

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**TEXAS DENTAL ASSOCIATION**

**and**

**Cases 16-CA-25349  
and 16-CA-25455**

**NATHAN CLARK, an Individual**

**and**

**Case 16-CA-25383**

**BARBARA JEAN LOCKERMAN, an Individual**

**COUNSEL FOR GENERAL COUNSEL'S  
RESPONSE AND OPPOSITION TO RESPONDENT'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

**TO THE HONORABLE MEMBERS OF THE NATIONAL LABOR RELATIONS  
BOARD:**

COMES NOW, General Counsel, by the undersigned Counsel for the General Counsel, and in response and opposition to the entirety of Respondent's Motion for Partial Summary Judgment, herein Respondent's Motion, and moves as follows:

1.

Based upon original charges in Case Nos. 16-CA-25349 filed on December 12, 2006 and 16-CA-25455 filed on February 28, 2007 by Nathan Clark, an Individual, and

Case No. 16-CA-25383 filed on January 8, 2007 by Barbara Jean Lockerman, an Individual, an Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing issued in this matter on August 8, 2007. A Second Amended Consolidated Complaint and Notice of Hearing issued on September 19, 2007 with hearing set for October 15, 2007.

2.

The Complaint, in relevant parts at paragraphs 6 and 22 of the Amended Consolidated Complaint and paragraphs 6, 7 and 23 of the Second Amended Consolidated Complaint, alleges that since on or about June 12, 2006, by maintaining its Electronics Communication Policy, Respondent has maintained a facially overbroad rule that unlawfully interferes with protected employee communications and therefore Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3.

Respondent's Motion, filed with the Region,<sup>1</sup> seeks partial summary judgment only as to the allegations set forth above in paragraph 2. In support thereof, Respondent

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<sup>1</sup> Respondent's Motion was received by the Region on September 18, 2007. A copy of such Motion is herewith forwarded to the Board for consideration. On September 19, 2007, Respondent's Counsel orally advised the undersigned Counsel for the General Counsel that Respondent filed its Motion via the Board's e-filing system and believed that such satisfied the Board's procedures for filing motions for summary judgment directly with the Board. Notwithstanding this assertion by Respondent's counsel, its Motion was not filed electronically with the Region and Counsel for the General Counsel is unaware as to whether the instant Motion was filed in accordance with the Board's Rules and Regulations as set forth in Section 102.24.

cites a number of Board cases including *Adtranz, AAB Daimler-Benz Transp. NA, Inc.*, 331 NLRB 291 (2000) and the administrative law judge's opinion in *In re Guard Publishing Co.*, Case Nos. 36-CA-8743-1 et al., 2002 WL 336963 (2002) for the proposition that the Board has consistently held that an employer may prohibit all personal use of its e-mail by employees. Therefore, Respondent avers that it is entitled to judgment as a matter of law.

4.

Factually, Respondent concedes that it maintains an electronic communications policy that states, in relevant part, the following:

The TDA provides electronic communications, including e-mail, as communications tools for conducting Association business. No other use of Association electronic communications is authorized. In addition, the electronic communications tools provided by the TDA may not be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job related solicitations.

5.

Respondent then argues that its electronic communications policy as set forth above in 4 is indistinguishable from a policy addressed by the Board in *Adtranz, supra* at 293, which stated that “[e]mployees may use hardware/software and electronic corporate mail systems provided by the company *for business use only.*”

Respondent acknowledges that its policy is more specific in prohibitions than that in *Adtranz* but argues that the effect of both policies is identical and therefore Respondent's policy must be upheld pursuant to the Board's decision in *Adtranz*.

6.

The standard for determining the appropriateness of summary judgment is whether based on all the pleadings and submissions, no material issues of fact and law exist which can reasonably be best resolved at a hearing. *KIRO, Inc.*, 311 NLRB 745, 746 (1993); *Lake Charles Memorial Hospital*, 240 NLRB 1330 (1979); *Rule 56 of the Federal Rules of Civil Procedure*. Section 102.24(b) of the Board's Rules and Regulations provides, in relevant part, that a party opposing a motion for summary judgment or dismissal is not required to submit affidavits or documentary evidence to show that there is a genuine issue for hearing, and that "[t]he Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist." *KIRO, Inc.*, supra at 746.

7.

In response to Respondent's Motion, Counsel for the General Counsel submits that the Complaint allegations are supported by facts proving the alleged violation and that the conduct alleged is violative of the Act. Counsel for the General Counsel further submits that genuine material issues of fact and law remain which can best be resolved by a hearing.

8.

Although Respondent's Motion does not specifically assert that no material issues of fact exist, Counsel for the General Counsel disputes and opposes any such contention. In fact, Respondent's own Motion sets forth a factual issue which can best reasonably be resolved at a hearing. Specifically, Respondent argues that its electronic communications policy is indistinguishable from an electronics communication policy addressed in the Board's *Adtranz* decision, but Respondent also concedes that its policy is more specific in its prohibitions than the policy in *Adtranz*. Counsel for the General Counsel disputes Respondent's factual and legal arguments in this respect and proposes that these issues necessitate a hearing.

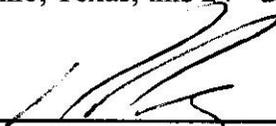
9.

In support of its Motion, Respondent further relies on the administrative law judge's decision (ALJD) in *The Register Guard*. However, any contention that this decision automatically leads to summary judgment in this matter is unfounded. In fact, the General Counsel and parties have filed exceptions to the ALJD and the issues are currently pending before the Board and as of yet undecided. Counsel for the General Counsel further suggests that the underlying issues in the *The Register Guard* are of such a novel nature that the Board allowed a rare oral argument to allow all parties and *amici* to fully litigate the matter. Any assertion that the underlying ALJD in the *The Register Guard* leads to summary judgment in this case is simply misplaced. On the contrary, *The Register Guard* exemplifies the need for a hearing in this matter.

In addition to the issues of material facts described above in paragraphs 8 and 9, the pleadings in this matter also support a conclusion that the Respondent has failed to meet its burden in establishing that no issues of material facts exist in this matter. Specifically, Respondent, by its Answer to the Amended Consolidated Complaint in this case, has denied relevant paragraph 22 and therefore denied the allegation that by maintaining a facially overbroad rule that unlawfully interferes with protected employee communications Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act. By virtue of these denials, this case is further inappropriate for disposition by partial summary judgment.

**WHEREFORE, PREMISES CONSIDERED,** Counsel for the General Counsel respectfully urges that Respondent's Motion for Partial Summary Judgment, be denied for the foregoing reasons.

**DATED** at San Antonio, Texas, this 24<sup>th</sup> day of September 2007.



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**Roberto Perez, Counsel for the General Counsel  
National Labor Relations Board  
Region 16  
Travis Park Plaza Building  
711 Navarro Street, Suite 705  
San Antonio, TX 78205-1711**

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above and foregoing Counsel for General Counsel's Response and Opposition to Respondent's Motion for Partial Summary Judgment has been served upon each of the following by or first class U.S. mail this 24<sup>th</sup> day of September 2007.

National Labor Relations Board  
Attn: Lester A. Heltzer, Executive Secretary  
1099 14<sup>th</sup> Street, N.W., Room 11602  
Washington, DC 20570

Honorable William N. Cates, Associate Chief  
Administrative Law Judge  
401 West Peachtree Street, N.W., Suite 1708  
Atlanta, Georgia 30308-3510  
VIA FACSIMILE to 404-331-2061

Brian T. Thompson, Esq.  
William H. Bingham, Esq.  
McGinnis, Lochridge & Kilgore, LLP  
600 Congress Avenue  
Suite 2100  
Austin, Texas 78701  
*VIA REGULAR U.S. MAIL*

Mary Kay Linn, Executive Director  
Texas Dental Association  
1946 South IH 35, Suite 400  
Austin, Texas 78704  
*VIA REGULAR U.S. MAIL*

Barbara Jean Lockerman  
209 Byrne St.  
Smithville, TX 78957  
*VIA REGULAR U.S. MAIL*

Nathan Clark Austin, Texas 78749  
8801 La Cresada Drive, Apt. 1536  
Austin, TX 78749  
*VIA REGULAR U.S. MAIL*



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**Roberto Perez, Counsel for General Counsel  
National Labor Relations Board  
Region 16  
Travis Park Plaza Building  
711 Navarro Street, Suite 705  
San Antonio, TX 78205-1711**

UNITED STATE OF AMERICA  
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TEXAS DENTAL ASSOCIATION	§	
	§	
and	§	
	§	
NATHAN CLARK, an Individual	§	Cases Nos. 16-CA-25349
	§	16-CA-25445; and
and	§	16-CA-25383.
	§	
BARBARA JEAN LOCKERMAN,	§	
an Individual	§	

**TEXAS DENTAL ASSOCIATION'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

Texas Dental Association (“TDA”) files this, its Motion for Partial Summary Judgment (“Motion”) against Nathan Clark’s claim that TDA violated the National Labor Relations Act (the “Act”) by maintaining its electronic communications policy. In support of the Motion, TDA would show the court the following:

**I.  
Introduction**

1. Nathan Clark claims that TDA violated section 8(a)(1) of the Act by maintaining its electronic communications policy, which prohibits employees from using TDA’s e-mail system except for TDA business.
2. The National Labor Relations Board (the “Board”) has consistently held that an employer may prohibit all personal use of its e-mail by employees. *Adtranz, AAB Daimler-Benz Transp. NA, Inc.*, 331 NLRB 291 (2000) *vacated in part by Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19 (D.C. Cir. 2001); *see also* Administrative Law Judge’s opinion in *In re Guard Publishing Co.*, Cases Nos. 36-CA-8743-1 et al., 2002 WL 336963 (2002).

Therefore, TDA is entitled to judgment as a matter of law, and the Court should grant this Motion. FED. R. CIV. P. 56.

## **II.** **Facts**

3. On February 28, 2007, Nathan Clark filed a charge against TDA alleging that “[w]ithin the past six months and continuing thereafter, [TDA] has maintained and enforced an electronic communication policy which prohibits any personal use of its email system in the work place.” Clark alleges that by this and other acts, TDA “has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the [National Labor Relations Act.]”

4. In the Amended Consolidated Complaint, the Board alleges that by maintaining its electronic communications policy, TDA “has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.”<sup>1</sup>

5. TDA’s electronic communication policy states, in relevant part, that:

The TDA provides electronic communications, including e-mail, as communications tools for conducting Association business. No other use of Association electronic communications is authorized. In addition, the electronic communications tools provided by the TDA may not be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

## **III.** **Arguments and Authorities**

6. The National Labor Relations Board (“Board”) has held that employees have no statutory right to use an employer’s equipment or media. *Mid Mountain Foods, Inc.* 332 NLRB 229, 230

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<sup>1</sup> The Board also alleges in the Consolidated Complaint that TDA “selectively and disparately” applied the electronic communications policy in violation of the Act. This Motion does not address these allegations and is limited to the allegation that TDA’s electronic communications policy was a violation of the Act on its face.

(2000). Thus, the Board has upheld non-discriminatory limits on the use of employer bulletin boards, in *Honeywell, Inc.*, 262 NLRB 1402 (1982), *enf'd* by 422 F.2d 405 (8th Cir. 1983), employer telephones, in *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enf'd in relevant part* by 714 F.2d 657, 663-64 (6th Cir. 1983), employer public address systems, in *The Health Co.*, 196 NLRB 134 (1972), and employer video equipment, in *Mid Mountain Foods, Inc.*, *supra*.

7. Furthermore, the Board has held that an employer can bar its employees from using its computers and electronic communications systems, including e-mail, for personal use. *Adtranz*, 331 NLRB 291; *see also In re Guard Publishing*, 2002 WL 336963 (stating that “the Board has consistently found that employers may non-discriminatorily limit the use of their communications equipment.”). The employer in *Adtranz* maintained an electronic communications policy that stated that “[e]mployees may use hardware/software and electronic corporate mail systems provided by the company *for business use only*.” 331 NLRB at 293 (emphasis in original). The Board held that this policy alone was not a violation. *Id.*

8. TDA’s policy is indistinguishable from that addressed in *Adtranz*. Both policies restrict employee use of electronic communications to uses related to the business of the employer. Although TDA’s policy is more specific in its prohibitions, for example prohibiting solicitation for religious or political causes, the same non-business uses would have been prohibited by the policy in *Adtranz*. Because the effect of both policies is identical, TDA’s policy must be upheld pursuant to the Board’s decision in *Adtranz*.

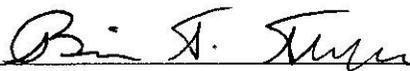
#### **IV.** **Conclusion**

9. The policy in *Adtranz* is indistinguishable from TDA’s policy. Thus, TDA’s policy is not overbroad and does not violate the Act.

10. For this reason, TDA is entitled to judgment as a matter of law against Clark's claim that TDA violated the Act by maintaining its electronic communications policy.

Respectfully submitted,

McGINNIS, LOCHRIDGE & KILGORE, L.L.P.  
William H. Bingham  
State Bar No. 02324000  
Lin Hughes  
State Bar No. 1021100  
Brian T. Thompson  
State Bar No. 24051425  
600 Congress Avenue  
Suite 2100  
Austin, Texas 78701  
(512) 495-6000  
(512) 495-6093 FAX

By:   
Brian T. Thompson

ATTORNEYS FOR TEXAS DENTAL  
ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was filed electronically through the Board's e-filing system. In addition, the original and four paper copies were sent via regular mail to:

National Labor Relations Board  
Travis Park Plaza Building  
711 Navarro, Suite 705  
San Antonio, Texas 78205

Copies were also sent via regular mail to:

Barbara Jean Lockerman  
209 Byrne Street  
Austin, Texas 78957

Nathan Clark  
8801 La Cresada Drive, Apt 1536  
Austin, Texas 78749



Brian T. Thompson

9-17-2007

Date