question is unlawfully overbroad under *Purple Communications*[1] with respect to the Employer's email system, and that the Employer has not satisfied its burden of demonstrating special circumstances justifying the necessity of the policy. The Employer's mere speculation about the possible negative effects of Section 7-related email use by employees during nonworking time is insufficient to establish special circumstances, and the Employer's identification of an alternative forum for protected employee communications is irrelevant. We further conclude that the policy in question is unlawfully overbroad with respect to the Employer's internet and intranet systems under an extension of *Purple Communications*.[2]

---

[1] 361 NLRB No. 126, slip op. at 1, 14 (Dec. 11, 2014).

[2] The Region's submission and the Union's underlying amended charge in this case concern the computer and telecommunications network usage policy of the Employer, St. Joseph Hospital. However, the revised October 2014 policy is a systemwide policy promulgated by St. Joseph Health System and applicable to all healthcare facilities in that system, of which the Employer is a part. Thus, the Region should request a systemwide remedial order. *Cf. MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 9 (July 21, 2011) (noting that the appropriate remedy for an unlawful companywide policy is a notice posting at

FACTS

St. Joseph Hospital ("the Employer") is a nonprofit corporation that operates a general acute care hospital in Orange, California. The Employer is part of the St. Joseph Health System, which includes a number of additional healthcare facilities in California and Texas. Since 2010, California Nurses Association/National Nurses United ("the Union") has at various times attempted to organize the nurses working at the Employer's facility. In or around February 2014, the Union began a new organizing campaign at the facility.

As of February 2014, the Employer maintained a "Solicitation/Distribution" policy that included a provision pertaining to the "Use of [the Employer's] Computer System and Other Property," which read:

> The [Employer's] computer and telecommunications network (including the [Employer's] email, Internet and Intranet systems), as well as other related property used for communications (including stationery, copy machines, telephones, mail systems, etc.) are the property of the [Employer] and is [sic] intended to be used for legitimate business purposes only. The [Employer] reserves the right to control the use of the network and its property as it deems appropriate.

On August 12, 2014, a hospital employee sent an email to a mailing list containing all registered nurses at the facility expressing (b) (6), (b) (7) opposition to the Union campaign. The initial email was sent at 7:57 a.m., and approximately nine hours later a pro-Union employee offered (b) (6), (b) (rebuttal in a reply-all message sent at 4:47 p.m. Less than one hour later, at 5:31 p.m., the Employer's Vice President of Human Resources replied, stating in relevant part:

> Just a friendly reminder – hospital email & the [Employer's registered nurse] distribution list should only be used for business purposes and should not be used to solicit or as a platform for personal opinions. I appreciate the passion around the subject of unionization, but ask that you continue to support and comply with hospital policies . . . .

A third employee sent an additional email at 6:31 p.m. expressing (b) (6), (b) (7) opposition to the Union. The Employer did not publicly respond to that message.

---

all of the company's facilities); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005) (same), *enforced in relevant part*, 475 F.3d 369, 380-81 (D.C. Cir. 2007).

In October 2014, the Employer promulgated a revised version of the computer and telecommunications network usage policy, applicable to all facilities in the St. Joseph Health System, which reads:

> [St. Joseph Health System's] computer and telecommunications network (including [St. Joseph Health System's] email, internet and intranet systems) are the property of [St. Joseph Health System] and are intended to be used for legitimate business purposes only. [St. Joseph Health System] reserves the right to control the use of the network system as it deems appropriate. In addition, employees may not use other [St. Joseph Health System] property (including stationary [sic], copy machines, mail systems, etc.) to solicit or distribute literature or to conduct personal business on behalf of non-[St. Joseph Health System] organizations.

ACTION

We conclude that under *Purple Communications* the Employer's computer and telecommunications network usage policy violates Section 8(a)(1) by prohibiting employees from using the Employer's email system during nonworking time for Section 7 activities, and that the Employer has not demonstrated that special circumstances make the prohibition necessary to maintain production or discipline. We further conclude that the Region should extend the rationale of *Purple Communications* and allege that the Employer's policy violates Section 8(a)(1) by prohibiting employees from using the Employer's internet and intranet systems during nonworking time for Section 7 activities.

A. The Employer's Total Ban on Nonwork Use of Email Violates Section 8(a)(1) Because It Has Not Demonstrated That Special Circumstances Justify the Ban.

In *Purple Communications*, the Board recently adopted the presumption that "employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."[3] To justify a total ban on employees' nonwork use of email, including Section 7 use on nonworking time, an employer must demonstrate that "special circumstances make the ban necessary to maintain production or discipline."[4] The Board has suggested that it will be the "rare case"

---

[3] 361 NLRB No. 126, slip op. at 14.

[4] *Id.*

where special circumstances justify a total ban,[5] and it has emphasized that in demonstrating special circumstances an employer's "mere assertion of an interest that could theoretically support a restriction" is insufficient.[6] The Board generally declines to find special circumstances where an employer's justification for a restriction on Section 7 activities is merely speculative or is otherwise unsupported by affirmative evidence.[7] Finally, "where special circumstances do not justify a total ban, employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline."[8]

Here, it is undisputed that the Employer grants employees access to its email system in the course of their work. Moreover, the Employer's policy restricts the use of its electronic communication systems, including email, at any time and for any reason other than "legitimate business purposes." Employees would reasonably construe the limitation to "legitimate business purposes" as a total ban on the

---

[5] *Id.*

[6] *Id.*

[7] *See, e.g.*, *Southwestern Bell Telephone Co.*, 276 NLRB 1053, 1053 n.2 (1985) (finding that evidence of "unusual" employee behavior and of objections by one or two employees did not sufficiently "prove" special circumstances to justify removal of union literature from bulletin board based on presumption of potential conflict); *United States Steel Corp.*, 223 NLRB 1246, 1248 (1976) (rejecting employer's claim of special circumstances justifying no-distribution rule when all of employer's arguments were based on mere "apprehensions" and "speculations" about what might happen in absence of policy), *enforced mem.*, 547 F.2d 1166 (3d Cir. 1977); *see also, e.g.*, *Meijer, Inc. v. NLRB*, 463 F.3d 534, 544-45 (6th Cir. 2006) (rejecting employer's special circumstances justification for parking lot no-solicitation rule where employer offered no "specific evidence of unusual circumstances" supplementing its "generic safety concern" regarding the presence of motor vehicles), *enforcing in part* 344 NLRB 916 (2005).

[8] *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 14. The Board listed employer prohibitions against large attachments or audio/video segments as examples of uniform and consistently enforced controls that may be acceptable "if the employer can demonstrate that they would interfere with the email system's efficient functioning." *Id.*, slip op. at 15.

nonwork use of the email system, including Section 7 use on nonworking time.[9] Indeed, in her August 12 email, the Employer's Vice President of Human Resources explicitly informed the employees that email was to be used solely for "business purposes" and not for discussing the "subject of unionization," which removed any potential ambiguity regarding the rule. As a result, consistent with the Board's recent recognition of employees' presumptive right to use their employers' email systems for Section 7 activities on nonworking time, the Employer's policy violates Section 8(a)(1) absent the presence of special circumstances justifying the policy.[10]

The Employer has failed to establish the requisite special circumstance to justify its policy. Here, the Employer's stated concern that allowing employees to send nonwork emails would create long email chains and cause work emails to be overlooked is too speculative to support a finding of special circumstances, and relies on reasoning that the Board has rejected. Although the Employer's email system is accessible to a comparatively large workforce—including the several hundred nurses at issue in the present case—the Employer has not demonstrated a concrete likelihood that an unusually burdensome number of Section 7-related emails would be sent. In the one instance in the record of the Employer enforcing its email policy, there was a nine-hour delay between an initial email sent to all registered nurses at the facility and the first reply. Even assuming that a large number of emails would be sent, the Employer has provided no evidence beyond its unsubstantiated speculation that its employees' use of email for Section 7 communications during nonworking time, when there is no expectation of employee productivity, would actually interfere with employee productivity during working time.

Furthermore, the Board has already suggested that even a hypothetical "flood" of Section 7-related emails would not sufficiently affect productivity so as to justify a total ban.[11] As the Board noted in *Purple Communications*, email access for protected

---

[9] *See Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 2-3 (finding email policy constituted total ban on nonwork use where it stated in part that employer's system "should be used for business purposes only"), *on remand to* Case 21-CA-095151, JD-14-15, slip op. at 3 (ALJD dated March 16, 2015) (finding same email policy to be unlawful). Also, even if there is some ambiguity regarding the extent of the policy's prohibition, that ambiguity should be construed against the Employer as the promulgator of the rule. *See, e.g.*, *Lafayette Park Hotel*, 326 NLRB 824, 828 & n.22 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

[10] *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 1, 14.

[11] *See id.*, slip op. at 15 n.72 ("To state the obvious, many employers already permit personal use of work email, and the sky has not fallen.").

communications may be limited to nonworking time, when productivity is not a concern. Moreover, an employer may limit its employees' ability to send or review nonwork emails during working time and may establish other mechanisms for monitoring employee productivity—and due to the nature of email, employees can simply "hit the 'delete' button" when they receive unwanted nonwork emails, negating concerns about a "debilitating impact on productivity."[12] In light of these realities of modern email systems, as discussed by the Board in *Purple Communications*, the Employer's stated concern about work emails getting overlooked is neither rational nor supported by the evidentiary showing that the Board requires to establish special circumstances.

Finally, to the extent the Employer argues that its overly restrictive email policy is justified by the availability of an alternative forum for Section 7 communications—the Employer's intranet site, "StaffHub"—this contention is also without merit. In *Purple Communications*, the Board explicitly rejected the argument that a presumption in favor of employee access should apply only in the absence of adequate alternative channels of communication.[13] Since the Board's decision—like the present case—concerned email usage by employees only, as opposed to nonemployees, the Board found that a "reasonable alternative means" standard would be contrary to longstanding Board and Supreme Court precedent.[14] As a result, the availability of a viable alternative forum is irrelevant to the Board's analysis of whether a restriction is justified by special circumstances relating to the nature of an employer's business.[15] Accordingly, because the Employer has not established the requisite

---

[12] *Id.*

[13] *Id.*, slip op. at 13-14 & n.62.

[14] *See id.*, slip op. at 14. The Supreme Court has suggested that the availability of alternative means of communication "might" be a relevant factor to consider when determining solicitation rights in the limited context of healthcare facilities. *See Beth Israel Hospital v. NLRB,* 437 U.S. 483, 505 (1978); *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 13 n.62. However, even though the present case involves a healthcare facility, the Court's underlying concern about "protecting patients from disturbance" is inapposite in the context of email or other electronic communications, which patients are not privy to and cannot easily observe.

[15] *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 13-14; *see, e.g.*, *NLRB v. Magnavox Co.*, 415 U.S. 322, 326-27 (1974) (noting that access to the employer's bulletin board as an alternative means of communication was irrelevant absent evidence of reduced production or discipline in concluding that a union cannot waive the unit employees' statutory right to distribute

special circumstances here, its policy prohibiting employees from using the email system for anything other than "legitimate business purposes" is unlawfully overbroad.

B. The Employer's Policy Is Also Unlawful with Respect to the Employer's Internet and Intranet Systems.

Although the Board stated that its holding in *Purple Communications* was limited to email, it noted that other forms of electronic communication "may ultimately be subject to a similar analysis."[16] Thus, we further conclude that this case is a good vehicle to present the Board with the opportunity to extend its holding in *Purple Communications* to other forms of electronic communication, including the Employer's internet and intranet systems.

1. The Internet System.

The internet shares many of the email-related attributes that were discussed by the Board in *Purple Communications* and that weigh in favor of extending the presumptive right of employees to use such means of communication for Section 7 activities on nonworking time.[17] Beyond facilitating the use of email, the internet

---

literature); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (discussing distinction between employees and nonemployee organizers, and noting the relevance of alternative means of communication to restrictions on the latter only); *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 17 (Mar. 25, 2011) ("Neither the Board nor any court has ever required employees to prove that they lacked alternative means of communicating with their intended audience as a precondition for recognition of their right, subject to reasonable restrictions, to communicate concerning their own terms and conditions of employment in and around their own workplace."), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1580 (2013).

[16] *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 14 & n.70.

[17] For example, the internet is one of the most efficient mechanisms for sharing information and opinions, and has had a pervasive effect on how individuals communicate in the twenty-first century. *See, e.g.*, Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 Geo. Wash. L. Rev. 262, 274-75 (2008) (discussing the internet's transformative effect on how Americans communicate); Mary Madden & Sydney Jones, *Networked Workers*, Pew Research Center's Internet & American Life Project, 4 (Sept. 24, 2008), *available at* http://www.pewinternet.org/2008/09/24/networked-workers/ (finding that 86% of American workers were internet users as of 2008).

itself has become a critical means of communication in modern society, including for Section 7-related purposes.[18] Like email, the internet is also a passive form of communication in that employees can wait to respond to messages until they are on nonworking time, and can easily ignore or delete messages altogether.[19] In addition, much like email, not all employees have access to the internet outside of the workplace.[20] We therefore conclude that in the present case the Employer's policy is unlawfully overbroad to the extent that it prohibits any use of the Employer's internet network for Section 7 purposes during nonworking time.

2. The Intranet System.

Finally, we note that an employer's intranet system facilitates employee communication in a similar manner, albeit on a more focused scale. Thus, for the same reasons that the Board should extend its *Purple Communications* framework to an employer's internet, we conclude that the Board should also apply that framework

---

Expanded use of the internet would also carry minimal costs for employers, and the internet does not have a finite capacity like physical equipment. *See Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 8-9 (distinguishing electronic communications from physical equipment like copy machines or bulletin boards); John Hagel et al., *From Exponential Technologies to Exponential Innovation: Report 2 of the 2013 Shift Index Series*, Deloitte, 5 (2013), *available at* http://www.deloitte.com/us/shiftindex (documenting the exponential decrease in internet bandwidth costs every year between 1999 and 2012).

[18] *See, e.g.*, *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1-4 (Aug. 22, 2014) (discussing employees' protected right to engage in Facebook discussion and finding employer's internet/blogging policy to be unlawfully overbroad); *see also Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 40-42 (Member Johnson, dissenting) (discussing the role of internet-accessible personal email and online social media networks).

[19] *Cf. Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 15 & n.72 (noting the similar attributes of email).

[20] *Cf. id.*, slip op. at 6 n.18 (recognizing that due to costs and other circumstances, "some employees do not privately use any electronic media"). Although the internet is not the same type of "natural gathering place for employees of a particular employer" as an employer's own internet network, *see id.*, such distinction does not diminish the importance of the internet in facilitating employees' exercise of their Section 7 rights at the workplace, as discussed above.

to an employer's intranet. In the present case, the Employer maintains an intranet site for its employees, "StaffHub," that functions as an internal social media platform and, thus, may facilitate Section 7-related communications among employees. As a result, because the Employer's computer and telecommunications network usage policy facially prohibits any use of the Employer's intranet system for Section 7-related purposes during nonworking time, the policy is unlawfully overbroad in violation of Section 8(a)(1).[21]

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing.

/s/
B.J.K.

H:ADV.21-CA-142162.Response.StJoseph.[redacted]

[21] Although the Employer itself has suggested that employees may use StaffHub for Section 7 purposes, the mere maintenance of an unlawfully overbroad rule will constitute a violation of the Act even in the absence of specific enforcement. *E.g.*, *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000) (noting that the mere maintenance of an unlawfully overbroad rule violates the Act because it inhibits employees from exercising their Section 7 rights, and that evidence of enforcement is not required), *enforced*, 297 F.3d 468 (6th Cir. 2002).