

## D.C. Circuit Finds Unlawful Discrimination Against Union Emails

July 10, 2009

In a case involving employee use of a company email system for union-related purposes, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in *Register-Guard v. NLRB*, No. 07-1528 (July 7, 2009), rejecting the National Labor Relations Board's (the Board's) earlier decision upholding discipline against a union president who sent two union-related emails to fellow employees on the company's computer system. The court granted the union's petition for review and remanded the matter for further proceedings.

The Board's December 2007 *Register-Guard* decision, 351 NLRB 1110, held that an employer does not violate Section 7 of the National Labor Relation Act (NLRA or the Act) by maintaining a policy limiting the use of electronic communications systems for all "non-job-related solicitations." The Board ruled that employees have "no statutory right to use the [employer's] email system for Section 7 matters," just as an employer may restrict for Section 7 purposes other forms of communication, such as bulletin boards, telephones, and copy machines.

The Board's decision further adopted a new standard for determining whether an employer violates Section 8(a)(1) of the Act by enforcing its email or other solicitation policies in a so-called discriminatory manner—i.e., when an employer prohibits union-related email solicitations but allows solicitation on other topics. The Board found it permissible for an employer to draw a line between charitable and noncharitable solicitations, personal (i.e., car for sale) and commercial sale of products (i.e., Avon), and between business-related and non-business-related purposes. In each case, the fact that union solicitation falls on the prohibited side of the line, in the Board's view, does not alone constitute unlawful discrimination.

The union did not petition the D.C. Circuit to reject the underlying rule of law established by *Register-Guard* that the company did not violate the Act by maintaining a policy prohibiting email use for all non-job-related solicitations. Instead, the union contended that the Board factually erred in determining that the Guard Publishing Company enforced its policy without discriminating against union activity. The company's written "Communication Systems Policy" provided that:

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

The union argued that the phrase "other non-job-related solicitations" required the company to uniformly prohibit *all* personal solicitations in order to prohibit union-related solicitations. The record contained



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