NLRB Adopts Employer-Friendly Positions on E-Mail Use and 'Non-Discriminatory' Enforcement of Employer Policies

In a long-awaited decision, the National Labor Relations Board (the "NLRB" or the "Board") ruled on December 16, 2007 that an employer does not violate the National Labor Relations Act (the "NLRA") when it prohibits employees from using the employer's e-mail network to facilitate union-related solicitations, so long as it does so in a non-discriminatory manner. And in a potentially far-reaching development, the Board also revised its long-standing rule for analyzing whether an employer restriction on the use of its property (including bulletin boards, copying machines, telephones and e-mail systems) unlawfully discriminates against union-related messages. Under the former Board analysis, a rule or practice which permitted employees to make personal use of bulletin boards, copying machines, and other forms of employer property would render invalid a ban on using that same property for union purposes. Under the Board's new standard, however, employees' use of employer property for personal purposes (for example, advertising for the sale of personal items, or announcements concerning births, marriages, or other personal events) would not require equal access for union-related solicitations, so long as postings of a similar character concerning other outside organizations were not permitted.

As discussed below, both parts of the Board's decision in *The Guard Publishing Company, d/b/a Register-Guard* will have important implications for employers in every industry. While the NLRB's ruling is still subject to appeal, and though the Board's 3-2 majority may be affected by appointments to be made following the November presidential election, every employer – unionized or not – should consider reviewing not only its e-mail policies, but also its policies and practices concerning the use of bulletin boards, copying machines, and other forms of employer property, in light of the *Guard Publishing* decision.

The Employer's E-Mail Policy and Practice

The Register-Guard (the "Company"), a newspaper publisher, adopted in 1996 the following policy governing the use of its communications systems and the equipment used to operate them: "Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations or other non-job-related solicitations." Under this policy, employees had been permitted – with the Company's knowledge – to send and receive personal e-mails including jokes, invitations to parties, and efforts to sell or purchase personal items (such as tickets to sporting events) and services (such as dog-walking). There was no evidence, however, that the Company e-mail system had ever been used in connection with any solicitation for an outside organization or cause of any kind (other than the United Way, for which the Company conducted a periodic charitable campaign).

In May 2000, the Company disciplined the president of its local union, a Company employee, for sending an e-mail from her Company computer to other Company employees at their Company e-mail addresses, clarifying certain facts about an earlier-occurring Union rally. In August 2000, the Company again disciplined this employee for sending two additional e-mails, each of which asked employees to take certain actions in support of the Union (wearing armbands in support of the Union's bargaining proposals and participating in the Union's entry in an upcoming town parade). The August e-mails, unlike the May message, were sent by the employee from a computer in the Union's office, but they were directed to multiple Company employees at their Company e-mail addresses. Each of these disciplinary actions, and the Company's communications policy itself, were challenged by the Union as violating employees' rights to engage in collective activity with respect to their working conditions, under Section 7 of the National Labor Relations Act.

The Board's Analysis

The E-Mail Policy

The Board majority first rejected the argument, asserted by the Union and by many other labor advocates who filed briefs in support of the Union, that the policy was unlawful on its face, simply because it restricted an employee's union-related use of the Company's e-mail system. Applying earlier Board decisions concerning the use of employer-owned bulletin boards, copying machines, telephones and other equipment, the *Guard Publishing* majority reaffirmed that employees have "no statutory right to use an employer's equipment or media, as long as the restrictions are nondiscriminatory." Accordingly, the Board ruled, an employer "may lawfully bar employees' nonwork-related use of its e-mail system, unless the [employer] acts in a manner that discriminates against Section 7 activity."

The Claim of Discriminatory Application

The Board next considered the claim that, having permitted employees' use of the e-mail system for personal purposes unrelated to work, the Company could not lawfully prevent employees from using the system for Union-related purposes. Recognizing that prior Board precedents would indeed have supported this challenge to the Company's implementation of its e-mail rule, the Board majority announced a new standard for assessing claims of discriminatory application of an otherwise lawful policy: to prove unlawful discrimination, it is necessary to demonstrate that the employer either adopted the policy out of a discriminatory animus against unions (or against a particular union), or that the employer barred union-related "activities or communications *of a similar character*" to those permitted for non-union-related purposes.

Thus, according to the Board majority, instances of personal use of the e-mail system by individual employees were *not* activities or communications of a character sufficiently *similar* to the Union president's sending of the August e-mails encouraging employees to support the Union, and were not sufficient to show a discriminatory application of the Company's policy where there was no evidence that the Company had permitted employees to send e-mails soliciting support for any other organization or cause. (Applying earlier Board precedents, the majority also found that in "permitting a small number of isolated beneficent acts" – such as the United Way solicitations at Register-Guard – the Company had not invalidated application of its rule to requests for union support).

Illustrating its new test, the Board's majority offered the view that a rule permitting e-mail solicitations for an unlimited number of charitable organizations, but not for any other organizations, or permitting solicitations of a personal nature (for the sale of a car, for example) but not for the commercial sale of a product or

service (such as Avon), could be applied to exclude solicitations for union-related purposes, while still permitting other solicitations. Drawing such distinctions, the majority opinion suggested, would not be unlawful so long as unions were not singled out for disparate treatment. Applying this standard, the Board majority held that the Company's discipline of the Union president for her two August e-mails, both of which had solicited support for Union activities, was lawful (since the e-mails violated the Company policy banning such solicitations and since no other similar solicitations had been permitted). However, the majority held that disciplining the employee for her May e-mail (which the Board viewed as not a solicitation at all, and as no different in kind from informational e-mails which the Company had permitted employees to send in the past) was an act of unlawful, anti-union discrimination.

What This Means for You

The decision of the Board majority, if it is sustained in the courts and not undermined by a reshuffling of Board appointees a year from now, gives significantly greater flexibility to employers in drafting and implementing important workplace policies.

Contact Information

If you would like to discuss this decision and its implications for your organization, please contact any partner in Ropes & Gray's Labor & Employment Department.

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