Employer Violates The National Labor Relations Act By Selectively Targeting Union Related E-Mails

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The United States Court of Appeals in Washington, D.C., recently held that an employer committed an unfair labor practice by selectively enforcing its e-mail usage policy against an employee who sent union-related e-mails. The case, *Guard Publishing Company v. National Labor Relations Board*, is a reminder that e-mail policies must be carefully drafted and consistently enforced to avoid potential legal pitfalls.

The employer, a daily newspaper, claimed that the union-related e-mails violated its policy prohibiting e-mails "used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." Despite this policy, the employer routinely allowed e-mails offering tickets for sporting events and requesting services such as dog-walking.

When the Union filed its initial charge with the NLRB, it argued that the National Labor Relations Act provided employees with a statutory right to use an employer's e-mail system for certain union-related purposes. The NLRB disagreed, holding that an employer may limit non-work-related use of its e-mail system so long as it does not discriminate against protected union activity.

The NLRB defined discriminatory treatment narrowly as the "unequal treatment of equals." Applying this standard, the NLRB held that, with the exception of one e-mail that was not a solicitation, the employer did not discriminate against union-related emails. The NLRB based this decision on the theory that the employer made a distinction between personal solicitations (*e.g.*, "My car is for sale") and group/organization solicitations (*e.g.*, "Girl Scout Cookies for sale"). The outcome would have been different had the employer previously allowed group/organization solicitations, only to take action when those group/organization solicitations were union-related.

On appeal, the Court of Appeals held that the employer had in fact discriminated against protected union activity. The Court noted that the personal/group distinction relied on by the NLRB was not contained in the employer's e-mail policy. Nor was it discussed in the employee's disciplinary notice. In fact, the notice cautioned the employee against using the e-mail system for union/personal business.

Significantly, because the Union did not appeal the issue, the Court of Appeals did not address the NLRB's holding that an employer may limit non-work-related use of its e-mail system. However, that portion of the NLRB's holding may be revisited by the NLRB itself once President Obama's appointees to the NLRB are confirmed by the U.S. Senate.

Employers should review their solicitation-distribution and e-mail policies for clarity and should train managers on the proper and uniform enforcement of those policies.