

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UPMC and its subsidiaries UPMC
PRESBYTERIAN SHADYSIDE and
MAGEE-WOMENS HOSPITAL of UPMC,
Single Employer, d/b/a/ SHADYSIDE HOSPITAL
and/or PRESBYTERIAN HOSPITAL
and/or MONTEFIORE HOSPITAL and/or
MAGEE-WOMENS HOSPITAL,

and

Case 06-CA-081896

SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC.

DECISION and ORDER

DAVID I. GOLDMAN
ADMINISTRATIVE LAW JUDGE

Counsel:

Janice A. Sauchin, Esq. and Emily M. Sala, Esq. (NLRB Region 6)
of Pittsburgh, Pennsylvania, for the Acting General Counsel

Mark Stuble, Esq. and H. Ellis Fisher, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.),
of Greenville, South Carolina, and

Michael D. Glass, Esq. and Jennifer G. Betts, Esq. (Ogletree, Deakins,
Nash, Smoak & Stewart, P.C.),
of Pittsburgh, Pennsylvania, and

Edward E. McGinley, Jr., Esq. (UPMC Employee Relations),
of Pittsburgh, Pennsylvania, for the Respondents

Claudia Davidson, Esq. (Law office of Claudia Davidson),
of Pittsburgh Pennsylvania, and

Kathy L. Krieger, Esq. (James & Hoffman, P.C.), and LaReil D. Purdie, Esq. (SEIU), and
Betty Grdina, Esq. (Mooney, Green, Saindon, Murphy & Welch),
of Washington, D.C., for the Charging Party

DECISION

5 DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves the government's
 challenge to three policies maintained by an employer for the purpose of regulating employee
 use of the employer's electronic technology (e.g., email, computers, servers, etc.). The
 government alleges that the three policies violate the National Labor Relations Act (Act). More
 specifically, the government alleges that the policies are overly broad and tend to chill activity
 10 protected by Section 7 of the Act. As discussed herein, I find that two of the three challenged
 policies violate Section 8(a)(1) of the Act. I dismiss the allegations regarding the third policy.

STATEMENT OF THE CASE

15 On May 25, 2012, SEIU Healthcare Pennsylvania, CTW, CLC (Union) filed an unfair
 labor practice charge against UPMC and its subsidiary hospitals, docketed by Region 6 of the
 National Labor Relations Board (Board) as Case 06-CA-081896. The Union filed an amended
 charge on June 21, 2012, a second amended charge on July 5, 2012, and a third amended
 charge on November 19, 2012. On December 13, 2012, based on an investigation of the
 charge in this case, and others filed by the Union,¹ the Acting General Counsel (General
 20 Counsel) of the Board, by the Regional Director for Region 6 of the Board, issued a complaint
 alleging violations of the Act by Respondent UPMC, Respondent UPMC Presbyterian
 Shadyside (Presbyterian Shadyside), and Respondent Magee-Womens Hospital of UPMC
 (Magee), and an order consolidating this case with other cases. An amended consolidated
 complaint issued December 13, 2012. UPMC filed a motion for summary judgment January 4,
 25 2013, that was denied by order of the Board on January 28, 2013.

 An order severing the other cases from the instant case issued February 8, 2013, and a
 second amended complaint issued February 11, 2013.

30 A hearing in the case was conducted February 20, 2013, in Pittsburgh, Pennsylvania. At
 the hearing, counsel for the General Counsel moved, without objection, to amend the complaint.
 That motion was granted. UPMC filed a motion for judgment on the pleadings on February 22,
 2013, which is addressed herein. Counsel for the General Counsel, the Union, and the
 Respondents, filed briefs in support of their positions by March 27, 2013. On the entire record,
 35 I make the following findings, conclusions of law, and recommended Order.

JURISDICTION

40 It is alleged in the complaint, admitted by Respondents, and I find, that Respondent
 Presbyterian Shadyside and Respondent Magee are Pennsylvania non-profit corporations with
 offices and places of business in Pittsburgh, Pennsylvania, and have been engaged in the
 operation of acute care hospitals providing inpatient and outpatient medical care. It is further
 alleged, admitted, and I find that each of these Respondents, during the 12-month period ending
 April 30, 2012, in conducting operations derived gross revenues in excess of \$250,000 and
 45 purchased and received at their respective facilities in Pittsburgh, Pennsylvania, goods valued
 in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. It is
 further alleged, admitted, and I find, that Respondent Shadyside Presbyterian and Respondent
 Magee are engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and

¹Cases 06-CA-086542, 06-CA-090063, 06-CA-090133, and 06-CA-090144.

health care institutions within the meaning of Section 2(14) of the Act. I further find that Respondent Presbyterian Shadyside and Respondent Magee are employers within the meaning of Section 2(2) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

5

UNFAIR LABOR PRACTICES

BACKGROUND

10 This case, and the other cases noted above, were originally scheduled for a February 5, 2012 hearing. These cases involved scores of allegations of violations of the Act by Respondents. As February 5, drew near, the parties were actively engaged in settlement negotiations and as a consequence the hearing was postponed. Those negotiations bore fruit, and on February 7, 2013, the Regional Director approved a settlement agreement between
15 Respondents (at that time including UPMC) and the Union. The settlement resolved most of the outstanding allegations. Respondents posted Board-approved notices at nearly 100 locations and agreed to reinstate and pay back pay to employees against whom they had allegedly discriminated. By entering into the settlement agreement, Respondents did not admit to any violations of the Act.²

20

Left unresolved by the settlement was the government's challenge to certain of Respondents' policies concerning employee usage of Respondents' email and electronic media. The lawfulness of the promulgation and maintenance of these policies is the remaining subject of this case to be resolved.

25

FACTUAL FINDINGS

UPMC is a holding company that owns subsidiaries that operate twenty hospitals in Pennsylvania, with the majority of them located in the Pittsburgh area. UPMC, through its
30 subsidiaries, has over 55,000 employees.

The facilities in the Pittsburgh area that UPMC owns are: Childrens' Hospital, UPMC East, Eye & Ear Institute, Montefiore Hospital, Passavant Hospital, St. Margaret's Hospital, McKeesport Hospital, Mercy Hospital, Western Psychiatric Institute and Clinic, Magee-Womens
35 Hospital, Presbyterian Hospital, and Shadyside Hospital. UPMC, through its various subsidiaries, also operates over 400 clinical locations in Western Pennsylvania, including CancerCenters, Imaging Centers, Outpatient Facilities, Urgent Care Facilities, and Senior Communities.

40

Respondent Presbyterian Shadyside is a subsidiary of UPMC, and employs more than 9,500 employees. Presbyterian Shadyside includes the following facilities: Eye & Ear Institute, Montefiore Hospital, Presbyterian Hospital, Shadyside Hospital, and Western Psychiatric Institute and Clinic. All of these facilities, except Shadyside Hospital, are located in the Oakland area of Pittsburgh, and are interconnected by pedestrian bridges, walkways and parking
45 garages. Shadyside Hospital is located approximately one mile away from the Oakland hospitals.

²Copies of the settlement agreement and notice postings were entered into evidence and may be found at Joint Exhibits 3 and 4.

Respondent Magee is a subsidiary of UPMC, and employs more than 2,500 employees. Magee-Womens Hospital is located in the Oakland area of Pittsburgh, several blocks away from Montefiore Hospital.

5 UPMC has delegated most of its policy-making functions to certain officials of Respondent Presbyterian Shadyside.

10 Respondent Presbyterian Shadyside, through certain of its officials such as Senior Vice-President Gregory Peaslee and Vice-President, Privacy and Information Security & Assistant Counsel John Houston, promulgates and maintains personnel and human resources policies which are applicable to all employees of UPMC's subsidiaries, including the facilities referenced above. These policies include the solicitation, electronic mail and messaging, and acceptable use of information technology resources policies at issue in the instant proceeding.

15 Respondents maintain a "UPMC Infonet" website which is not accessible to the general public and is exclusively for Respondents' communications with employees.

20 All of Respondents' personnel and human resources policies are maintained on the UPMC Infonet, which is password-protected. All employees are given passwords with which to access the Infonet. There are computers in certain departments or work areas of Respondents' facilities which can be accessed by multiple employees. Not all of Respondents' employees have email addresses within UPMC's electronic mail system.

The Three Challenged Policies

25 This case involves the General Counsel's and the Union's challenge to three policies maintained by Respondents: a solicitation policy, an electronic mail and messaging policy, and an acceptable use of information technology resources policy. The pertinent text of each policy is set forth below.

30

1. Solicitation policy

35 Respondent Presbyterian Shadyside and Respondent Magee maintained a solicitation policy, dated December 15, 2011, until October 9, 2012. It was revised October 10, 2012, in certain respects not relevant to this case, and maintained and published since that time on Respondents' UPMC Infonet. The policies, read, in pertinent part, as follows:

40 **IV. Procedure**

* * * *

45 C. 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).

* * * *

50

F.^{3]} All situations of unauthorized solicitation or distribution must be immediately reported to a supervisor or department director and the Human Resources Department and may subject the staff member to corrective action up to and including discharge.

5

2. Electronic mail and messaging policy

10 Since about February 1 to about October 25, 2012, and from October 26 to December 6, 2012, and from December 7, 2012 to present, Respondent Presbyterian and Respondent Magee have maintained versions of an electronic mail and messaging policy which read, in pertinent part, as follows:

15 **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.

* * * *

25 **V. GUIDELINES**

* * * *

30 2. 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.

40

3. Acceptable use of information technology resources policy

45 Respondents promulgated an “Acceptable Use of Information Technology Resources” policy dated October 10, 2011. It was modified July 27, 2012 and again on December 7, 2012. It has remained in effect since then. All versions of the policy include, in pertinent part:

³This paragraph “F” became paragraph “G” in the October 10 revision.

I. POLICY

5 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

10 To establish guidelines for:

- 1. The acceptable use of UPMC information technology resources.
- 15 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

20 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.

30 “De minimis 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.

* * *

35 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, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- 40 • Describe any affiliation with UPMC;

* * * *

- 45 • Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

* * * *

50

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

* * * *

5

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.

10

Summary of Challenged Policies

To summarize, with an eye toward the General Counsel's and the Union's challenge to these policies:

15

1. The solicitation policy prohibits employees from using the UPMC email system "to engage in solicitation." It also mandates that all "unauthorized solicitation" be reported to a supervisor or manager and warns that violations may lead to "corrective action up to and including discharge."

20

2. The electronic mail and messaging policy prohibits employees from using the email system "in a way that may be disruptive, offensive to others, or harmful to morale;" or "[t]o solicit employees to support any group or organization, unless sanctioned by UPMC executive management." In addition, this policy prohibits use of the email system "in a manner inconsistent with UPMC policies and directives, including, but not limited to . . . job performance."

25

3. Finally, the acceptable use of information technology resources policy restricts use of UPMC "computers, servers, Internet e-mail, etc." to support "the business, clinical, research, and educational activities of UPMC workforce members." It restricts use of these resources to "authorized activities" which are defined as "related to assigned job responsibilities and approved by the appropriate UPMC management." However, the policy provides that where a "UPMC technology resource is assigned to an employee, the employee is permitted de minimis personal use of the [resource]," defined as use of the resource "only to the extent that such use does not affect the employee's job performance [] or prevent[] other employees from performing their job duties."

30

35

40

The acceptable use of information technology resources policy also prohibits employees, "[w]ithout UPMC's prior written consent," from "independently establish[ing] (or otherwise participat[ing] in) websites social networks (such as face book, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that" describe any affiliation with UPMC, disparage or misrepresent UPMC, make false or misleading statements regarding UPMC, or using UPMC logos or other copyrighted or trademarked materials. This policy also requires "written approval of UPMC's Chief Information Office or Privacy Officer" and the use of "appropriate security controls" for any "[s]ensitive, confidential, and highly confidential information transferred over the Internet."

45

Analysis

5 The General Counsel and the Union contend that the promulgation and maintenance of
 the solicitation, electronic mail, and information technology policies constitute overly broad
 limitations on the right of employees to communicate regarding activities protected by the Act.
 As such, it is their contention that these policies on their face—without regard to intent or actual
 application—violate Section 8(a)(1) of the Act. In deference to the six-month statute of
 10 limitations set forth in Section 10(b) of the Act, the complaint alleges that the violations began
 and have been occurring at all times since February 1, 2012 (even though the enactment of
 each policy precedes that date).

The cornerstone of the Act is Section 7, which provides that

15 Employees shall have the right to self-organization, to form, join, or assist labor
 organizations, to bargain collectively through representatives of their own
 choosing, and to engage in other concerted activities for the purpose of collective
 bargaining or other mutual aid or protection, and shall also have the right to
 refrain from any or all of such activities

20 The United States Supreme Court has long recognized that “the right of employees to
 self-organize and bargain collectively established by § 7 of the [Act] necessarily encompasses
 the right effectively to communicate with one another regarding self-organization at the jobsite.”
Beth Israel Hospital v. NLRB, 437 U.S. 483, 491 (1978). As the Supreme Court has recognized,
 the workplace “is a particularly appropriate place for the distribution of § 7 material, because it
 25 ‘is the one place where [employees] clearly share common interests and where they traditionally
 seek to persuade fellow workers in matters affecting their union organizational life and other
 matters related to their status as employees.’” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978),
 quoting *Gale Products*, 142 NLRB 1246 (1963). Accord: *Central Hardware Co. v. NLRB*, 407
 U.S. 539, 542–543 (1972) (“[Section 7] organization rights are not viable in a vacuum; their
 effectiveness depends in some measure on the ability of employees to learn the advantages
 30 and disadvantages of organization from others. Early in the history of the administration of the
 Act the Board recognized the importance of freedom of communication to the free exercise of
 organization rights.” (Citations omitted.) In short, “the ability of employees to communicate with
 their fellow employees in the workplace” is “central to Sec. 7.” *J.W. Marriott Los Angeles*, 359
 NLRB No. 8, slip op. at 3 fn. 4 (2012).

35 Of course, employees’ Section 7 right to communicate in the workplace is not boundless.
 “[The Board must adjust] the undisputed right of self-organization assured to employees under
 the Wagner Act and the equally undisputed right of employer to maintain discipline in their
 establishments. Like so many others, these rights are not unlimited in the sense that they can
 40 be exercised without regard to any duty which the existence of rights in others may place upon
 employer or employee.” *Beth Israel Hospital v. NLRB*, 437 U.S. at 492, quoting, *Republic
 Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945) (Court’s bracketing).

45 In considering the propriety of employer rules limiting or governing employee
 communication in the workplace, the Board balances the Section 7 rights of employees and the
 rights and interests of employers. *Republic Aviation*, supra at 797–798. As the Supreme Court
 explained in *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), “the locus of the accommodation
 [between the legitimate interests of both] may fall at differing points along the spectrum

depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.” (internal quotes and bracketing omitted.)

As part of balancing these interests, the Board has developed presumptions and rules on when employer property rights must give way to employees’ Section 7 rights, and vice-versa. Thus, bans on employee Section 7 solicitation at an employer’s facility that apply to nonworking areas during nonworking time are presumptively unlawful. In the other direction, the Board has held that, at least where there is alternative means of communication, an employer’s property interest in its equipment can displace employee Section 7 rights and an employer can ban the use of its equipment—in this case, most pertinently email and electronic resources—for Section 7 purposes, as long as the ban is nondiscriminatory.

The Board’s test for evaluating allegedly overbroad and/or ambiguous rules—the particular issues at bar here—emerged from this balancing of employee and employer rights. The Board recognizes that rules that are overly broad or ambiguous may reasonably be read to ban some employee activity that employers are permitted to ban under the Board’s balancing tests, but also may be read to ban employee activity that is protected under Board tests. If the rule is overly broad and unclear the rule may have a tendency to chill employees in the exercise of protected Section 7 activity while permitting a range of other activity, and this may be so regardless of whether the employer so intends or lawfully can apply the rule in that fashion. Rules that are ambiguous and overly broad so that they reasonably chill protected activity are violative of the Act.

Thus, “[i]n determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011). “Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (footnote omitted), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). “In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage*, *supra* at 646. If it does not, “the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647.

In the instant case, there is neither evidence nor allegation that the challenged rules were promulgated in response to union activity. There is no claim that the rules have been discriminatorily applied. Rather, in this case the claim is that the challenged rules are overbroad or ambiguous and will reasonably tend to chill employees in the exercise of their rights under Section 7. As the Board has recently explained, when a rule is unduly ambiguous, “[e]ven if the Respondent . . . [does] not intend the rule to extend to protected communications, that intent was not sufficiently communicated to the employees. It is settled that ambiguity in a rule must be construed against the respondent-employer as the promulgator of the rule.” *DirectTV*, 359 NLRB No. 54, slip op. 2 (2013), citing *Lafayette Park Hotel*, *supra* at 828 (even if rule not intended to reach protected conduct, its lawful intent must be “clearly communicated to the employees”). “As the mere maintenance of the rule itself serves to inhibit the employees’ engaging in otherwise protected organizational activity, the finding of a violation is not precluded by the absence of specific evidence that the rule was invoked as any particular date against any

particular employee.” *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971).

1. Solicitation policy

5

Turning to the policies at issue, Respondents’ solicitation policy prohibits the use of email for all nonwork solicitation. There are no other limitations or qualifications.

10

In determining whether a rule is overly broad or ambiguous, such that it will have a reasonable tendency to chill protected conduct, reference, of course, must be made to the backdrop balancing test that the Board has developed for the type of conduct the rule regulates. And under current Board precedent, this poses a problem for the General Counsel’s argument that the solicitation policy is unlawfully overbroad.

15

When a workplace rule involves the employees’ right to use a particular item of employer equipment to engage in Section 7 communications, and with regard to use of email and electronic messaging systems in particular, the *Republic Aviation* balancing that governs face-to-face communication has been redrawn—indeed, discarded—in favor of employer property rights and at the expense of employee rights under the Act.

20

In *Register-Guard*, 351 NLRB 1110 (2007), enfd. in part, denied in part 571 F.3d 53 (D.C. Cir. 2009), the Board considered a rule that barred use of the employer’s email system for nonwork-related solicitation. Rejecting the balancing of *Republic Aviation*, the Board majority in *Register-Guard* held that “the Respondent’s employees have no statutory right to use the Respondent’s email system for Section 7 purposes” and that the employer “may lawfully bar employees’ nonwork-related use of its email system, unless the Respondent acts in a manner that discriminates against Section 7 activity.” 351 NLRB at 1110, 1116. In reaching this result, the majority in *Register-Guard* equated the employer’s email system and the issue at stake “with a long line of cases governing employee use of employee-owned equipment,” and found that “[a]n employer has a basic property right’ to ‘regulate and restrict employee use of company property.’ *Union Carbide Corp. v. NLRB*, 714, 657, 663–664 (6th Cir. 1983).” *Register-Guard*, supra at 1114.

25

30

35

In addition, although the instant case presents a facial challenge to the employer’s rule, and not a claim of discriminatory enforcement of an otherwise valid rule, it is relevant to the discussion to note that the Board majority in *Register-Guard* adopted a new rule for determining when an employer’s discriminatory application of a facially neutral rule violates Section 8(a)(1). The Board majority redrew the line of objectionable discrimination in a way that allowed employers far more leeway to draw lines between permitted and nonpermitted communication, even if the right to Section 7 communication was adversely affected by the line drawing. Thus, the Board in *Register-Guard* found that it was not unlawful for an employer to permit widespread personal use of email by employees but draw a line disciplining employees who engaged in solicitation on behalf of other organizations, including unions.

40

45

50

It must be stressed, however, that while *Register-Guard* provided employers with significant discretion to establish rules for prohibiting employee email usage for nonwork activity, the decision did not provide employers with unlimited discretion to promulgate or enforce rules that discriminate against Section 7 activity in the use of employer-owned email and electronic messaging systems. The *Register-Guard* decision made clear that “drawing a distinction along Section 7 lines” remains unlawful. For instance, an employer cannot permit employees to use its email system to communicate antiunion messages, but prohibit its use by employees for

prounion messages. *Register-Guard*, supra at 1118. It cannot single out unions, or union organizational activity, or employee discussion of wages and working conditions for narrow prohibition, while allowing comparable discussion or solicitation on every other similar subject. It cannot engage in such viewpoint discrimination. See *Register-Guard*, supra at 1119 (violation
 5 found where “[t]he only difference between [the employee’s] email and the emails permitted by the Respondent is that [the employee’s] email was union-related”). See *Guard Publishing v. NLRB*, 571 F.3d 53, 60 (D.C. Cir. 2009) (rejecting Board’s dismissal of an allegation in *Register-Guard*, because “substantial evidence does not support the Board’s determination that [the employee] was disciplined for a reason other than that she sent a union-related e-mail”); see
 10 also *Costco Wholesale Corp.*, 358 NRB No. 106 (2012).

In this case, the Respondents’ solicitation policy bars all nonwork solicitation. Other nonwork use of the email system is not barred, but the line is drawn based on solicitation/nonsolicitation generally, not on Section 7 lines. Under *Register-Guard*, the solicitation policy is
 15 lawful. It bars no Section 7 activity that the Board has found takes precedence over an employer’s assertion of a property right to bar generally nonwork solicitation.⁴

The Union also contends (C.P. Br. at 15) that the solicitation policy’s requirement that
 20 “unauthorized solicitation or distribution must be immediately reported to a supervisor [or manager]” constitutes an unlawful interference with protected activities, citing cases such as *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998), and cases cited therein. However, those cases are distinguishable. They find unlawful employer invitations

to report instances of fellow employees’ bothering, pressuring, abusing, or
 25 harassing them with union solicitations and imply and imply that such conduct will be punished. [The Board] has reasoned that such announcements from the employer are calculated to chill even legitimate union solicitations, which do not lose their protection simply because a solicited employee rejects them and feels
 30 “bothered” or “harassed” or “abused” when fellow workers seek to persuade him or her about the benefits of unionization.

Greenfield Die & Mfg., 327 NLRB at 238.

In this case, reasonably read, the solicitation policy’s reporting requirement is tailored to
 35 a requirement that substantive violations of the solicitation policy be reported. As discussed above, this is a lawful policy under *Register-Guard*, supra. Given that, it is not unlawful to require employees to report violations.

I will dismiss the allegations of the complaint alleging that the solicitation policy is
 40 unlawful.

⁴The General Counsel and the Union argue that *Register-Guard* should be overruled. This argument must await consideration by the Board. My charge is to apply Board precedent. *Waco Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“We emphasize that it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied.”) (Citation omitted); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

2. Electronic mail and messaging policy

5 The electronic mail and messaging policy is a very different policy than the solicitation policy. It does not prohibit the nonwork use of or solicitation through the email system, opening the way for employees to use the email system for a range of nonwork activity. Its limitations on nonwork use bear scrutiny.

10 First, the distinction between the type of nonwork use permitted and prohibited is stated in broad and ambiguous terms, indicating only that the policy bars nonwork use that “may be disruptive,” or “offensive” or “harmful to morale.” Second, under this policy, solicitation is barred only if it seeks to have employees “support any group or organization,” and even that is permitted if it is “sanctioned by UPMC executive management.”

15 Thus, this policy does not bar all employee nonwork use of email, but only some nonwork use of email. Considering the first limitation, nonwork email usage is allowed unless the usage “may be disruptive,” or is “offensive,” or “harmful to morale.”

20 These terms—and there are no illustrations or guidance provided that would assist an employee in interpreting them—sweep broadly and ambiguously. It is clear that these terms would reasonably be understood to include a spectrum of communication about unions, and, indeed, criticism of Respondents’ working conditions, while permitting widespread nonwork use of the email system for an array other subjects.⁵

25 The result is that this ambiguous rule, while permitting a range of nonwork use of email, would reasonably chill employee use of the email system to discuss *any* Section 7 activity, which, of course, includes not only discussion of organizing a union but any concerted discussion of employment conditions.

30 This is a violation of the Act under longstanding Board precedent. And nothing in *Register-Guard* overturns, reorders, or renders irrelevant the Board’s longstanding approach to overly broad and ambiguous employer rules. To be sure, *Register-Guard* moved the marker guiding distinctions an employer can draw between prohibited and permitted communications.
35 But an employer’s discretion to draw lines that permit some nonwork use but prohibit Section 7-related use of the email system is not unlimited. Where an employer’s rule permits nonwork use of email, a vague and overly broad rule about the email usage presents the same problem for

⁵*Karl Knauz Motors*, 358 NLRB No. 164 (2012) (“Courtesy” rule unlawful because its broad prohibition against being “disrespectful” using “language which injures the image or reputation” of the employer, would reasonably be construed by employees as encompassing Section 7 activity such as statements to co-workers objecting to working conditions and seeking support of others in improving them); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (“We find that the rule’s prohibition of ‘negative conversations’ about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful under the principles set forth in *Lutheran Heritage Village-Livonia*”); *University Medical Center*, 335 NLRB 1318, 1320–1322 (2001) (rule against “disrespectful conduct” toward others unlawful), enft. denied in relevant part, 335 F.3d 1079 (D.C. Cir. 2003).

employees that the Board confronts in every case where the rule sweeps broadly and ambiguously through Section 7 rights.

5 That is, the employer has "failed to define the area of permissible conduct in a manner
clear to employees and thus caused employees to refrain from engaging in protected activities."
American Cast Iron Pipe Co. v. NLRB, 600 F.2d 132, 137 (8th Cir. 1979). Employees
confronting an employer's rule "should not have to decide at their own peril what information is
not lawfully subject to such a prohibition." *Hyundai America Shipping Agency*, 357 NLRB No.
10 80, slip op at 12 (2011), cited in *DirectTV*, 359 NLRB No. 54, slip op. at 3 (2013). Such
ambiguity and over breadth is unlawful precisely because it chills Section 7 activity—an
employee will reasonably avoid Section 7 activity precisely out of concern that the employer
may apply the rule in a manner that impermissibly singles out Section 7 activity. This is the very
essence of the problem that the Board precedent is designed to prevent. That is why

15 Board law is settled that ambiguous employer rules—rules that reasonably could
be read to have a coercive meaning—are construed against the employer. This
principle follows from the Act's goal of preventing employees from being chilled in
the exercise of their Section 7 rights—whether or not that is the intent of the
employer—instead of waiting until that chill is manifest, when the Board must
20 undertake the difficult task of dispelling it.

Flex Frac Logistics, LLC, 358 NLRB No. 127, slip op. at 2 (2012).

25 It is no answer for an employer to retort: "employees have no statutory right under
Register-Guard to use the email system for Section 7 purposes, so they should *presume* that a
vague rule prevents all use of the email system for Section 7 purposes, and does so in lawful
way." Under *Register-Guard*, an employer cannot draw a distinction between permitted and
prohibited email usage based *solely* on the Section 7 related content of the email. Indeed, in
Register-Guard the Board *found* a violation where the employer disciplined an employee for
30 using the email system to send an email where "[t]he only difference between [the employee's]
email and the emails permitted by the Respondent is that [the employee's] email was union-
related." *Register-Guard*, *supra* at 1119.

35 Thus, nothing in *Register-Guard* permits facially overbroad and vague email rules.
Indeed, the Board has explained its understanding of *Register-Guard* in just this way.

40 In *Costco Wholesale Corp.*, 358 NRB No. 106 (2012), the Board considered a
handbook rule maintained for employees entitled "Electronic Communications and Technology
Policy." The rule governed "electronic communications for business use" and warned that
"[m]isuse or excessive personal use of Costco technology or electronic communications is a
violation of Company policy for which you may be disciplined, up to and including termination of
employment." The policy required, *inter alia*, that

45 Any communication transmitted, stored or displayed electronically must comply
with the policies outlined in the Costco Employee Agreement. Employees should
be aware that statements posted electronically (such as online message boards
or discussion groups) that damage the Company, defame any individual or
damage any person's reputation, or violate the policies outlined in the Costco
Employee Agreement, may be subject to discipline, up to and including
50 termination of employment.

The Board found this workplace rule unlawful. In doing so the Board went out of its way to specifically address *Register-Guard*, and distinguish it. The Board in *Costco* explained that the

5 rule does not implicate Board's holding in *Register-Guard*, 351 NLRB 1110 (2007), enfd. in relevant part 571 F.3d 53 (D.C. Cir. 2009). The issue in *Register-Guard* was whether employees had a statutory right to use their employer's email system for Sec. 7 purposes. The Board found that the employer did not violate Sec. 8(a)(1) by prohibiting the use of the employer's email for "nonjobrelated solicitations." Here, the rule at issue does not prohibit using the electronic communications system for all non-job purposes, but rather is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).

15 358 NLRB at slip op. at 2 fn. 6 (parallel citations omitted)

20 The Board's reasoning in *Costco* is on point here. Precisely as in *Costco*, here Respondents' electronic mail and messaging policy does not prohibit using the electronic communications system for all non-job purposes, but rather, bars only vaguely characterized types of communications (e.g., communications that may be "disruptive," "offensive" or "harmful to morale"). Precisely as in *Costco*, the rule at issue "is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1)."⁶

⁶Notably, Respondents' contention that the rule at issue in *Costco* did not involve use of the employer's electronic resources is in error. See 358 NLRB No. 106, slip op. at 7-8.

Respondents also contend (R. Br. at 32) that the Board's recent decision in *DirectTV*, 359 NLRB No. 54 (2013) undermines—or is inconsistent with—the Board's decision in *Costco*. Respondents' contention is based on a misreading of *DirectTV*. In *DirectTV*, an administrative law judge ruled (slip op. at 21):

Regarding handbook provision 21.4 Use of Company Systems, Equipment and Resources, the General Counsel maintains that even though the Respondent prohibits "use of company property," namely company systems, equipment and resources, which includes the Respondent's email system, for purposes "of any religious, political, or outside organizational activity," this blanket prohibition should be found impermissible regarding Section 7 activity as it unduly restricts union and protected concerted activities. The General Counsel, citing *Register-Guard*, 351 NLRB 1110 (2007), acknowledges that the Board has recently resolved the issue. I agree. I shall dismiss this allegation of the complaint.

The Board agreed with the Judge that the policy was lawful under *Register-Guard*. (Slip op. at 1 fn. 2.)

Respondents argue that this decision is at odds with the decision in *Costco*, because the full policy, as set forth in the ALJ's decision, like the policy in *Costco*, involved arguably ambiguous limitations on personal usage such as "questionable subject matter." However, it is apparent from the ALJ's reasoning (reproduced in full here), and the Board's endorsement of it, that the ALJ did not consider the lawfulness of that aspect of the policy. It is not mentioned in his analysis. Rather, the ALJ's ruling considered only whether a rule permitting the use of the email system by employees could exclude use for purposes "of any religious, political, or outside organizational activity." Under *Register-Guard*, such a rule is lawful. But, as discussed in the text, *Costco* considered a

Independently, the electronic mail and messaging policy's ban on solicitation that seeks to have employees "support any group or organization, unless sanctioned by UPMC executive management," is also violative of the Act.

5 It would be one thing, pursuant to *Register-Guard*, to promulgate a rule barring use of an employer's email system for nonwork matters, including Section 7 solicitation (i.e., Respondents' solicitation policy, discussed above). And it would be one thing, pursuant to *Register-Guard*, to bar solicitation in support of any group or organization. However, a rule
10 barring solicitation for groups or organizations "unless sanctioned by UPMC executive management" holds out the prospect that there are groups and organizations on whose behalf employees will be permitted to solicit—as long as UPMC executive management approves.

A rule providing for a management approval process for certain viewpoints and certain organizations is antithetical to Section 7 activity and a reasonable employee will be chilled from
15 even asking. As with any overly broad and ambiguous rule, the employer has effectively chilled Section 7 activity without expressly prohibiting it. "In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1)." *Costco*, supra. "The Act's goal of preventing employees from being chilled in the exercise of
20 their Section 7 rights—whether or not that is the intent of the employer" requires the Board, "instead of waiting until that chill is manifest," to "undertake the difficult task of dispelling it." Such rules chill Section 7 activity precisely because the employees must seek permission to engage in such solicitation.

In this regard Respondents' rule here is squarely analogous to the no-access rule found
25 unlawful in *J.W. Marriott Los Angeles*, 359 NLRB No. 8 (2012). In *J.W. Marriott*, the Board found unlawful an employer rule that barred access by offduty employees to the interior of the employer's facility except with "prior approval from your manager." In doing so, the Board rejected the argument that "no Sec. 7 right is at issue because 'there is no Section 7 right of off
30 duty employees to access the interior of an employer's facility'" (369 NLRB No. 8, slip op. 3 fn. 4) (internal quotations omitted), an argument equally applicable here, as there is no statutory right to use the employer's email system for Sec. 7 purposes. *Register-Guard*, supra. The Board in *J.W. Marriott*, supra, slip op. at 2, held that notwithstanding that there is no Section 7 right for offduty employees to access the interior of the facility, the rule at issue was unlawful because it

35 requires employees to secure managerial approval, giving managers absolute discretion to grant or deny access for any reason, including to discriminate against or discourage Section 7 activity. The judge therefore found that the rule 'invites reasonable employees to believe that Section 7 activity is prohibited without prior management permission.' Indeed, because all access is prohibited
40 without permission, it does more than merely invite that belief: it compels it. In turn, employees would reasonably conclude that they were required to disclose to management the nature of the activity for which they sought access—a compelled disclosure that would certainly tend to chill the exercise of Section 7
45 rights.

J.W. Marriott relies on the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), in which the Board established that an employer's rule barring offduty employees from access to its facility is valid only if it:

different question: the application of an overly broad and ambiguous limitations on otherwise permitted personal use of computer systems.

(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

Tri-County enables an employer to ban completely off-duty employee access to the interior of its property. Similarly, *Register-Guard* enables an employer to ban completely employee nonwork of its email system. However, neither *Tri-County* nor *Register-Guard* allows an employer to promulgate rules prohibiting access or use “just to those engaging in union activity.” *Tri-County, supra.*; *Register-Guard, supra* (violation to discipline employee for using email where “only difference between [the employee’s] email and the emails permitted by the Respondent is that [the employee’s] email was union-related”). And in neither situation may an employer maintain a rule that permits use of its property, including for Section 7 purposes, only when employees obtain approval from management.

In the instant case, as with access for off-duty employees in *J.W. Marriott*, a complete ban on employee email use would not raise a legal issue. However, just as with the access rule in *J.W. Marriott*, employees wanting to use email for Section 7 purposes are required to disclose this to and seek permission from management. This chilling effect is unavoidable. Of course, the problem is made even more acute by the fact that employers have a right under 8(c) of the Act to communicate their views (noncoercively) regarding unionization. Many employers do not hide their views on unionization and their view, whatever it is, could serve to chill employee willingness to seek permission to solicit for the opposite view.⁷

⁷At the hearing the Union indicated it was going to present a witness for the purpose of authenticating and moving into evidence a large number of documents purportedly maintained by Respondents on a website available to employees, and which provided information that, I think it is fair to say, was devoted to giving employees reasons not to support the Union. We did not reach the point of authenticating the documents with a witness, as I sustained Respondents’ objections to introduction of these documents on relevancy grounds (that being the occasion for my review of the documents). The documents were placed in the Rejected Exhibit File, as CP Exhs. 1 and 2. On brief, the Union has raised again the issue of the admissibility of the documents. Upon consideration of the matter, I do agree that the documents are relevant in one respect (and it is one of the rationales for admission specifically advanced by the Union at the hearing). Evidence that Respondents conveyed to employees that they opposed unionization is relevant to consideration of whether a reasonable employee would be willing, pursuant to the terms of the electronic mail and messaging policy, to seek Respondent’s permission to solicit for prounion causes. The establishment by the employer (presumably in a completely lawful manner) that it actively discourages and opposes unionization would discourage employees from seeking permission to communicate for prounion causes. I reverse my relevancy ruling on these grounds. However, I am not admitting the documents because, due to my initial ruling, authentication was not established. In addition, I do not believe introduction of these documents are necessary to my findings and conclusions. As stated in the text, the right of the employer to advance its position on Section 7 matters would likely chill employees seeking permission to engage in contrary Section 7 solicitation. But should a reviewing body agree with my relevance ruling and disagree with my view that these documents are not decisive, the proper course will be a remand order for the purpose of permitting the Union an opportunity to authenticate the documents (through witness testimony or stipulation).

I find the electronic mail and messaging policy is overly broad and ambiguous, in violation of Section 8(a)(1) of the Act.

3. Acceptable use of information technology resources policy

5 The acceptable use of information technology resources policy begins by establishing a broad restriction on the use of Respondents' information technology for "business, clinical, research, and educational activities of UPMC workforce members." This policy goes on to delineate a significant carve-out to the broad prohibition: where a "UPMC technology resource is assigned to an employee, the employee is permitted de minimis personal use of the [resource]." The policy expressly defines "de minimis personal use" as use of the resource "to the extent that such use does not affect the employee's job performance []or prevent[] other employees from performing their job duties."

15 The other part of the acceptable use policy challenged in the complaint consists of the following "requirements" (excerpted from a list of 25):

20 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, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;

* * * *

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

* * * *

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "Use of UPMC Name, Logo, and Tagline").

* * * *

35 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.

40 In terms of analyzing these provisions, Respondents argue (R. Br. at 34) that read in context, this "policy is exclusively intended to govern communications that could reasonably be construed as being made on behalf of Respondents." They further argue that the policy "only restricts employees' use of Respondents' equipment and activities at work. The policy does not (and could not reasonably be construed to) restrict employees' ability to use their own electronic resources while offduty to engage in Section 7 activity." Id.

50 As to Respondents' latter contention, I agree. The introductory "policy" and "purpose" provisions render reasonably clear that this policy concerns use of UPMC information technology resources—not employees' own computers and technology. (See, "Purpose" To establish guidelines for . . . the acceptable use of UPMX information technology resources.") However, Respondents' former claim—that the policy may reasonably be read to govern only

communications that could be “construed as being made on behalf of Respondents”—does not constitute a reasonable reading of the policy. That is certainly one concern of the policy. But the portion of the policy that the General Counsel’s case takes issue with is the portion governing “de minimis personal use” by employees. Almost by definition, that is use of the computer systems that is not being made by employees on behalf of Respondents.

Read in context—employees are allowed to use computers for nonwork purposes to the extent it does not interfere with job duties and, based on item #20, it appears that employees may use these resources for social media communication that goes well beyond communication with others using Respondents’ equipment. By implication employees are permitted to use Respondents’ equipment to participate in Facebook, MySpace, Twitter, and other such sites, as long as the employees do not describe any affiliation with UPMC, do not “disparage or misrepresent” UPMC, make “false or misleading statements regarding UPMC,” or use UPMC logos, “or other copyrighted or trademarked materials.” However, employees can make statements and communications that fall within the scope of these restricted areas if written prior consent is obtained from UPMC.

Based on much the same reasoning set forth above regarding the electronic mail and messaging policy, these overly broad and vague restrictions on employee use of technology resources, which employees can avoid if they seek and receive permission from the employer, violate the Act. Thus, the prohibition on statements that “[d]isparage or [m]isrepresent UPMC” and the prohibition on “false or misleading statements regarding UPMC” are very similar to the prohibition on posted statements “that damage the Company, defame any individual or damage any person’s reputation” that were found unlawfully overbroad in *Costco*, supra.⁸ Nothing in Respondents’ rule indicates that any protected activity is exempt from the rule, and thus, facially, the rule chills Section 7 activity in the absence of a lawfully promulgated rule that draws lines in a nondiscriminatory way explaining which protected conduct is permitted and which is not. Precisely as with the electronic mail and messaging policy, in this policy the employer has “failed to define the area of permissible conduct in a manner clear to employees and thus caused employees to refrain from engaging in protected activities.” *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979). Employees confronting an employer’s rule “should not have to decide at their own peril what information is not lawfully subject to such a prohibition.” *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op at 12 (2011), cited in *DirectTV*, 359 NLRB No. 54, slip op. at 3 (2013). Such ambiguity and over breadth is unlawful

⁸See also *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule against “derogatory attacks on hospital representatives” unlawful), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) (“By permitting the punishment of employees for speaking badly about hospital personnel, the employer ‘failed to define the area of permissible conduct in a manner clear to employees and thus cause[d] employees to refrain from engaging in protected activities’” (quoting *American Cast Iron Pipe v. NLRB*, 600 F.3d 132, 137 (8th Cir. 1979)); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (“rule’s prohibition of ‘negative conversations’ about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful”); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348, 356-357 (2000) (rule prohibiting “false or misleading work-related statements concerning the company, the facility, or fellow associates” is unlawful), enfd. 297 F.3d 468 (6th Cir. 2002); *Knauz BMW*, 358 NLRB No. 164, slip op. at 1 (2012) (“courtesy” rule prohibiting “disrespectful” conduct unlawful); *Cincinnati Suburban Press*, 289 NLRB 966 fn. 2, 975 (1988) (rule prohibiting false statements unlawful).

precisely because it chills Section 7 activity—an employee will reasonably avoid all Section 7 activity precisely out of concern that the employer may apply the rule in a manner that impermissibly singles out Section 7 activity. This is the very essence of the problem that the Board precedent is designed to prevent.

5

The prohibition “on describing any affiliation with UPMC” is reasonably read to prohibit employees (who, are using Facebook Twitter, etc., which the employer’s rule permits) from telling anyone where they work, a restriction that severely inhibits discussion with others about the terms and conditions and pluses and minuses of their work experience. This unusual prohibition would greatly chill Section 7-related discussion, and perhaps nothing but Section-7 related discussion, without any apparent nondiscriminatory boundary or distinction in a rule that generally permits personal use of email to discuss matters on social media sites. As in *Costco*, supra, slip op. at 2 fn. 6: “Here, the rule at issue does not prohibit using the electronic communications system for all non-job purposes, but rather is reasonably understood to prohibit the expression of certain protected viewpoints. In doing so, the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).”

10

15

The rule prohibits the use of UPMC logos (and other trademarked or copyrighted materials) by employees when they are posting on social media sites. It is one thing to have a rule that is narrowly tailored to prohibit trademark or copyright infringement. But this sweeps much broader. Employees have a Section 7 right to display a logo as part of their Section 7 communications. There is no issue—or, more accurately, need not be an issue—of trademark or copyright infringement. See *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019–1020 (1991), *enfd.*, 953 F.2d 638 (4th Cir. 1992) (employer policy prohibiting employees from wearing uniforms with company logo while engaging in union activity is unlawful infringement of Section 7 rights of employees in absence of legitimate business justification). A rule that permits widespread use of social media by employees for nonwork purposes but bars use of logos is a prohibition of the expression of “certain protected viewpoints that inhibits certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Section 8(a)(1).” *Costco*, supra.

20

25

30

Moreover, the acceptable use of information technology resources policy makes clear that all of the above limitations—on disparaging, misrepresenting, making false or misleading statements, or using UPMC logos—can be engaged in by employees if they receive prior written permission from UPMC to do so. This requirement that employees request and receive permission in order to find out if Section 7 activity will be permitted is antithetical to the Act. See, *J.W. Marriott*, 359 NLRB No. 8 (2012), discussed above (managers’ absolute discretion over application of rule is unlawful because it requires management permission to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission, a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights).

35

40

Finally, the acceptable use of information technology resources policy requires employees using the internet to have “the written approval of UPMC’s Chief Information Officer or Privacy Officer” before transferring “[s]ensitive, confidential, and highly confidential information” over the internet. This will reasonably chill protected employee discussion such as on wages, personnel matters, benefits and other terms and conditions of employment,⁹ and the

45

⁹*Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291–292 (1999) (rule prohibiting employees from revealing confidential information regarding customers, fellow employees, or hotel business, unlawful); *Albertson’s, Inc.*, 351 NLRB 254 (2007) (employer unlawfully used its confidentiality rule to discipline an employee for engaging in protected concerted activity,

conclusion is unavoidable here, as record evidence suggests that (in other employment rules) Respondents define “confidential information” to include “Compensation Data,” “Benefits Data,” “Staff Member (Co-Worker) Data,” and “Policies and Procedures.”¹⁰ Thus, a reasonable employee will conclude that the rule permits a wide-range of internet discussion, but excludes this particular and important type of Section 7 communication. This kind of viewpoint discrimination, based not on neutral drawing of lines but on the reasonable believe that core Section 7 topics have simply been excluded from discussion, is not permitted. *Costco*, supra. And as discussed, above, the problem is compounded by the rule’s recitation that this “confidential” information may be transferred with the “approval” of a designated UPMC official. *J.W. Marriott*, supra.

For all of the above reasons, I find that the maintenance and promulgation of the acceptable use of information technology resources policy violates Section 8(a)(1) of the Act.¹¹

namely, providing employee names to assist the union's organizing campaign).

¹⁰The December 13, 2012 consolidated complaint alleged that the Respondents maintained a “Confidential Information Policy” which provided as “examples of confidential information” “Compensation Data,” “Benefits Data,” “Staff Member (Co-Worker) Data,” and “Policies and Procedures.” Respondents’ answers neither admitted nor denied these allegations, stating instead that the “Confidential Information Policy is a document that speaks for itself” and then denying “all allegations . . . that are inconsistent with the document.” This non-answer constitutes an admission under Board Rules. See Sec. 102.20. I note that documents, in fact, do not speak for themselves. *Lane v. Page*, 272 F.R.D. 581 602-603 (D. NM 2011); *State Farm Mutual Auto Insurance v. Riley*, 199 F.R.D. 276 (N.D. Ill. 2001) (app. p. 2). See also, *Chicago District Council of Carpenters Pension Fund v. Balmoral Racing Club, Inc.*, 2000 U.S. Dist. LEXIS 11488, 2000 WL 876921 (N.D. Ill 2000) (Judge Shadur) (“[Defendant] goes on in each of those paragraphs to state that it denies all of the corresponding Complaint allegations that are “inconsistent therewith.” But how are [Plaintiffs]’ counsel or this Court expected to divine just what provisions of the Complaint’s allegations regarding the operative documents may be viewed as “inconsistent therewith” by [Defendant] and its counsel? . . . No reason appears why [Defendant] should not respond by admitting any allegation that accurately describes the content of whatever part of a document is referred to”).

¹¹Most of Respondents’ brief (and much of the General Counsel’s and the Union’s briefs as well) is devoted to arguments regarding the propriety of *Register-Guard*. As noted, these arguments on which the Board must rule. I am bound to accept the *Register-Guard* precedent.

Respondents raise a few other defenses that warrant only brief mention. Respondents contend (R. Br. at 19–21) that allowing employees to use the email system for Section 7 purposes would constitute unlawful support by Respondents for union organizing. This argument turns precedent on its head. It suggests that permitting employee use of the email system for all purposes *except* Section 7 purposes would be acceptable, and indeed, that even when an employer permits free and unfettered use of email by employees it is *prohibited* from permitting email to be used for Section 7 purposes. Such an argument is without precedent and directly contrary to the Board’s holding in *Register-Guard*. As long as employees can use email without regard to their views on unionization, there can be no serious claim that Respondents are susceptible to a claim of unlawful support for allowing Section 7 activity on their email system. Similarly, Respondents contention (R. Br. at 21-22) employee email usage to support unions would violate the right of employees to refrain from union activity is a straw man. No party suggests that pronoun employees should be able to use the email system to voice their opinions while antiunion employees are prohibited from doing so. Such a policy would violate

**UPMC's Motion for Judgment on the Pleadings and
UPMC's Consent to be Bound for Purposes of Certain Remedial Relief**

5 UPMC filed a document entitled "Motion for Judgment on the Pleadings," stamped received by the NLRB Order Section" of the Board's Executive Secretary on February 20, 2013, at 12:19 p.m.

10 The motion seeks dismissal of UPMC "as a respondent in the case" on the grounds that the complaint "does not allege that UPMC engaged in any unfair labor practices" and that the government "has failed to state a claim upon which relief can be granted."

15 Review of the complaint makes one thing clear: the complaint states no cause against UPMC. The complaint does not allege that UPMC engaged in any unfair labor practices. It does not seek a remedy against UPMC. Indeed, contrary to UPMC's representation in the motion, the complaint does not identify UPMC as a respondent. The previous iterations of the complaint *did* name UPMC as a respondent. (see, e.g., Amended Consolidated Complaint dated January 8, 2013; GC Exh. 1(y); Consolidated Complaint (GC Exh. 1(s)). With nothing more, UPMC's motion could be denied—as moot and unnecessary.

20 However, UPMC is not unconnected to the case. As referenced above, this case, along with several other cases originally comprised scores of alleged violations of the Act by Respondents, including UPMC, the parent entity that owns Respondent Presbyterian Shadyside and Respondent Magee. A settlement agreement between Respondents (at that time including UPMC) and the Union, approved by the Regional Director, resolved most of the outstanding allegations prior to issuance of the second amended complaint that was the subject of the hearing in this case.

the Act under *Register-Guard* and under first principles of the Act. Respondents' contention that the hospital setting warrants unique restrictions on use of electronic communications for Section 7 purposes is misplaced. Under *Register-Guard*, Respondents are under no requirement to permit any nonwork employee use of email. But when they do, their discretion to bar Section 7 activity, or only Section 7 activity, is not unfettered. Respondents make no case why nonwork non-Section 7 activity is less distracting in a hospital setting than Section 7-related use of electronic communications.

Respondents also (R. Br. at 30) argue, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that the Board cannot decide this case because it lacks a quorum due to the allegedly unconstitutional recess appointment of two of the three current Board members. The Board rejected this argument in *Center for Social Change*, 358 NLRB No. 24 (2012), *enfd.* D.C. Cir. 2012 U.S. App. LEXIS 25150 (2012). Moreover, it has rejected the argument in the wake of the decision in *Noel Canning*. See *Orni 8, LLC*, 359 NLRB No. 87, slip op. 1 at fn. 1 (2013).

Finally, Respondents assert in their answers that "the Board's Acting General Counsel was improperly and unlawfully appointed and cannot lawfully take any action in this matter." No support for this contention is provided. Acting General Counsel Lafe Solomon was appointed to his office on June 21, 2010, pursuant to Section 3(d) of the Act, which provides: "In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy" Notably, Respondents do not argue that the Acting General Counsel's lawful appointment lapsed, but only that his appointment was improper and unlawful. I reject the contention for which Respondents provide no support.

5 The earlier complaints in this case all alleged that UPMC was a single employer with the subsidiary hospital respondents. UPMC denied the single-employer allegations (and denied the allegations of substantive misconduct). The pre-trial settlement included a written stipulation, entered into evidence in the hearing in this case as Joint Exhibit 1, and represented without objection to be “a resolution of the . . . single employer issue.”

10 This document stipulated that “[t]he Respondent”—which included UPMC—would expunge any policies found to be unlawful “wherever they exist on a systemwide basis at any and all of Respondent's facilities” and that the Respondent will “notify all of its employees at all of Respondent's facilities within the United States and its territories where such policies were in existence . . . that such policies have been rescinded and will no longer be enforced.”

15 While the extant second amended complaint maintains no allegations of wrongdoing against UPMC, nevertheless UPMC was served with the second amended complaint, filed objections and an answer to the second amended complaint, and UPMC’s counsel who filed the answer and objection appeared at the hearing (they also represent the subsidiary respondents). The stipulation was entered into evidence without objection in their presence. Moreover, Respondents’ posthearing brief was filed on behalf of UPMC, as well as Presbyterian Shadyside and Magee. (R. Br. at 1.) Thus, UPMC has been fully apprised of and involved in this case, despite the lack of substantive claims against it in the second amended complaint. There is no due process problem (and none alleged) with holding UPMC liable for remedial purposes to the extent UPMC consented to be bound by a remedial order, as set forth in Joint Exhibit 1.

25 The upshot of all of this is—that while I agree with UPMC that no cause of action is stated against it in the complaint, UPMC has agreed to be bound for certain stipulated remedial purposes, and was and is a party for purposes of remedial relief, akin to a Rule 19 defendant in federal court. This serves not only to empower the Board to issue remedial relief affecting UPMC, but permits UPMC to protect its interests. I deny the motion for judgment on the pleadings on these grounds.¹²

35 CONCLUSIONS OF LAW

- 40 1. Respondent UPMC Presbyterian Shadyside and Respondent Magee-Womens Hospital of UPMC are employers within the meaning of Section 2(2), (6), and (7) of the Act, and health care institutions within the meaning of Section 2(14) of the Act.
- 45 2. Since about February 1, 2012, Respondents have violated Section 8(a)(1) of the Act by their maintenance of the electronic mail and messaging policy and the acceptable use of information technology resources policy.
3. The unfair labor practices committed by Respondents affect commerce within the meaning of Section 2(6) and (7) of the Act.

¹²The General Counsel and the Union argue (GC Br. at 29–30; CP Br. at 29) that the motion was untimely. The General Counsel also argues that the motion was not properly served (GC Br. at 30). I do not reach those arguments in light of my denial of the motion.

REMEDY

5

Having found that Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

10

Respondents shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

15

Within 14 days, Respondents shall rescind the personnel and human resources policy entitled "Electronic Mail and Messaging Policy," and the policy entitled "Acceptable Use of Information Technology Resources Policy," maintained on the UPMC Infonet.

20

As part of the remedy in this case, Respondents shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in all Respondents' facilities or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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 Respondents customarily communicate with their employees by such means. In the event that, during the pendency of these proceedings, Respondents have gone out of business or closed a facility involved in these proceedings, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by Respondents at any time since February 1, 2012. When the notice is issued to Respondents, they shall sign it or otherwise notify Region 6 of the Board what action they will take with respect to this decision.

25

30

In Joint Exhibit 1, Respondents, and UPMC stipulated to the following:

35

The undersigned parties hereby stipulate that any policies either adjudicated as unlawful, or which Respondent agrees to voluntarily rescind in connection with the instant matter, will be expunged wherever they exist on a systemwide basis at any and all of Respondent's facilities within the United States and its territories, including, but not limited to, those which are operated by UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC.

40

Moreover, Respondent agrees that it will notify all of its employees at all of Respondent's facilities within the United States and its territories where such policies were in existence, including, but not limited to, those employees working in facilities which are operated by UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, that such policies have been rescinded and will no longer be enforced. Appropriate notice to employees of the rescission will be accomplished by whatever means Respondent has traditionally used to announce similar policy changes to employees in other circumstances.

45

Presbyterian Shadyside, Magee, and UPMC shall comply with the terms of this stipulation.

50

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

5

ORDER

Respondents UPMC Presbyterian Shadyside and Magee-Womens Hospital of UPMC, Pittsburgh, Pennsylvania, their officers, agents, successors, and assigns, shall

10

1. Cease and desist from:

- a. Promulgating and maintaining a personnel and human resources policy such as that entitled the “Electronic Mail and Messaging Policy,” including on the UPMC Infonet, that contains the following language:

15

UPMC electronic messaging systems may not be used:

20

- To promote illegal activity or used in a way that may be disruptive, offensive to others, or harmful to morale; or

25

- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;

30

- 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.

35

- b. Promulgating and maintaining a personnel and human resources policy such as that entitled the “Acceptable Use of Information Technology Resources Policy,” including on the UPMC Infonet, that contains the following language:

40

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.

¹³If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

“De minimis 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.

5

* * *

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, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

10

- Describe any affiliation with UPMC;

15

* * * *

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

20

* * * *

- Use UPMC’s logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles “Use of UPMC Name, Logo, and Tagline”).

25

* * * *

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.

30

35

- c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

40

2. Take the following affirmative action necessary to effectuate the policies of the Act:

45

- a. Within 14 days, rescind the personnel and human resources policy entitled “Electronic Mail and Messaging Policy,” maintained on the UPMC Infonet that contains the following language:

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

5

- To solicit employees to support any group or organization, unless sanctioned by UPMC executive management;

10

- 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.

15

- b. Within 14 days, rescind the personnel and human resources policy entitled "Acceptable Use of Information Technology Resources Policy," maintained on the UPMC Infonet that contains the following language:

20

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.

25

30

"De minimis 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.

35

* * * *

40

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, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

45

- Describe any affiliation with UPMC;

* * * *

50

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

* * * *

- Use UPMC’s logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles “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.

- c. Within 14 days after service by the Region, post at all their facilities nationwide the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondents’ authorized representative, shall be posted by Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the 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 Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondents 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, Respondents have gone out of business or closed any facility involved in these proceedings, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by Respondents at any time since February 1, 2012.
- d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

As further remedy for the violations found in this case, UPMC, Respondents UPMC Presbyterian Shadyside, and Magee-Womens Hospital of UPMC, Pittsburgh, Pennsylvania, their officers, agents, successors, and assigns, shall, in accordance with the stipulation (Joint Exhibit 1) signed by all parties:

- 1. Take the following affirmative action which has been agreed to pursuant to the stipulation signed by the parties, and is necessary to effectuate the purposes of the Act:
 - a. Expunge the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy wherever they exist on a systemwide

¹⁴If 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.”

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 NOT promulgate and maintain a personnel and human resources policy such as that entitled the "Electronic Mail and Messaging Policy," including on the UPMC Infonet, that contains the following language:

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.

WE WILL NOT promulgate and maintain a personnel and human resources policy such as that entitled the "Acceptable Use of Information Technology Resources Policy," including on the UPMC Infonet that contains the following language:

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 minimis 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, MySpace, peer-to-peer networks, twitter, etc.) electronic bulletin boards or other web-based applications or tools that:

- Describe any affiliation with UPMC;

* * * *

- Disparage or Misrepresent UPMC;
- Make false or misleading statements regarding UPMC;

* * * *

- Use UPMC's logos or other copyrighted or trademarked materials (See UPMC Policy HS-PR1100 titles "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.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days rescind the rescind the personnel and human resources policy entitled "Electronic Mail and Messaging Policy" maintained on the UPMC Infonet that contains the language set forth above.

WE WILL within 14 days rescind the rescind the personnel and human resources policy entitled "Acceptable Use of Information Technology Resources Policy," maintained on the UPMC Infonet that contains the language set forth above.

WE WILL, along with UPMC, expunge the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy wherever they exist on a systemwide basis at any and all of UPMC, Presbyterian Shadyside, and Magee's facilities within the United States and its territories.

WE WILL, along with UPMC, notify all employees at all of our facilities within the United States and its territories where the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy were in existence, that such policies have been rescinded and will no longer be enforced.

UPMC PRESBYTERIAN SHADYSIDE and
MAGEE-WOMENS HOSPITAL OF UPMC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111
(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.