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NLRB Grants Use of Company Email for Union Purposes

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August 18, 2011

On July 26, 2011 the NLRB found that union representatives may have a right to correspond with employees on their corporately purchased email accounts to solicit union activity. *The Guard Publishing Co., d/b/a The Register-Guard*, 375 NLRB No. 27 (2011).

The *Register-Guard* is a newspaper in Eugene, Oregon. Some of its employees are represented by the Communications Workers of America, Local 37194. In August of 2000 its local president, and an employee, circulated two emails to the workforce. The first email was sent to employees from the president's union email account and to the employees' work email. It encouraged workers to wear green shirts in support of a union collective bargaining effort. The second email was also sent from the president's union account to employees' work accounts and encouraged the employees to participate in a community parade on behalf of the union. On August 22, 2000 the employer disciplined the union president for violating the company's communications systems policy which prohibited solicitations:

Communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non- job – related solicitations.

The CWA filed unfair labor practice charges and the NLRB concluded that the local president was not discriminatorily disciplined for the August emails based upon a decision of the Seventh Circuit Court of Appeals. *Register-Guard*, 351 NLRB 1110 (2007). The Board reasoned that in disciplining the union president it was not treating solicitations to support union activity differently from solicitations to oppose union activity. As the Board recognized, "… an employer would violate Section 8(a)(1) by permitting employees to send antiunion emails while prohibiting prounion emails…. But it would not be unlawful discrimination for an employer to permit, for example, emailed solicitations for charitable organizations but not emailed solicitations for other kinds of organizations…." (citing, *Fleming Cos. v. NLRB*, 349 F.3d 968 (7th Cir. 2003). The CWA challenged this ruling in the D.C. Circuit Court of Appeals.)

On July 7, 2009 the D.C. Circuit Court of Appeals remanded the issue to the NLRB directing that it determine whether substantial evidence existed in the record to establish that the employer refused to permit employees from making solicitations of any nature. In essence, the D.C. Circuit rejected the standard established by the Seventh Circuit Court of Appeals and directed the NLRB to determine whether the newspaper had "… inconsistently enforced the communications systems policy by disciplining (the union president) for her August email solicitation on behalf of the Union, while permitting other employees to email non-union-related solicitations of a personal nature." The NLRB took up this limited issue and

concluded that the company had permitted employees to email solicitations such as party invitations, baby announcements, offers of sports tickets and requests for services such as dog-walking. As such, the NLRB concluded that the Employer had illegally discriminated against the union president when it disciplined her for using its own computer system to solicit its own employees to demonstrate against the company in parades and their manner of dress.

The *Register-Guard* decision has been anticipated since the NLRB members were nominated by the current president. Its impact is clear. Employers may own the computers, email accounts and may be paying their employees to work, but the NLRB will zealously guard a union's "right" to email your employees, on your computer, on your email accounts and to be read while your employees are working on your time, to protest against you or organize your employees into their union. The only theoretical way to prohibit this conduct is to insure that you have a communications system policy that prohibits no-job-related solicitations- and to enforce it consistently, which many employers find difficult if not impossible to accomplish.

What is clear from this opinion is that the current NLRB was unhappy with losing in the Seventh Circuit Court of Appeals. At a minimum, the NLRB will find it difficult to enforce the *Register-Guard* test in the Seventh Circuit in that the opinion expressly rejects the direction of the Seventh Circuit Court of Appeals. Moreover, the opinion also makes it clear that having successfully forum shopped this litigation into the D.C. Circuit Court of Appeals, there is now an express split between the Seventh and D.C. Circuits on the issue of whether unions should have a right to use an employer's computer system to solicit its employees. Historically, a split between circuits plainly puts interpretation of federal law in tension and is a sound basis for the U.S. Supreme Court of Appeals to resolve the dispute. It is not clear at this juncture whether the newspaper will seek appeal, but ultimately, any employer adversely impacted by the current test announced in *Register-Guard* will have standing to make that case.