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NLRB FINDS NO STATUTORY RIGHT TO USE EMPLOYER'S E-MAIL SYSTEM FOR "SECTION 7 COMMUNICATIONS"

In [*The Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 70](#) (December 16, 2007), the National Labor Relations Board, in a 3-2 decision, held that an employer did not violate Section 8(a)(1) by maintaining a policy that prohibited employees from using the employer's e-mail system for any "non-job-related solicitations."

The Board majority also announced and applied a new standard for determining whether an employer has violated Section 8(a)(1) by discriminatorily enforcing its policies. In deciding the case, the Board considered the exceptions and briefs of the parties, amicus submissions from various organizations, and presentations by the parties and some amici at an oral argument on March 27, 2007.

The employer's written policy prohibited the use of e-mail for "non-job-related solicitations." In practice, the employer allowed a number of nonwork-related employee e-mails, but there was no evidence that it permitted e-mails urging support for groups or organizations. The employer issued two written warnings to employee Suzi Prozanski for sending three union-related e-mails. The complaint alleged that the employer's maintenance of the policy and its enforcement against Prozanski were unlawful.

Addressing the maintenance of the policy, the Board majority of Chairman Battista and Members Schaumber and Kirsanow reasoned that under Board precedent, employees have no statutory right to use an employer's equipment for Section 7 purposes. The majority found that *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), in which the Court held that a ban on solicitation during nonworking time was unlawful absent special circumstances, was inapplicable to the use of an employer's e-mail system, because *Republic Aviation* involved only face-to-face solicitation, not the use of employer equipment. The majority noted that the use of e-mail "has not changed the pattern of industrial life at the Respondent's facility to the extent that the forms of workplace communication sanctioned in *Republic Aviation* have been rendered useless Consequently, we find no basis in this case to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." Therefore, the majority concluded, the maintenance of the policy did not violate Section 8(a)(1).

With respect to the alleged discriminatory application of the policy to Prozanski's e-mails, the majority clarified that "discrimination under the Act means drawing a distinction along Section 7 lines." The majority adopted the reasoning of the United States Court of Appeals for the Seventh Circuit, noting that in two cases involving the use of employer bulletin boards, the court had distinguished between personal nonwork-related postings such as for-sale notices and wedding announcements, on the one hand, and "group" or "organizational" postings such as union materials on the other. See *Fleming Companies v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003), denying enf. to 336 NLRB 192 (2001); and *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319-320 (7th Cir. 1995), denying enf. to 313 NLRB 1275 (1994). The Board majority found that the court's analysis, "rather than existing Board precedent, better reflects the principle that discrimination means the unequal treatment of equals." The majority overruled the Board's decisions in *Fleming*, *Guardian*, and other similar cases to the extent they were inconsistent with its decision here.

Applying its new standard, the majority found that the employer had permitted a variety of personal, nonwork-related e-mails, but had never permitted e-mails to solicit support for a group or organization. Because two of Prozanski's e-mails were solicitations to support the union, the employer did not discriminate along Section 7 lines by applying its e-mail policy to those e-mails. However, the majority found that a third e-mail by Prozanski was not a solicitation, but simply a clarification of facts surrounding a recent union event. Accordingly, the enforcement of the policy with respect to that e-mail was unlawful.

In dissent, Members Liebman and Walsh argued that "given the unique characteristics of e-mail and the way it has transformed modern communication, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper." Therefore, the dissenters reasoned, Board decisions finding no Section 7 right to use such employer property are inapplicable. Rather, pursuant to *Republic Aviation*, supra, and *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), the Board's task in cases involving employee-to-employee communication in the workplace "is to balance the employees' Section 7 right to communicate with one another against the employer's right to protect its business interests." In the dissenters' view, where an employer has given employees access to e-mail in the workplace for their regular and routine use – as the employer has done – a ban on "non-job-related solicitations" should be unlawful absent a showing of special circumstances. Finding no proof of special circumstances here, the dissenters would have found that the maintenance of the policy violated Section 8(a)(1).

Regarding the alleged discriminatory enforcement of the policy, Members Liebman and Walsh stated that they would adhere to Board precedent, under which they would find a violation as to all three of Prozanski's e-mails. They contended that the "discrimination" analysis applied by the Seventh Circuit and adopted by the majority, which focused on whether the other activities permitted by the employer were "equal" to Section 7 activity, was not appropriate in Section 8(a)(1) cases. In the dissenters' view, the essence of a discriminatory enforcement

violation is interference with the employees' Section 7 rights, and "[d]iscrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer's business justification" for prohibiting the activity.

In addition to the issues relating to maintenance and enforcement of the employer's existing e-mail policy, the Board majority of Chairman Battista and Members Schaumber and Kirsanow also dismissed an allegation that the employer violated Section 8(a)(5) and (1) of the Act by insisting on a bargaining proposal that would prohibit use of the e-mail system for "union business." Without passing on whether the proposal was unlawful, the majority found insufficient evidence that the employer had "insisted" on the proposal. In dissent, Members Liebman and Walsh found that the evidence as a whole did show "insistence," and that the proposal was an illegal codification of a discriminatory practice of allowing e-mail use for a broad range of nonwork-related messages, but not for union-related messages.

The Board also unanimously affirmed the judge's finding that the employer violated Section 8(a)(1) by maintaining an overly broad rule, in the absence of special circumstances, prohibiting employees from wearing or displaying union insignia while working with the public.

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