PROSKAUER ROSE LLP®

Client Alert

A report for clients and friends of the Firm

June 2008

Employers Get Mixed Results in E-Mail Cases After NLRB's Landmark Ruling in *Register-Guard*

On May 15, 2008, the General Counsel of the National Labor Relations Board issued a report summarizing developments since the Board's recent decision in *The Guard Publishing Company, d/b/a The Register-Guard*, 351 NLRB No. 70 (2007), involving employee access to an employer's e-mail system for purposes of union organizing.

In *Register-Guard*, the NLRB ruled that the employer did not violate Section 8(a)(1) of the National Labor Relations Act by maintaining a policy prohibiting the use of the company e-mail system for all "non-job-related solicitations," including activity protected by Section 7 of the Act. The Board reasoned, as in prior cases involving company telephones, fax machines and copiers, that an employer's e-mail system is company property that "employees have no statutory right to use . . . for Section 7 purposes." The NLRB also redefined discriminatory enforcement of a business-use-only restriction on employer e-mail use, concluding that the employer did not violate the Act by enforcing its policy against e-mails soliciting support for the union, while permitting certain personal e-mail use, because it had not previously allowed the system to be used to solicit support for any outside group or organization.

Following the *Register-Guard* decision, the General Counsel directed the Board's Regional Offices to submit all cases involving discriminatory enforcement of "business use only" e-mail policies to the Division of Advice to assure consistent application of that ruling. Examined in the General Counsel's report were three cases involving employee use of an employer's e-mail system.

In one, the General Counsel upheld an employer's rule prohibiting union officials (who had a company e-mail account) from using the system to send plant-specific messages to managers at other facilities. In that case, the employer permitted the union to use its e-mail system to conduct union business and to communicate with management about labor relations issues at the facility where it represented employees, but threatened to revoke the union's privileges if it continued to send group e-mails to managers outside the facility. The Division of Advice concluded that the employer's rule was lawful because it "solely involved [the use] of company equipment," did not discriminate against union activity, and did not otherwise prohibit the union from engaging in protected communications outside the plant or to broad groups of managers.

In a second case, however, the General Counsel found that the employer discriminatorily enforced an otherwise valid rule prohibiting non-business use of company e-mail. In that case, an employee was given a written warning after sending e-mails to 20 co-workers about an off-site union meeting. Managers, supervisors and other employees, however, were allowed to send non-work related e-mails, including jokes, chain letters and solicitations for cosmetics and candies during working time. The investigation also revealed that the employer's decision to discipline the employee was content-based, aimed at punishing him for his union activity and chilling other employees from doing the same. In light of the evidence of anti-union motivation, the Division of Advice concluded that *Register-Guard* did not preclude a complaint.

In the final e-mail case discussed in the General Counsel's report, an employee was discharged for sending an anonymous e-mail to the employer's Board of Directors seeking an employee-complaint procedure. In rejecting the company's defense that the employee had made improper use of its e-mail system, the General Counsel emphasized that the employer had permitted extensive personal use of the system. Further, this particular e-mail did not constitute "solicitation" under the policy because it did not call for employees to take action, but rather was a direct communication to management seeking improved working conditions. Accordingly, the Division of Advice concluded that the discharge was unlawful.

Plainly, the Board is taking a very fact-specific approach to these issues, and any action against an employee based upon use of the employer's e-mail system should be carefully reviewed. The General Counsel is continuing to require the submission of all cases raising issues under its December 2007 ruling in *Register-Guard*. We follow this area closely and will advise you of developments as they become public.

BOCA RATON • BOSTON • LONDON

LOS ANGELES • NEW ORLEANS • NEW YORK • NEWARK

PARIS • SÃO PAULO • WASHINGTON, D.C.

Client Alert

Proskauer's nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. For more information about this practice area, contact:

New York

Peter D. Conrad
212.969.3020 – pconrad@proskauer.com

Michael J. Lebowich
212.969.3217 – mlebowich@proskauer.com

Boston

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Boca Raton

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Newark

Marvin M. Goldstein
973.274.3210 – mmgoldstein@proskauer.com

Los Angeles

Mark Theodore
310.284.5640 – mtheodore@proskauer.com

New Orleans

Howard Shapiro
504.310.4085 – howshapiro@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

You can also visit our Website at **www.proskauer.com**