The Guard Publishing Co. d/b/a The Register-Guard *and* Eugene Newspaper Guild, CWA Local 37194. Cases 36–CA–8743–1, 36–CA–8789–1, 36–CA–8842–1, and 36–CA–8849–1

July 26, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit. The sole question is whether the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by disciplining union president and employee Suzi Prozanski for sending two union-related emails to unit employees using the Respondent's email system in August 2000. We now answer that question affirmatively.

On December 16, 2007, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] The Board found that the Respondent did not violate Section 8(a)(1) of the Act by maintaining a policy prohibiting employees, in relevant part, from using the Respondent's email system for any "non-job-related solicitations." The Board found, however, that the Respondent violated Section 8(a)(3) and (1) by discriminatorily enforcing its policy to discipline Prozanski for sending one union-related email in May 2000. By contrast, the Board found that the Respondent's discipline of Prozanski for two union-related emails sent in August 2000 did not violate Section 8(a)(3) and (1).[2] Subsequently, the Respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order, the Union intervened and petitioned for review, and the Board cross-applied for enforcement of its Order.[3]

On July 7, 2009, the court denied the Respondent's petition and granted the Board's cross-application for enforcement. The court also granted the Union's petition for review of the Board's finding that the Respondent did not unlawfully discipline Prozanski for sending the two August emails, concluding that the Board's finding was not supported by substantial evidence. Accordingly, the court set aside the Board's finding and remanded that matter to the Board "for further proceedings consistent with [the court's] opinion."[4]

On December 15, 2009, the Board notified the parties that it had decided to accept the court's remand, and invited all parties to submit statements of position concerning the issue raised by the remand. The General Counsel, the Respondent, and the Union each filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[5]

Having accepted the remand, we accept the court's opinion as the law of the case. Based on that remand, the court's opinion, and the parties' statements of position, we find that the Respondent violated Section 8(a)(3) and (1) by disciplining Prozanski for sending the August emails, and we will issue an appropriate supplemental Order.

Background

The Respondent publishes the Register-Guard, a daily newspaper in the Eugene, Oregon area. Approximately 150 of its employees are represented by the Eugene Newspaper Guild, CWA Local 37194 (the Guild or the Union). Since 1996, the Respondent has maintained a "Communications Systems Policy" (CSP) to govern use of email, among other forms of communication. The relevant CSP provision states that

> Company communication systems and the equipment used to operate the communication systems are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

The Respondent knew that in addition to using work email for work-related matters, its employees also used it to send and receive personal messages. The Respondent did not reprimand employees for sending those messages, which included party invitations, baby announcements, offers of

[1] *Register Guard*, 351 NLRB 1110 (2007) (*RG I*).

[2] Additionally, the Board found that the Respondent violated Sec. 8(a)(1) by maintaining an overly broad rule barring employees from wearing or displaying union insignia, and that it did not violate Sec. 8(a)(5) by proposing, during contract negotiations, a provision that would have prohibited use of email for "union business" because there was insufficient evidence that it had insisted on the proposal.

[3] The Respondent petitioned for review of the Board's findings that its union insignia rule and discriminatory enforcement of its email policy violated Sec. 8(a)(1), and that its discipline of Prozanski for sending the May email violated Sec. 8(a)(3). The Union petitioned for review solely of the Board's finding that Prozanski was lawfully disciplined for sending the August emails. The Union did not challenge the Board's finding that the Respondent's email policy itself was lawful.

[4] *Guard Publishing Co. v. NLRB*, 571 F.3d 53, 62 (D.C. Cir. 2009).

[5] Member Becker is recused and did not participate in the consideration of this case.

sports tickets, and requests for services such as dog-walking. *Register Guard*, 351 NLRB 1110, 1111 (2007) (*RG I*).

On May 4, 2000,[6] union president and unit employee Suzi Prozanski sent an email, entitled "setting it straight," to approximately 50 unit employees at their work email addresses. Her message corrected a misstatement circulated by another employee regarding a Union rally that had taken place a few days earlier. The Respondent issued Prozanski a written warning for violating the CSP by using the Company's email system "for the purpose of conducting Guild business." Id. at 1111 fn. 5.

In August, the Respondent disciplined Prozanski for sending two more emails to coworkers at their work email addresses. Her August 14 message, entitled "Go Green," asked employees to wear green to support the Union's contract negotiations. Her August 18 message, entitled "Let's parade," asked employees to help with the Union's participation in an upcoming town parade. *Guard Publishing Co. v. NLRB*, 571 F.3d 53, 56 (D.C. Cir. 2009). Prozanski sent these messages from a computer in the Union's offsite office, thinking that the warning letter in May was for using the Respondent's equipment to send the message, and that there would be no problem if she used the Union's computer. *RG I*, supra, 351 NLRB at 1112. The Respondent, however, issued Prozanski a disciplinary warning dated August 22, stating that she had violated the CSP by using the Respondent's communications system for Guild activities, and quoting the CSP's prohibition on "non-job-related solicitations." Id.

The Board's Decision in *RG I*

The Board found that the Respondent did not violate Section 8(a)(1) by maintaining the CSP. Id. at 1116. Next, before analyzing the Respondent's application of the CSP to Prozanski's emails, the Board modified existing precedent concerning discriminatory enforcement of employer rules and policies. The Board adopted the Seventh Circuit's view that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." Id. at 1119 (citing *Fleming Cos. v. NLRB*, 349 F.3d 968 (7th Cir. 2003); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995)). Under the modified standard, "discrimination must be along Section 7 lines" to be unlawful, meaning, for example, an employer would violate Section 8(a)(1) by permitting employees to send antiunion emails while prohibiting prounion emails. Id. at 1118. But it would not be unlawful discrimination for an employer to permit, for example, emailed solicitations for charitable organizations but not emailed solicitations for other kinds of organizations: "the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines." Id.[7]

Applying that modified definition, the Board found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily enforcing its policy with regard to Prozanski's May email because the CSP prohibited only "'nonjob-related solicitations,' not all non-job-related communications." Id. at 1119–1120. Because the May email was not a solicitation, it was not prohibited by the CSP, and differed from permitted emails only by its reference to the Union. Thus, the Respondent "discriminated along Section 7 lines" by disciplining Prozanski for that email. Id.

By contrast, the Board found no discriminatory enforcement with regard to Prozanski's August emails. Although the Respondent had permitted email solicitations of a personal nature, the August emails solicited support for an organization, the Union, and there was no evidence that the Respondent had permitted employees to use email to solicit support for any group or organization.[8] The Board concluded, therefore, that there was no unequal treatment along Section 7 lines of communications of a similar character, and that the Respondent's August discipline of Prozanski did not violate Section 8(a)(3) and (1). Id.

The D.C. Circuit's Opinion

As to Prozanski's May email, the court agreed with the Board that the Respondent could not have neutrally applied its CSP because the CSP did not cover that email. The May email was not a solicitation, but simply a clarification of the facts surrounding the Union's rally earlier that week. *Guard Publishing*, supra, 571 F.3d at 58–59. Noting that the May 5 disciplinary notice "admonished

[6] All dates are in 2000, unless stated otherwise.

[7] By contrast, under pre-*Register Guard* precedent, discriminatory enforcement of rules governing use of an employer's equipment or other resources consists of allowing employees to use that equipment or those resources for nonwork-related purposes while prohibiting Sec. 7-related purposes. See, e.g., *Vons Grocery Co.*, 320 NLRB 53, 55 (1995); *E.I. duPont de Nemours & Co.*, 311 NLRB 893, 919 (1993). No party asks us to revisit this issue here.

Chairman Liebman relevantly dissented in *Register Guard*. She adheres to her dissent. She agrees with the court, however, that even applying the discrimination standard as modified in *Register Guard*, the Respondent's enforcement of the CSP was unlawful with respect to all three of Prozanski's emails. See *RG I*, supra, 351 NLRB at 1131.

[8] One exception was the Respondent's annual United Way campaign, which fell within the "isolated beneficent acts" exception under *Hammary Mfg. Corp.,* 265 NLRB 57 (1982).

[Prozanski] for 'us[ing] the company's e-mail system expressly for the purpose of conducting Guild business,'" the court found that the Board had reasonably concluded that the Respondent had discriminated against Prozanski along Section 7 lines and therefore violated Section 8(a)(3) and (1). Id. at 59.

The court disagreed, however, with the Board's finding that the Respondent had lawfully enforced its CSP with regard to the two August emails. The court found that the Respondent had inconsistently enforced the CSP by disciplining Prozanski for her August email solicitations on behalf of the Union, while permitting other employees to email non-union-related solicitations of a personal nature. The court also noted that the Respondent's August 22 warning to Prozanski explained that it was disciplining her for using the email system "for dissemination of union information," and told her to "refrain from using the Company's systems for union/personal business." Id. at 60.

The court rejected the Board's rationale that there was no discrimination because the August emails were solicitations on behalf of an organization rather than an individual, and that there was "'no evidence that the [Register-Guard] permitted employees to use e-mail to solicit other employees *to support any group or organization*.'" Id. (quoting *RG I*, supra, 351 NLRB at 1119 (the court's emphasis)). The court observed that neither the company's written policy nor its explanation in its August warning to Prozanski drew a distinction between individual and organizational solicitations, finding that the Respondent's rationale was "a post hoc invention" raised only after the General Counsel filed the complaint. Id. The court thus concluded that "substantial evidence does not support the Board's determination that Prozanski was disciplined for a reason other than that she sent a union-related e-mail." Id.

Accordingly, the court set aside the Board's determination regarding the August emails and remanded that matter to the Board for further proceedings consistent with the court's opinion.

Discussion

The court's opinion, which we have accepted as the law of the case, held that there is not substantial evidence to support a finding that the Respondent lawfully enforced its CSP to discipline Prozanski for her August emails.[9] We accordingly conclude that the Respondent discriminatorily enforced its CSP and violated Section 8(a)(3) and (1) of the Act by disciplining Prozanski for those emails.

REMEDY

Having found that the Respondent unlawfully disciplined union president Suzi Prozanski for using its electronic communications systems to send union-related emails on August 14 and 18, 2000, we shall require the Respondent to rescind the disciplinary actions taken against Prozanski for sending those emails and to post an appropriate notice.

ORDER[10]

The National Labor Relations Board orders that the Respondent, The Guard Publishing Company d/b/a The Register-Guard, Eugene, Oregon, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful warning issued to Suzi Prozanski on August 22, 2000, remove from its files any reference to the unlawful warning, and within 3 days thereafter notify Prozanski in writing that this has been done and that the warning will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its facility in Eugene, Oregon, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[12]

[9] We reject the Respondent's contention, in its statement of position, that the issue before the Board is whether the court erred in setting aside the Board's finding that Prozanski was lawfully disciplined for her August emails. The correctness of the court's decision is not before us.

[10] Inasmuch as the court has already enforced the provisions of our original Order reported at *RG I*, 351 NLRB at 1121—including, inter alia, a provision requiring the Respondent to cease and desist from discriminatorily prohibiting employees from using its electronic communications systems to send union-related messages—we shall not repeat them here. See, e.g., *Fluor Daniel, Inc.*, 350 NLRB 702, 702 fn. 5 (2007); *Bryan Adair Construction Co.*, 341 NLRB 247, 247 fn. 4 (2004).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[12] In *J. Picini Flooring*, 356 NLRB No. 9 (2010), the Board recently decided that its remedial notices are to be distributed electronically in appropriate circumstances. For the reasons stated in his dissenting

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 26, 2011

Wilma B. Liebman, Chairman

Mark Gaston Pearce, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of notices.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL, within 14 days from the date of the Board's Order, rescind the unlawful warning issued to Suzi Prozanski on August 22, 2000, and remove from our files any reference to the unlawful warning, and WE WILL, within 3 days thereafter, notify Prozanski in writing that this has been done and that the warning will not be used against her in any way.

THE GUARD PUBLISHING COMPANY D/B/A THE REGISTER-GUARD