

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

DATE: December 18, 2012

TO: Robert W. Chester, Regional Director  
Region 6

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

SUBJECT: UPMC and UPMC Presbyterian 506-6090-3600  
Shadyside, a Single Employer, d/b/a 512-5012-0175  
Shadyside Hospital and/or Presbyterian 512-5012-1725-8800  
Hospital and/or Montefiore Hospital 512-5012-1737-0183  
AND UPMC and Magee Hospital, a 512-5018-1700  
Single Employer 512-5018-3300  
Case 06-CA-081896 512-5012-3322  
512-5012-6729  
512-5012-8320-5033  
625-7742-1000  
625-7742-6700

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by maintaining certain policies that regulate employees' use of its email and electronic communication systems, and by prohibiting employees from sending pro-union emails while permitting anti-union emails. The Region also submitted the issue of whether electronic notice posting remedies are warranted where the Employer has not only used electronic means to commit certain unfair labor practices, but also customarily uses electronic communication.

We conclude that under *Register Guard*,<sup>1</sup> the Solicitation and Electronic Mail and Messaging Policies are lawful because the Employer is entitled to restrict use of its electronic systems as long as it does not make distinctions along Section 7 lines; however a provision in the Acceptable Use of Information Technology Resources Policy is unlawful because employees would reasonably interpret it as specifically prohibiting Section 7 communications; and the Employer has, under the definition of

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

discrimination announced in *Register Guard*, discriminatorily applied its policies to prohibit pro-union email messages while permitting anti-union messages.

Further, the Region should use this case as a vehicle to argue that *Register Guard* should be overturned. First, the Region should argue that employees have a Section 7 right to use their employer's electronic communication systems. Second, the Region should urge the Board to return to the pre-*Register Guard* definition of discriminatory treatment. Applying those standards, the Region should argue that certain other rules, which were maintained in the context of numerous unfair labor practices that restricted employees' Section 7 communications, are also unlawfully overbroad. Finally, the Region should seek both an intranet and email notice-posting remedy.

### **FACTS**

SEIU Healthcare Pennsylvania, CTW, CLC ("Union") has an organizational campaign, which it began in January 2012,<sup>2</sup> underway at several of the Employer's Pittsburgh, PA hospitals. The Union's charge alleges that the Employer's electronic communication policies unlawfully restrict Section 7 conduct and that the Employer has applied those policies in a discriminatory manner.

#### **The Employer's email usage policies**

UPMC has three policies that concern email usage: (1) Section IV (C) of the Solicitation Policy, which prohibits using the email system "to engage in solicitation;" (2) Electronic Mail and Messaging Policies ("Electronic Mail Policy"), which regulates employees' use of UPMC's electronic mail and messaging systems; and (3) Acceptable Use of Information Technology Resources Policy ("Information Technology Resources Policy"), which governs employees' use of "UPMC's information technology resources (computers, servers, Internet, email, etc.)." The pertinent portions of each policy are outlined below. The allegedly unlawful provisions are italicized.

##### **1) Solicitation Policy**

No staff member may distribute any form of literature that is not related to UPMC business or staff duties at any time in any work, patient care, or treatment areas. *Additionally, staff members may not use UPMC electronic messaging systems to engage in solicitation* (see also Policy HS-IS0147 Electronic Mail and Messaging).

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<sup>2</sup> All dates hereafter are in 2012.

## **2) Electronic Mail and Messaging Policy**

### **IV. DEFINITIONS**

Electronic Messaging System(s): Any UPMC sponsored e-mail or other electronic messaging system (including instant messaging systems), that is used to conduct UPMC business and has the capability to create, send, receive, forward, reply to, transmit, store, copy, download, or display electronic messages for purposes of communication across computer networks among individuals and groups.

### **V. GUIDELINES**

1. UPMC electronic messaging systems may not be used:
  - *To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or . . . .*
  - *To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;*
  - *In a manner inconsistent with UPMC policies and directives, including, but not limited to policies concerning commercial communication, solicitation, sexual harassment, job performance and appropriate Internet use.*

## **3) Information Technology Resources Policy**

### **I. POLICY**

The UPMC information technology resources (computers, servers, Internet, e-mail, etc.) *shall only be used for supporting the business, clinical, research, and educational activities of UPMC workforce members.*

[ . . . ]

### **II. PURPOSE**

To establish guidelines for:

1. The acceptable use of UPMC information technology resources.
2. Ensuring that appropriate security controls are implemented on UPMC information technology resources.
3. Ensuring that all software is appropriately licensed

and used in a manner consistent with the software's license terms and conditions.

#### IV. REQUIREMENTS

1. UPMC workforce members shall only use UPMC information technology resources for authorized activities. Authorized activities are related to assigned job responsibilities and approved by the appropriate UPMC management. *To the extent that a UPMC information technology resource is assigned to an employee, the employee is permitted de minimis personal use of the UPMC Information technology resource.*

*“De minimus personal use” is defined as use of the information technology resource only to the extent that such use does not affect the employee’s job performance nor prevents other employees from performing their job duties.*

[ . . . ]

20. *Without UPMC’s prior written consent, a UPMC workforce member shall not independently establish (or otherwise participate in) websites, social networks (such as face book [sic], MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:*

- *Describe any affiliation with UPMC;*
- *Make references to UPMC patients;*
- *Disparage or Misrepresent UPMC;*
- *Make false or misleading statements regarding UPMC;*
- *Make promises or commitments by UPMC; or*
- *Use UPMC’s logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1000 titles [sic] “Use of UPMC Name, Logo, and Tagline”).*

23. *Sensitive, confidential, and highly confidential information transferred over the Internet shall use appropriate security controls and have the written approval of UPMC’s Chief Information Officer or Privacy Officer.*

## **The Employer's enforcement of its email usage policies**

### **Union-related emails prohibited by Employer**

Sometime around January or February, a unit director told all employees present at [REDACTED] unit's staff meeting that they could not use their computers at work for union activity. The evidence demonstrates that pro-union employees have not used their computer systems to send messages or to communicate with other employees about the Union.

### **Anti-union emails permitted by the Employer**

The Union has provided four emails to establish the Employer's discriminatory application of its electronic communications policies. On March 15, a unit employee sent an email to a distribution list that included employees and supervisors. In that email, [REDACTED] explained that SEIU was not a nursing union and that [REDACTED] did not feel that it was appropriate for a service union to represent nurses, that union dues were significant, that the Union could not guarantee anything, and that employees could actually end up with fewer rather than more benefits. [REDACTED] also stated that if the employees unionized, "[n]either [a team supervisor], myself, or any members of [the supervisor's] team would be able to assist you with any schedule changes or special requests," and requested that employees go to a facility that was already unionized if they felt that they needed a union work environment.

In late March, a nurse ("originator") sent an email to other employees.<sup>3</sup> Several employees who received that email added their own comments and stories to [REDACTED] original email and forwarded the email to their coworkers. When the email was last forwarded, it contained at least four employees' stories and comments regarding their negative experiences with unions in prior workplaces, including the union getting poor-performing employees their jobs back, mandated overtime, ineffective grievance processing, and expensive union dues. One instructed employees on how to get union organizers, who were visiting employees' homes to obtain support for the organizing effort, to leave their property. The originator and another employee replied that they did not want coworkers sharing their information with union organizers, and the originator also added that [REDACTED] believed that sharing that information may also be a

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<sup>3</sup> The Region is still trying to ascertain whether this email was distributed to supervisors; if not, then it cannot be used to demonstrate discriminatory application of the rule. However, it would still be relevant to demonstrate that employees understood the Confidential Information Policy as restricting Section 7 communications. The Region has already determined that the rule is unlawful because employees would reasonably read it to prohibit Section 7 conduct.

violation of the Employer's Confidential Information policy, because "staff member data" was listed under "examples of confidential information."

On or around April 18, an employee at the Employer's Magee Women's Hospital distributed an email to several distribution lists, which included employees and supervisors. [REDACTED] email generally stated that unions are outdated; that service unions such as the SEIU had no business representing nurses; that the union dues are high and that employees "will be terminated" if they do not pay the union initiation fee; that strikes can occur and employees can lose their benefits; that Magee's Professional Practice Council was already providing many of the same benefits that a union could provide at no cost to employees; that the Union would permit bad employees to remain employed at the expense of good employees; and that it is difficult to get a union out once the employees vote for it.

In mid to late August, another nurse wrote and distributed an email, which other employees circulated to various address distribution lists that included both employees and supervisors. Like the prior emails, this email took an anti-union stance, provided links to various websites, and reiterated the same sentiment about union dues.

There is no evidence that that the Employer disciplined any employees for sending anti-union email messages on its email system or instructed them to stop doing so.

#### Other unlawful Employer conduct

The Region has determined that the Employer committed numerous unfair labor practices in its effort to suppress the union organizing campaign. Beginning around May and continuing thereafter, there were incidents involving supervisors and managers instructing employees not to talk about the Union at work or on the Employer's property, both on and off duty. One supervisor told an employee that [REDACTED] could not visit other employees' homes to talk about the Union. The Employer had its security guards patrol and surveil the bus stops and public areas surrounding the Employer's facilities, and instructed employees in its weekly departmental newsletter to notify security if organizers were seen on the Employer's premises. Various Employer agents also warned and/or removed non-employee union organizers and employee union activists from public areas of UPMC property. The unlawful conduct also included interrogations, threats, surveillance, the impression of surveillance, discriminatory enforcement of certain other policies in order prevent union activity, discriminatory discipline and discharges, and the maintenance and enforcement of other unlawful handbook rules. The Employer also issued various types of formal discipline pursuant to its unlawfully overbroad Solicitation Policy, and the Employer's security guards removed a known union employee-activist from the public cafeteria while [REDACTED] was off duty. There is no evidence that the Employer has taken similar

action against employees on the property for other non-work related purposes, or against members of the public who come to the facility and use the public cafeteria.

The Employer has also used its electronic communication systems to carry out its unlawful conduct. For example, a supervisor/manager emailed employees in the pharmacy department and instructed them that “[i]f you are contacted by a Union Organizer, please report this activity to myself or another member of the pharmacy management team.” Although the Employer has prohibited union solicitation in patient areas, the Employer has utilized screensavers on its computers, including the stationary computers in patient rooms for the use of hospital employees, to push its anti-union message.<sup>4</sup>

The Union asserts that the totality of the Employer’s unlawful conduct has chilled employees’ support for the Union.

### ACTION

We conclude that under *Register Guard*,<sup>5</sup> the Solicitation and Electronic Mail and Messaging Policies are lawful because the Employer is entitled to restrict use of its electronic systems as long as it does not make distinctions along Section 7 lines; however a provision in the Acceptable Use of Information Technology Resources Policy is unlawful because employees would reasonably interpret it as specifically prohibiting Section 7 activities. We further conclude that under *Register Guard*, the Employer has discriminatorily applied its policies to prohibit pro-union messages while permitting anti-union messages.

We also conclude that the Region should use this case as a vehicle to argue that the two holdings of *Register Guard* should be overturned. First, the Region should argue that employees have a Section 7 right to use their employer’s electronic communication systems. Second, the Region should urge the Board to return to the pre-*Register Guard* definition of discriminatory treatment. Moreover, applying those standards, the Region should argue that certain other rules, which were maintained in the context of numerous unfair labor practices that restricted employees’ Section 7 communications, are also unlawfully overbroad. Finally, the Region should seek both an intranet and email notice-posting remedy.

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<sup>4</sup> One screensaver message states: “Have questions about the Union? Go to [www.UPMCcares](http://www.UPMCcares)” and “Unsure what the Union means for you and your family? Go to [www.UPMCcares](http://www.UPMCcares).”

<sup>5</sup> 351 NLRB 1110 (2007).

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 non-business use of the employer's e-mail system are lawful.<sup>6</sup> In so holding, the Board rejected the General Counsel's argument that the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*<sup>7</sup> required the Board to balance the employer's business interest against the employees' equally important Section 7 interest in communicating at the workplace.<sup>8</sup> Additionally, the *Register Guard* decision modified Board law concerning discrimination in this context, concluding 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>9</sup> Thus, the Board adopted the Seventh Circuit's analysis in *Fleming Co.*<sup>10</sup> and *Guardian Industries*,<sup>11</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>12</sup> 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, solicitation and "mere talk," and business-related use and non-business related use.<sup>13</sup> In each case, the Board noted, the fact that union solicitation may be prohibited does not establish that the rule discriminates along Section 7 lines.<sup>14</sup> Notwithstanding that *Register Guard*'s email rule was facially lawful, the Board found that it discriminatorily enforced that rule, which prohibited non-business use of its email systems, when it disciplined an employee for sending a personal email to her coworkers to "clarify the facts surrounding the union's rally the day before."<sup>15</sup> The Board found that this email was unlike other emails that were "solicitations" and that under the employer's

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<sup>6</sup> 351 NLRB at 1110, 1114-16.

<sup>7</sup> 324 U.S. 793, 801-02 (1945).

<sup>8</sup> 351 NLRB at 1115-16.

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

<sup>10</sup> *Fleming Cos. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), *denying enforcement to* 336 NLRB 192 (2001).

<sup>11</sup> *Guardian Indus. Group v. NLRB*, 49 F.3d 317 (7th Cir. 1995), *denying enforcement to* 313 NLRB 1275 (1994).

<sup>12</sup> *Register Guard*, 351 NLRB at 1117-18.

<sup>13</sup> *Id.* at 1118.

<sup>14</sup> *Id.* at 1119.

<sup>15</sup> *Ibid.*

previous application of the policy, it should have been allowed because the employer tolerated other “personal” emails.<sup>16</sup> Additionally, the Board also noted that in assessing an employer’s action in future cases, “if the evidence showed that the employer’s motive for the line-drawing was antiunion, then the action would be unlawful.”<sup>17</sup>

### **Provisions that are lawful under *Register Guard***

We first conclude that the Employer’s Solicitation, Electronic Mail, and Information Technology Resources Policies apply only to employees’ use of the employer’s electronic communication systems. Specifically, Section II of the Information Technology Resources Policy expressly states that its purpose is to establish guidelines for the “acceptable use of [the Employer’s] information technology resources.” Thus, although provision 20 of the Information Technology Resources Policy, read in isolation, refers to social media more generally, in context it clearly only applies to the use of the Employer’s electronic communication systems.

We further conclude that the provisions of the Solicitation and Electronic Mail Policies that regulate employees’ use of the Employer’s electronic communication systems are lawful on their face under *Register Guard*, since the Employer is permitted to restrict use of its systems so long as it does not discriminate along Section 7 lines. The Solicitation Policy prohibits employees from utilizing the Employer’s electronic messaging systems for solicitation, and the Electronic Mail Policy prohibits employees from using the Employer’s electronic mail and messaging systems “[t]o solicit employees to support any group or organization, unless sanctioned by UPMC executive management” and from engaging in any activities that are “disruptive, offensive to others, or harmful to morale.” Thus, neither discriminates along Section 7 lines. Further, the Information Technology Resources Policy provision that prohibits non-business use and the somewhat inconsistent provision that permits only de minimus personal use are lawful under *Register Guard’s* holding that an employer may lawfully bar employee email use for non-business related purposes unless it discriminates against Section 7 activity.<sup>18</sup> And the highlighted provisions in Rule 20 (other than the two provisions discussed below) and in Rule 23 are lawful, despite their likely infringement on Section 7 activities, because, under *Register Guard*, employees have no affirmative Section 7 right to use the Employer’s email system apart from the right to be free from employer discrimination.

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.* at 1118, n. 18.

<sup>18</sup> *Id.* at 1116.

### **Provisions that are unlawful under *Register Guard***

In *Costco Wholesale Corp.*, the Board recently determined that a handbook rule that prohibited employees from using the employer's technology or electronic communications to electronically post statements that "damage the Company, defame any individual or damage any person's reputation," was unlawful because by its terms, the prohibition against making those kinds of statements clearly encompassed concerted communications protesting the employer's treatment of its employees.<sup>19</sup> The Board distinguished rules addressing conduct that was reasonably associated with actions that fall outside the Act's protection, such as conduct that is malicious, abusive, or unlawful.<sup>20</sup> The Board also noted that its conclusion did not implicate *Register Guard* because the rule did not prohibit email for all non-job purposes but rather was reasonably understood to prohibit the expression of certain protected viewpoints.<sup>21</sup>

Here, the provisions in the Information Technology Resources Policy that prohibit employees from using the Employer's information technology resources to engage in social media communications that disparage or misrepresent the Employer, or make false or misleading statements regarding the Employer, are very similar to the provision found unlawful in *Costco* and clearly encompass concerted communications protesting the Employer's treatment of its employees. In addition, if the Board overturns *Register Guard*, these rules, like those discussed below, are unlawfully overbroad under *Lutheran Heritage*.

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<sup>19</sup> 358 NLRB No. 106, slip. op. at 2 (Sept. 7, 2012).

<sup>20</sup> *Id.* at 2, citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647-49 (2004) (rule addressing "verbal abuse," "abusive or profane language," and "harassment") and *Palms Hotel & Casino*, 344 NLRB 1363, 1367-1368 (2005) (rule addressing "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees).

<sup>21</sup> *Id.* at 2, n.6. That conclusion is somewhat in tension with *Register Guard's* holding that an employer can restrict employee use of its electronic systems in any way it wants so long as it does not specifically discriminate along Section 7 lines. If the Board decides not to overrule *Register Guard*, it may use this opportunity to better harmonize its decision in *Costco* with *Register Guard*.

**Under *Register Guard*, the Employer discriminatorily enforced its email policies by prohibiting employees from using its systems to send pro-union messages while permitting employees to send anti-union messages.**

The evidence establishes that the Employer disparately enforced its email policies against pro-union employees. As an initial matter, the Employer's various managers and supervisors prohibited pro-union employees, under threat of discipline, from discussing the Union at work. For example, sometime in January or February, a unit director told all employees at (b)(6), (b)(7) staff meeting that they could not use the Employer's information technology systems to discuss the Union.<sup>22</sup> Moreover, the Employer distributed to employees its Solicitation, Electronic Mail, and Information Technology Resources Policies, parts of which the Region has determined to be unlawful because they would reasonably be read to prohibit union solicitation and communication. The evidence demonstrates that as a result of these policies and the Employer's concurrent instructions to not discuss the Union at work or use the Employer's information technology systems for Union activity, pro-union employees did not use the Employer's email system to communicate about or share their views about the Union.

At the same time, the Employer knowingly permitted statutory employees to utilize its email system to send anti-union propaganda. Although the plain language of those policies prohibits non-business solicitations, employees, with the Employer's acquiescence, have used the Employer's email system to distribute anti-union messages, including messages soliciting employees to not support the union effort, to various email distribution lists that included both statutory employees and supervisors.

Therefore, the Employer's enforcement of those policies constituted discrimination along purely Section 7 lines: it allowed one type of protected communication—messages against the union—while prohibiting pro-union messages or solicitations. This is precisely the principle of discrimination that the Board espoused in *Register Guard*, i.e., "the unequal treatment of equals."<sup>23</sup> Or, as the Board clarified, "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-

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<sup>22</sup> See *Register Guard*, 351 NLRB at 1119 (employer discriminatorily enforced its email rule when it disciplined an employee for sending an email to her coworkers to "clarify the facts surrounding the union's rally the day before;" the email was unlike other "solicitations" emails and as the employer tolerated other "personal" emails, it should have been allowed).

<sup>23</sup> *Id.* at 1117.

protected status."<sup>24</sup> Therefore, even under *Register Guard*, the Employer's discriminatory enforcement of its Solicitation and Electronic Mail Policies was unlawful.

**The Region should also argue that employees have a statutory right to use their employer's email system for Section 7 activity and that the Employer's overbroad rules violate Section 8(a)(1).**

This case 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>25</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>26</sup> relying upon *Republic Aviation Corp. v. NLRB*.<sup>27</sup>

Applying these principles, the following provisions in the Information Technology Systems Policy, and the Electronic Mail Policy, are unlawfully overbroad because, although lawful under *Register Guard*, employees would reasonably interpret the rules to restrict employees' right to use email for Section 7 purposes: the provision in the Electronic Mail Policy prohibiting employees from using the Employer's email system "[t]o promote illegal activity" or "in a way that may be disruptive, offensive to others, or harmful to morale;" the provision in the Information Technology Systems Policy prohibiting employees from using the Employer's information technology systems to engage in social media communications that "[u]se UPMC's logos or other copyrighted or trademarked materials" or that "[d]escribe any affiliation" with the Employer; and the provision requiring employees to use "appropriate security controls" and get the Employer's approval when they transfer "sensitive, confidential, and highly confidential information" over the Internet, and the provision prohibiting from disclosing their affiliation with the Employer.<sup>28</sup>

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<sup>24</sup> *Id.* at 1118.

<sup>25</sup> *See Register Guard*, 351 NLRB at 1114-16.

<sup>26</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>27</sup> 324 U.S. 793, 803 n.10 (1945).

<sup>28</sup> Although the "business use only" provision would ordinarily be unlawful under the General Counsel's position on *Register Guard*, the same rule also states clearly that minimal personal use is permitted as long as that use does not affect the employee's job performance or prevent other employees from performing their duties. We would not find such a provision unlawful. *See* Pre-Argument Brief of General Counsel at 14-17, *Register Guard*, 351 NLRB 1110 (2007) (36-CA-8743, 36-CA-8789, 36 CA-8842, 36-CA-8849), relying upon *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10

These provisions provide an appropriate vehicle to apply the traditional analysis set forth in *Lafayette Park* and *Lutheran Heritage* that employees have the Section 7 right to use an employer's email for Section 7 purposes because they would reasonably be construed to chill employees in the exercise of those rights.<sup>29</sup> To begin, the prohibition against using the Employer's email system "in a way that may be disruptive, offensive to others, or harmful to morale," is unlawful because the provision proscribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees.<sup>30</sup> Further, the portion of the Information Technology Resources Policy that prohibits employees from sending emails without obtaining the Employer's written approval, and that requires employees to use "appropriate security controls" when they transfer "sensitive, confidential, and highly confidential information" over the Internet, is unlawfully overbroad because employees would reasonably interpret a prohibition on

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(1945). *See also Alpine Access, Inc.*, Case 07-CA-068538, Advice memorandum dated June 5, 2012, pp. 14-15 (acknowledging that although the employer's policy was unlawfully overbroad, an employer has a business interest in limiting employee-to-employee email communications to prevent liability triggered by inappropriate e-mail content, to protect space on its server, to protect against computer viruses that can be transferred through e-mail attachments, and to ensure that employees are not spending excessive time engaged in personal e-mail to the detriment of productivity).

<sup>29</sup> Although we have not previously argued that provisions such as these are unlawful where they are part of an employer's policy regarding use of its own electronic systems, the rules in this case are being maintained in the context of numerous unfair labor practices designed to oppose and suppress the union organizing campaign. In these circumstances, employees would reasonably interpret these rules so as to chill Section 7 activity and it is important that employees receive the message that these activities cannot lawfully be restricted. *See generally Tradesmen International*, 338 NLRB 460, 461 n.2 (2002) (distinguishing *GHR Energy Corp.*, 294 NLRB 1011 (1989), *enforced* 924 F.2d 1055 (5th Cir. 1991), and explaining that where the environment in which the rule was maintained also includes other unfair labor practices, the Board may find a rule unlawful in that context although it may not if the rule were maintained in an environment otherwise free of unfair labor practices).

<sup>30</sup> *See, e.g., Claremont Resort and Spa*, 344 832, 832 (2005) (rule prohibiting "negative conversations" about management unlawful); *University Medical Center*, 335 NLRB 1318, 1318-22 (2001) (rule against "disrespectful conduct" toward others unlawful), *enforcement denied in rel. part*, 335 F.3d 1079 (D.C. Cir. 2003); *Adranz ABB Daimler-Benz*, 331 NLRB 291, 291 n.3 (2000) (rule against using "abusive or threatening language to anyone on Company premises" unlawful), *enforcement denied in pertinent part* 253 F.3d 19 (D.C. Cir. 2001); *American Medical Response of Connecticut, Inc.*, Case 34-CA-12576, Advice Memorandum dated October 5, 2010 (rule prohibiting "[u]se of language or action that is inappropriate . . . or of a general offensive nature" unlawful).

“sensitive” information to cover Section 7 activity, such as employee criticism of management or working conditions.<sup>31</sup> In addition, employees would reasonably construe the terms “sensitive” and “confidential” to include employee wages, benefits, performance evaluations, and discipline, absent limiting or clarifying language.<sup>32</sup>

Next, the provision prohibiting employees from using the Employer’s logos or other copyrighted or trademarked materials when engaging in social media communications on their Employer’s information technology resources is also unlawfully overbroad because in the absence of any further explanation, employees would reasonably interpret these provisions as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing UPMC’s logo.<sup>33</sup> Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, employees’ use of its logo or trademarks while engaging in Section 7 activities would not infringe on that interest. Courts have identified three interests that are protected by the trademark laws: (1) the trademark holder’s interest in protecting the good reputation associated with his mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark; (2) the trademark holder’s interest in being able to enter a related commercial field at some future time and use its well-established trademark; and (3) the public’s interest in not being misled as to the source of

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<sup>31</sup> See *Claremont Resort & Spa*, 344 NLRB 832 (rule prohibiting “negative conversations” about employees or managers found unlawfully overbroad). See also *Southern Maryland Hosp. Ctr.*, 293 NLRB 1209, 1222 (1989) (unlawful rule against “derogatory attacks”), *enforced in rel. part*, 916 F.2d 932 (4th Cir. 1990); *Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2, 975 (1988) (rule against “improper or unseemingly” conduct unlawful).

<sup>32</sup> See, e.g., *University Medical Center*, 335 NLRB at 1320, 1322 (employees could reasonably construe rule prohibiting disclosure of “confidential information’ about employees” to preclude discussion of terms and conditions of employment, including wages); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-92 (1999) (rule prohibiting employees from revealing confidential information concerning hotel’s customers, fellow employees or hotel business was unlawful).

<sup>33</sup> Cf. *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation is protected), *enforced*, 976 F.2d 743 (11th Cir. 1992); *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20 (1991) (finding unlawful prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time away from the plant), *enforced sub nom.*, *Pepsi-Cola Bottling Co. v. NLRB*, 953 F.2d 638 (4th Cir. 1992).

products offered for sale using confusingly similar marks.<sup>34</sup> These interests are not remotely implicated by employees' non-commercial use of UPMC's name, logo, or other trademarks in the course of engaging in Section 7 activities related to their working conditions.<sup>35</sup> Thus, the Employer has no legitimate basis to prohibit the use of its name or service marks in this manner, and the rule is unlawfully overbroad.

Finally, the provision of the Information Technology Resources Policy prohibiting employees from using the Employer's information technology resources to engage in social media communications that "[d]escribe any affiliation" with the Employer is unlawful because it limits employees' ability to enlist third-party support regarding employment concerns and to find and communicate with one another regarding their terms and conditions of employment.<sup>36</sup>

**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 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 pro-union employees' Section 7 communications under that standard. Specifically, the Region should argue that 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>37</sup> An employer's discriminatory treatment of Section 7-related communications is relevant not because

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<sup>34</sup> See *Scarves by Vera*, 544 F.2d 1167, 1172 (2d Cir. 1976).

<sup>35</sup> Even if trademark principles were applicable to this kind of use, there is no unlawful infringement where use of a trademark would not confuse the public regarding the source, identity, or sponsorship of the product. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d at 565, 569 (use of trademark in an advertisement comparing the alleged infringer's product to the trademark holder's product not unlawful because it did not create a reasonable likelihood that purchasers would be confused as to the source, identity, or sponsorship of the advertiser's product).

<sup>36</sup> See, e.g., *Rite Aid Corporation*, Cases 8-CA-62080 and 31-CA-30255, Advice Memorandum dated September 22, 2011, at p. 4 (rule was unlawfully overbroad because employees would reasonably interpret it to prohibit their use of the employer's name in social media communications, and use of an employer's name is essential for employees to communicate with their colleagues about the workplace or search online for additional employees of the employer at its other locations).

<sup>37</sup> *Id.* at 1129 (Liebman and Walsh dissenting).

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>38</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>39</sup> And under this pre-*Register Guard* standard, we conclude that the Employer violated Section 8(a)(1) when it permitted anti-union employees to send the nonwork-related anti-union emails while prohibiting pro-union employees from sending pro-union emails.

**Electronic notice remedies are appropriate in this case.**

The Region should seek an electronic notice posting remedy requiring the Employer to not only post an electronic copy of the Board's traditional notice posting on the Employer's intranet site, but also email employees a copy of the Board's traditional notice. The intranet notice and email notice are appropriate here because the Employer regularly communicates with employees through electronic mediums.<sup>40</sup> An electronic notice posting is also appropriate here because the Employer committed various unfair labor practices through electronic means.<sup>41</sup> The Region should not, however, seek a remedy that would require the Employer to post the notice as a screensaver on the stationary computer monitors in patients' rooms, notwithstanding that the Employer posted anti-union screensavers in patient-care areas. A

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<sup>38</sup> *Id.*

<sup>39</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 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>40</sup> *J. Picini Flooring*, 356 NLRB No. 9 (2010) (electronic notice posting appropriate where employer regularly utilized electronic bulletin board to communicate with employees).

<sup>41</sup> See *Public Service Co. of Oklahoma*, 334 NLRB 487, 490-91 (2001) (requiring employer to post a standard notice in electronic fashion on the same basis and to the same group or class of employees as was sent to an unlawful solicitation of employee union sympathies), *enforced*, 318 F.3d 1174 (10th Cir. 2003); OM Memorandum 06-82, "Electronic Notice Posting," dated August 15, 2006, at p. 2, n.2.

screensaver notice is not needed in light of the other electronic remedies, and it would be an ineffective method of communicating the Board's notice, given the space and viewing-time limitations that a screensaver provides.

/s/  
B.J.K.

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