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Court Limits Enforcement of Non-Union Email Policy

Services

Labor & Employment

Traditional Labor Relations

Professionals

PAUL F. PAUTLER, JR.
KANSAS CITY:
816.983.8259
PAUL.PAUTLER@
HUSCHBLACKWELL.COM

TERRY L. POTTER
ST. LOUIS:
314.345.6438
TERRY.POTTER@
HUSCHBLACKWELL.COM

On July 7, 2009, the U.S. Court of Appeals for the D.C. Circuit determined that an employer violated the National Labor Relations Act by inconsistently enforcing an email use policy against union communications.

In this case, the Court reviewed a decision of the National Labor Relations Board (NLRB) regarding an unfair labor practice charge filed by the Eugene, Oregon Newspaper Guild. The Guild filed the charge when one of its members (who happened to be the union's president) was disciplined for using her employer's email system to send messages to colleagues regarding union business.

The employer, The Register-Guard, had in place a policy limiting the use of company-provided email to business-related purposes. The policy also specifically prohibited the use of the email system for solicitation or discussion of political causes or outside and non-job-related organizations. Over time, employees used the email system for personal use, including solicitation of personal items, such as for event tickets. Register-Guard management was aware of the personal use of the email system, but did not impose discipline for personal use of the email system prior to this instance.

After the employer disciplined the employee responsible for sending the email about union affairs, the union filed an unfair labor practice charge. The NLRB examined the manner in which the company enforced its email policy. Three instances of email usage were scrutinized. The first involved a message from the employee/union president entitled "Setting it Straight," which commented upon a prior union rally and, more specifically, the employer's warning that the rally would be attended by "anarchists." The Board ruled that the company violated the law when it disciplined the employee for using the email system to merely comment on union issues. The reasoning was that the company had

never disciplined anyone previously for private email use, and doing so now was solely because of the union-related content of the email.

The second and third emails were union-related, but did not comment on the employer's characterizations of the union rally. One message urged employees to "wear green" to show unity during contract negotiations, and the other asked for volunteers to help at the union's entry in a local parade. The NLRB upheld the discipline imposed for these email messages, concluding that the messages constituted "solicitation." The Board concluded that the policy did not allow solicitation for outside organizations. There was no evidence that the Register-Guard had previously allowed employees to solicit on behalf of outside organizations. Since the solicitation was on behalf of the union, and not personal, the Board concluded that the employer's discipline did not run afoul of the National Labor Relations Act.

The Court of Appeals agreed with the NLRB on the discipline imposed for the first email message. The Court held that, where an employer's no-solicitation policy for email usage is not regularly enforced, the employer violates the National Labor Relations Act when it chooses to enforce that policy related to union activity. Only the application of the policy was scrutinized. The key element, according to the D.C. Circuit, was the uneven enforcement of the email policy. The Court determined that the only instance where discipline occurred regarding the company email policy was in relation to union-related emails.

The Court disagreed with the Board on the second and third emails, however. In contrast to the Board, the Court determined that those emails did not constitute "solicitation." Accordingly, the Court concluded that the Register-Guard discriminated in violation of the law when it enforced its policy only in relation to emails having *union content*, and not in any other circumstance.

What This Means to You

This ruling should encourage employers to review both their email policies and the enforcement of those policies. With an organized workforce, email messages pertaining to union business or activity cannot be prohibited if other personal emails are permitted. At workplaces without union representation, the enforcement of a no-solicitation/no-distribution policy will be compromised (at least with respect to email communication of union activity) if email solicitations for other causes are tolerated or simply ignored by the employer.

Contact Info

If you have any questions about this or any other labor & employment matters, please contact your Husch Blackwell Sanders attorney.

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