Ogletree Deakins

You've Got Mail – NLRB Issues Key Ruling Concerning E-Mail Communications

January 1, 2008

"(E)mployees have no statutory right to use . . . (an employer's) e-mail system for Section 7 purposes." So said the National Labor Relations Board (NLRB) in a long-awaited decision finding that an employer has the right to restrict use of its e-mail system based on its property interest in the computer equipment. Specifically, the NLRB ruled that an employer's policy prohibiting the use of its system for "non-job-related solicitations" did not violate Section 8(a)(1) of the National Labor Relations Act. The Register-Guard, 351 NLRB No. 70 (December 16, 2007).

"(E)mployees have no statutory right to use . . . (an employer's) e-mail system for Section 7 purposes." So said the National Labor Relations Board (NLRB) in a long-awaited decision finding that an employer has the right to restrict use of its e-mail system based on its property interest in the computer equipment. Specifically, the NLRB ruled that an employer's policy prohibiting the use of its system for "non-job-related solicitations" did not violate Section 8(a)(1) of the National Labor Relations Act. ***The Register-Guard***, 351 NLRB No. 70 (December 16, 2007).

At issue in the case was the following rule: "Company communication systems and the equipment used to operate the communications system are owned and provided by the Company to assist in conducting the business of The Register-Guard. 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."

While the NLRB approved of the company's rule, it was also careful to recognize employees' Section 7 rights to communicate about their union activities or sentiments. Indeed, the employees' ability to communicate in other ways at work was an important factor in *The Register-Guard* decision. Those alternate means of communicating do not, however, have to be the most convenient or most effective mediums of communication.

The facts of *The Register-Guard* are fairly straightforward. The rule existed. Employees used e-mail to communicate about work related matters, but also communicated about non-work related personal matters (such as jokes, baby announcements, party invitations, and offers of sports tickets or services like dog walking). There was no evidence, however, that employees used the e-mail system to solicit support for any outside cause or organization (other than the company's annual United Way campaign).

The president of the union representing The Register-Guard employees sent three e-mails which resulted in warnings being issued by the company to her. One e-mail was for the purpose of clarifying what the union president considered an inaccurate or incomplete company communication. The other two urged union members to wear green on a certain date to support the union's bargaining position and to participate in the union's entry in a town parade. The administrative law judge held that all the company warnings to the union president were unlawful. The NLRB reversed the ruling on the warning for the second and third e-mails.

The NLRB rejected arguments that the e-mail system was the equivalent of face-to-face communications and that it was essentially a "gathering place" at work. Also rejected was the argument that the employer lost its right to enforce its property rights in the communications system because it permitted personal communications. Instead, the NLRB upheld the employer's property rights (citing a litany of cases where employers protected their property rights in phone systems, bulletin boards, public address systems, TV equipment, etc.) and further ruled that it is not unlawful to permit personal communications while banning non-business solicitations.

Establishing a clear standard, the NLRB held that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." The NLRB noted that some courts had described illegal discrimination as "unequal treatment of equals."

Thus, an employer may not allow one union to solicit but prohibit another from doing so, or allow anti-union employees to solicit but not those supporting a union. On the other hand, the NLRB explained, "an employer may draw a line between charitable solicitations and noncharitable (sic) solicitations, between solicitations of a personal nature (*e.g.*, a car for sale) and solicitations for the commercial sale of a product (*e.g.*, Avon products), invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use."

Applying these standards, the NLRB ruled that the warning given to the union president for sending the e-mail providing what she believed to be more complete and accurate information violated federal law because it was more akin to personal communications between employees, which the company had permitted. But the two e-mails asking the employees to wear green to support the union's cause and to participate in the parade were found to be non-business-related solicitations (which the rule did not permit and the company had not allowed); therefore, the company's warning stemming from these communications was lawful.

Practical Impact: According to Jimmie Stewart, a shareholder in Ogletree Deakins' Greenville office: "This ruling is not likely to put an end to the e-mail issue. It was a bitterly contested 3-2 decision. The dissenters (Liebman and Walsh) said that the decision confirmed that `the NLRB has become the Rip Van Winkle of administrative agencies, which must have slept through 20 years of technological advances in communication'."

Further, the dissent protested "in the strongest possible terms" the majority's definition of discrimination as a comparison of equals being treated differently rather than comparing access for union purposes to any non-business-related use of communication systems.

Stewart applauded the NLRB for providing guidance in a difficult and controversial area: "*The Register-Guard* ruling is welcome instruction on an issue which has been confusing at best. Employers should take the opportunity to review their solicitation and e-mail policies. If revisions are needed, the policies should be modified. Old policies should be revoked and the revised policies disseminated effectively. Managers and supervisors should be trained and the revised policies should be uniformly and consistently enforced."

Stewart and several other Ogletree Deakins' attorneys will be speaking at a program that focuses on new union organizing strategies and tactics. The program, "Not Your Father's Union Campaign," will take place on March 27-28 in Miami, Florida. For more information, call (310) 225-5668.

Note: This article was published in the January/February 2008 issue of *The Employment Law Authority*.

TOPICS

Traditional Labor Relations