



NLRB ISSUES IMPORTANT NEW DECISION ON E-MAIL POLICY AND EXCEPTIONS TO SOLICITATION RULES



Gary Wright
 "Traditional NLRB decisions provide that employees have the statutory right to engage in union solicitations on company property, so long as there is no interference with work."

For a number of years unions and employers have wondered how the NLRB would rule on the legality of bans on union solicitations over an employer's e-mail system. Traditional NLRB decisions provide that employees have the statutory right to engage in union solicitations on company property, so long as there is no interference with work. Further, prior NLRB decisions indicate that union-related solicitations may not be discriminated against, as compared to other non-work-related solicitations, such as for personal or charitable causes. As an application of these principles, normally an employer may limit postings on plant bulletin boards to company postings or other work-related matters, so long as it does not discriminate against employees who desire to post union-related matters.

The question is particularly important regarding an employer's e-mail system, because e-mails are such a common, powerful, and efficient method of communication. The unions argued that there is little reason to limit union solicitations on an employer's e-mail system, particularly if other non-work-related communications are allowed. The unions also argued that an e-mail system is more akin to an oral solicitation, which is allowed on company property provided there is no interference with work, than the use of an employer bulletin board.

In a December 21 ruling, a 3-2 majority of the NLRB ruled that an employer did not violate federal labor law by maintaining a policy prohibiting use of its e-mail system for "non-job-related solicitations," and that the employer legally enforced the policy against an employee/union president who sent two e-mails to employees urging them to support the union. Register-Guard, 351 NLRB No. 70, 183 LRRM 1113. There are actually two significant parts to the ruling, and each needs to be examined separately, as do the repercussions of the ruling.

The first important part of the ruling is that employees have no statutory right to use an employer's e-mail system for activity protected under Section 7 of the Labor Act. A majority of the NLRB found that an employer has the basic property right to regulate and restrict employee use of its e-mail system.

There is a second, equally important part of the ruling. After having found that the employer may limit use of its e-mail system, a separate issue was whether the employer engaged in discriminatory enforcement of its rule against union solicitations. On this point, the Board majority makes a new and important distinction in saying that, "An employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and

Continued on page 3 ►►

Our Firm Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Weathersby & Schneider, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

KNOW YOUR ATTORNEY

Fredrick R. Baker



Wimberly Lawson Seale Wright & Daves, PLLC, is pleased to announce that Fredrick R.

Baker has been elevated to the status of Member of the Firm.

Fred has been with the firm for over six years and has successfully represented the firm's clients in numerous litigation matters as well as served clients well in providing sound counsel and advice.

Fred is a Member in the Cookeville, Tennessee office. His law practice includes an emphasis in workers' compensation and employment law.

Fred received his Bachelor of Arts degree in Philosophy, summa cum laude, from Transylvania University and his law degree, magna cum laude, from the University of Tennessee.

Be sure to visit our website often

www.wimberlylawson.com

for the latest legal updates, seminars, alerts and firm biographical information!

EMPLOYER'S HARASSMENT POLICY WITH NUMEROUS AVENUES FOR REPORTING HARASSMENT ESTABLISHED DEFENSE



RON DAVES

"The court found it therefore unreasonable for the plaintiff not to pursue any other avenue available under the employer's harassment policy after the supervisor indicated his unwillingness to act on her complaint."

harassment policy. The plaintiff contended that she did not complain to anyone else because she feared retaliation.

The plaintiff further contended that she did, in fact, use the employer's harassment reporting policy by complaining to the harassing supervisor. However, the court found that the employer's policy offered numerous avenues for reporting harassment, including any supervisor, the employee relations office, the executive director, and others. The court found it therefore unreasonable for the plaintiff not to pursue any other avenue available under the employer's harassment policy after the supervisor indicated his unwillingness to act on her complaint. The court states that, "In most cases, as here, once an employee knows his initial complaint is ineffective, it is unreasonable for him not to file a second complaint, so long as the employer has provided multiple avenues for such a complaint." Thus, the court dismissed the allegation against the employer, finding that the plaintiff's failure to complain after her initial conversation with her supervisor was a failure to take advantage of the employer's harassment prevention program. Other cases have pointed out a disadvantage for employers who provide numerous avenues for reporting harassment.

A best-practices approach is likely to be one that provides more than one or two avenues for complaints, but is very specific as to what persons are the responsible parties to whom complaints can be made. That will provide more assurance from an employer that complaints are handled responsibly.

Editor's Note — This case establishes the advantages of an employer's having multiple reporting channels to register an harassment complaint, and even suggests the desirability of having an appeals procedure for such an harassment complaint. Not every court is going to agree with the result in this case, but an employer is provided another potential defense to harassment claims by careful drafting of its harassment reporting policies.

NLRB ISSUES IMPORTANT NEW DECISION ON E-MAIL POLICY AND EXCEPTIONS TO SOLICITATION RULES
continued from page 1

between business-related use and non-business-related use.” The Board majority notes that in the past it had looked at whether the employer allows employees to use its communications for non-work-related purposes, but now finds that this standard “fails to adequately examine whether the employer’s conduct discriminated against Section 7 activity.” The Board majority finds the more appropriate analysis “better reflects the principle that discrimination means the unequal treatment of equals.” Thus, the Board should look at whether the employer treated all communications “of a similar character” the same, and it should be permissible for the employer to treat personal communications differently than communications on behalf of organizations, including unions.

Applying this standard, the Board majority finds the employer did not discriminate along Section 7 lines when it disciplined the union president for two e-mails soliciting employees to take action in support of the union. Although the employer “tolerated personal employee e-mail messages,” there was “no evidence that the [employer] permitted employees to use e-mails to solicit other employees to support any group or organization,” the Board stated.

However, the Board draws a distinction on another e-mail sent by the union president, finding that it was not a solicitation because it “did not call for action” and instead “simply clarified the facts surrounding the union’s rally the day before.” Because the employer had “permitted a variety of non-work-related e-mails other than solicitations,” the Board said it found that the only difference in this e-mail and those permitted by the employer is that this e-mail was union-related. This particular e-mail was thus statutorily protected, and could not be the source of disciplinary action or discrimination by the employer.

The Board majority supports its ruling by pointing to prior cases involving employer-owned bulletin boards, telephones, and televisions, noting that it has consistently held that there is no statutory right to use an employer’s equipment or media so long as the restrictions are non-discriminatory.

The two dissenting Democrats on the Board vigorously argued that, “Where, as here, an employer is giving employees access to e-mail for regular, routine use in their work, we would find that banning all non-work-related “solicitations” is presumptively unlawful absent special circumstances.” They assert that ownership does not give the employer “an absolute right to exclude Section 7 e-mails.”

The two-member minority also dissents, “in the strongest possible terms,” from the application of the discrimination concept. They say that the Board “has long held that an employer violates [the Act] by allowing employees to use an employer’s equipment or other resources for non-work-related purposes while prohibiting Section 7-related uses.” In other words, they take the position that if the employer allows employees to use an e-mail system for personal reasons, then the employer cannot discriminate against union-related solicitations.

***Editor’s Note** — The majority ruling that an employer may restrict e-mail usage to work-related purposes is not surprising, and is supported by applicable precedent, although an argument could be made to the contrary. The surprising aspect of the ruling is the Board majority’s new distinction as to what constitutes “discrimination,” emphasizing that an employer may distinguish among communications “of a similar character.” Under this distinction, employers may ban solicitations by unions or for other commercial activities, while allowing personal communications. One wonders how the employer will be able to effectively enforce this distinction, however. Issues will undoubtedly arise in the future as to whether the employer knowingly allowed inappropriate solicitations, thus allowing union-related solicitations. A further complication is that the current decision is a narrow 3-2 ruling, and the Republican Chairman of the NLRB’s term as a Board member expired on the day after the ruling, and many Democrats have threatened not to reconfirm him because he has been a part of so many alleged anti-union rulings. Thus, some parts of this precedent may be overruled if a different Board majority is established in the future.*

TO SUBSCRIBE to our complimentary newsletter,
please go to our website at www.wimberlylawson.com or email
srichards@wimberlylawson.com



ACCOMMODATION FOR SUNDAY MORNING SERVICES ENOUGH

An interesting religious accommodation issue was recently decided by the Eleventh Circuit Court of Appeals, in which an employer's accommodation by allowing Sunday mornings' off during church services was found sufficient. *Bush v. Regis Corp.*, 102 FEP Cases 560 (C. A. 11, 2007). The plaintiff and her family were Jehovah's Witnesses who attended religious services on Sundays, and their faith also required that they perform field service, which they preferred to do as a

Joe Lynch

"The plaintiff and her family were Jehovah's witnesses who attended religious services on Sundays, and their faith also required that they perform field service, which they preferred to do as a family on Sunday afternoon."

family on Sunday afternoon. The court noted that the phrase "reasonable accommodation" is not defined and turns on the facts and circumstances of each case. It stated that compliance with Title VII does not require an employer to give an employee a choice among several accommodations, nor is the employer required to demonstrate that alternative accommodations proposed by the employee constitute undue hardship.

Under the facts of the current case, the employer offered the plaintiff a reasonable accommodation. When it required her to cover shifts every other Sunday, it started the shift after her religious services had concluded. And as soon as the services changed times, the employer gave the plaintiff Sundays off

to accommodate the services. In addition, the employer permitted the plaintiff to swap shifts to allow her to attend religious conventions.

In spite of these accommodations, the plaintiff argued that the Sunday shift prevented her from doing field service with her family, which constituted a bona fide religious belief. The court found that the record indicated that field service was not required to be performed on Sundays; rather, that was the day the plaintiff and her family merely wished to perform field services. An employee has a duty to make a good faith attempt to accommodate her religious needs through means offered by the employer. In this case, the court found that the plaintiff did not make any such effort, and accordingly the employer was properly granted summary judgment on the religious accommodation claim.

Editor's Note — This case demonstrates several principles. First, it is difficult to set forth hard and fast rules defining how far an employer must go in granting an accommodation. Second, the employer does have some flexibility in granting accommodations, and the employee has some duty to cooperate. It certainly helped the employer's case that it had accommodated the plaintiff in various ways, even though it did not make all the accommodations requested by the plaintiff.

Finally, the point is very interesting that the plaintiff requested accommodations in areas not required by her religion. Thus, whether an employee's requested accommodation is required by their religion, is another factor to be considered in the determination of reasonable accommodation.



LOSS/THEFT OF EMPLOYEE PERSONAL INFORMATION MAY TRIGGER LEGAL REQUIREMENTS

Many states have passed laws requiring businesses to disclose to residents of the state any breach in the security of computerized data containing personal/private information. All of the states require that the disclosure be made in the most expedient time possible unless directed otherwise

Mark Travis

"All of the states require that the disclosure be made in the most expedient time possible unless directed otherwise by law enforcement."

by law enforcement. Most of the state laws do not specify the details or manner of providing notice, but the statute in New York state specifies what type of information must be provided. This state statute requires the notice to include: contact information for the company making the disclosure, and a description of the categories of information that were, or reasonably believed to have been, acquired by a person without valid authorization. Some states also require certain state authorities to be notified. Even in the absence of statute, some courts have entertained cases involving a breach of security of private information under standard negligence theories.

While these cases have normally been unsuccessful, employers should check what obligations they might have should there be a loss or theft of employee personal information.