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D.C. Circuit Limits NLRB's *Guard Publishing* Decision on E-Mail Policies

David W. Garland[1] and William R. Horwitz[2], Sills Cummis & Gross P.C.

Employers that celebrated the 2007 decision in *The Guard Publishing Company*, 351 NLRB No. 70 (2007), in which the National Labor Relations Board (the "NLRB" or the "Board") upheld an employer's ability to enforce a facially-neutral e-mail policy to prohibit employees from disseminating pro-union messages via its e-mail system, will be disappointed by the recent opinion of the U.S. Court of Appeals for the District of Columbia Circuit reviewing that decision. In *Guard Publishing Company v. NLRB*, 2009 BL 145295 (D.C. Cir. July 7, 2009), the Court concluded that the employer had acted improperly in enforcing its e-mail policy. The decision highlights the importance of exercising care in formulating and enforcing e-mail policies.

Factual Background

In 1996, the Guard Publishing Company (the "Company") adopted a policy governing the use of its e-mail system. The policy provided: "Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations."

Company employees regularly sent and received e-mail regarding work-related matters. Employees also used e-mail for personal messages such as birth announcements, party invitations, offers of sporting event tickets, and requests for services such as dog walking. The Company knew about and allowed these nonwork-related e-mail messages. Other than solicitations for the United Way, for which the Company conducted charitable campaigns, employees apparently did not use the Company's e-mail system to solicit participation in or support for any outside organization or cause.

In 2000, the Company issued written warnings to Suzi Prozanski, a Company employee and president of a union representing a unit of its employees, for three union-related e-mails that she had sent to her fellow union members at their Company e-mail addresses. On May 4, she had sent an e-mail discussing a union rally that had taken place earlier in the week. On August 14, she had sent an e-mail urging employees to wear green to show their support for the union during collective bargaining negotiations. On August 18, she had sent an e-mail encouraging

employees to participate with the union in an upcoming town parade. After the Company issued this discipline to Prozanski, the union filed an unfair practice charge challenging, among other things, the e-mail policy and the written warnings.

The NLRA

Section 7 of the National Labor Relations Act ("NLRA") provides, in relevant part, that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Under the NLRA, an employer engages in an unfair labor practice if it interferes with an employee's Section 7 rights (Section 8(a)(1)) or discriminates against an employee in order to "encourage or discourage" union membership (Section 8(a)(3)). 29 U.S.C. § 158(a)(1), (3).

The ALJ Decision

An Administrative Law Judge ruled that the Company's e-mail policy did not violate the NLRA. He determined, however, that the Company discriminated, in violation of the NLRA, by issuing written warnings to Prozanski for her union-related e-mails while permitting other employees to send and receive other nonwork-related e-mails. The Company and union filed exceptions to the ALJ's decision.

The NLRB

In its decision, the NLRB first considered whether the Company's e-mail policy prohibiting "non-job-related solicitations" violated the NLRA. The NLRB decided that it did not, explaining that as long as the Company did not discriminate against employees because of their union activity, it was not required to permit union-related e-mail.

The Board then considered whether the Company's enforcement of the e-mail policy was discriminatory. According to the NLRB, "discrimination means the unequal treatment of equals." Therefore, "an employer clearly would violate the [NLRA] if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not prounion employees." In contrast, "an employer may draw a line between charitable solicitations and noncharitable 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 between business-related use and non-business-related use." Thus, an employer can prohibit union communications as part of a ban on all "communications of a similar character."

Applying this reasoning, the Board determined that the Company did not violate the NLRA when it disciplined Prozanski for her August 14 and 18 e-mails asking employees to take action in support of the union because, although the Company permitted personal e-mails, no evidence showed that it permitted the use of e-mail to solicit support for any organization or group. The NLRB reached a different conclusion regarding Prozanski's May 4 e-mail, which it characterized as merely an account of facts about a union rally and not a solicitation. Given that the Company permitted other nonwork-related e-mails, it could not prohibit ones simply because they related to the union. Thus, the Company violated Section 8(a)(1) and (3) by issuing a warning to Prozanski for her May 4 e-mail. Both the Company and the union petitioned the D.C. Court of Appeals to review the decision.

The Court of Appeals

The most significant aspect of the NLRB's decision was the proposition that an employer does not violate the NLRA by prohibiting union-related e-mails pursuant to a facially-neutral e-mail policy that does not discriminate against unions. In the Court of Appeals, however, the union did not challenge this proposition and, as a result, the Court did not consider the issue. Instead, the Court "move[d] directly to the question of whether the [Company] selectively enforced its e-mail policy against the union."

The union contended that the Company's enforcement of the policy as to Prozanski's May and August e-mails was discriminatory. The Company contended that the NLRB correctly found no discrimination with respect to Prozanski's August e-mails, but contended that the NLRB erred in concluding that it had discriminated with respect to her May e-mail. The Court agreed with the union.

The Court explained that an employer's otherwise valid policy prohibiting solicitation may not be used to discriminate against union solicitation. Considering the ordinary definition of the word "solicit," the Court concluded that the Company's attempt to characterize Prozanski's May e-mail as a solicitation was "simply more distortion than the words can bear." The Court observed that the only difference between Prozanski's May e-mail and nonwork-related e-mails that the Company permitted was that her e-mail was union-related. Thus, the Court determined that the Board's conclusion that the Company's decision to discipline Prozanski for the May e-mail violated the NLRA was "certainly reasonable."

The Court, however, disagreed with the NLRB regarding the August e-mails. The Court explained that those e-mails constituted solicitations because they called upon employees to take action to support the union. The Court rejected the NLRB's reasoning that these e-mails violated the e-mail policy because, unlike the numerous personal solicitations sent by employees, these constituted solicitations to support a group or organization.

The Court labeled this rationale a "post hoc invention," noting that the e-mail policy "made no distinction between solicitations for groups and for individuals." The Court observed that the disciplinary warning that Prozanski received "did not invoke the organization-versus-individual" distinction, but instead warned her about using the e-mail system for "union/personal business." According to the Court, "neither the company's written policy nor its express enforcement rationales relied on an organizational justification."

Finally, the Court noted that "the only employee e-mails that had ever led to discipline were the union-related e-mails at issue here." The Court concluded that disciplining Prozanski for her August e-mails violated the NLRA.

Conclusion

The law governing the use of e-mail in the workplace continues to develop. Although it would be difficult for an employer to revise its policies with every new court decision, an employer should periodically review its policies to ensure that they conform to the latest developments. Based upon prior court decisions, employers should generally ensure that their policies clearly state: (1) all electronic communications are the property of the employer; (2) employees must not use the Internet or e-mail for conduct that is inappropriate (such as transmitting derogatory, harassing, or offensive information or images) or illegal (such as gambling); and (3) the employer reserves the right to monitor all e-mail communications and Internet activity and, therefore, employees should have no expectation that any such information will be private.

Employers should also review their e-mail policies to ensure that they are facially-neutral, and may even wish to consider formulating policies that prohibit solicitations on behalf of individuals or organizations. Simply issuing appropriate policies, however, is not enough. As *Guard Publishing* makes clear, employers must also enforce e-mail policies in an even-handed manner and, in particular, not single out union communications.

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[1] David W. Garland is Chair of the Employment and Labor Practice Group of Sills Cummis & Gross P.C., with offices in Newark, Princeton, and New York City. He devotes his practice to defending corporate clients in employment discrimination, wrongful discharge, and other employment-related litigation. Mr. Garland has defended lawsuits in courts throughout the United States. Mr. Garland is listed in *The Best Lawyers in America, The Chambers USA Guide to America's Leading Business Lawyers*, and *Who's Who Legal USA — Management Labour and Employment Lawyers*.

[2] William R. Horwitz is Of Counsel in the Employment and Labor Practice of Sills Cummis & Gross P.C. He represents corporate clients in employment-related litigation in federal and

state courts, before federal and state agencies, and in arbitration. He regularly counsels clients on employment-related issues and works with companies to develop new or improve existing policies, procedures and agreements to safeguard confidential information and business relationships.

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