

# Employee rights lagging behind digital age

Sunday, 18 May 2008

By Diane Stafford

Two college students in California may force the National Labor Relations Board to enter the 21st century -- but don't get your hopes up soon. The presidential election season has put politics over expediency.

Once we get a new president, and the new president's appointments fill vacancies on the NLRB board, we may finally get a workplace-savvy ruling from the board about employee-organizing rights in the digital age.

A bit of background: The NLRB board made a neo-Luddite decision in December in a case known as Register-Guard when it failed to recognize that "remote" workers communicate with each other online.

The decision in that case failed to recognize that in widely dispersed workplaces, many co-workers never meet in break rooms or near bulletin boards, the traditional gathering spots for employee communication.

On the heels of Register-Guard, here's the new case to watch:

Sarah Doolittle and Austin Garrido, two California Polytechnic State University students worked part time for ULoop.com, an online marketplace for college students on campuses. Early this year, they noticed that their paychecks were a lot smaller than expected and, upon inquiry, learned that their pay rate had been cut without notice from \$10 an hour to \$8 an hour.

They posted a message on the ULoop-sponsored message board set up for employees on dispersed campuses, saying that they wanted to form a union. Twenty minutes later, they said, they were fired, ostensibly for using the company's site for union-organizing activities. ULoop isn't commenting.

The students filed a complaint with the NLRB, alleging that their union-organizing rights had been violated. If they had posted such a notice on the office bulletin board, handed out fliers in the parking lot or phoned each other, their right to discuss unionizing would have been protected by law.

The ULoop case will take time to percolate through the system. Meanwhile, we're left with Register-Guard, which most labor law experts agree was a behind-the-times ruling.

In December, the NLRB ruled 3-2 (Republicans overruling Democrats) that the employer in Register-Guard could prohibit union solicitations at work by e-mail because its existing workplace policy banned all nonjob-related solicitations on the company's electronic platforms.

Immediately, some employment law attorneys told their employer clients that the decision meant they could safely prevent union-organizing activity on their proprietary electronic platforms as long as they prohibited all kinds of employee solicitations using those media.

Some workplaces forbade co-worker e-mails such as "Please buy my daughter's Girl Scout cookies" as an insurance policy against having to allow electronic union-related solicitations.

But the overriding legacy of Register-Guard, short-term though it could be, was the board's failure to acknowledge the way many employees now work and communicate.

"This is a great transformational issue, focused on how old Labor Board precedent applies in a modern, virtual employment world," commented employment law attorney Tim Davis when asked his thoughts about the situation.

Davis, a lawyer at Constangy, Brooks & Smith who represents employers, added: "Unfortunately, this is a political hot potato. It will be decided in the political arena before it gets decided in the legal arena."

Josh Goldstein, press secretary for the American Rights at Work organization, put it succinctly: "The workplace is changing, and the law needs to catch up." Diane Stafford is the workplace and careers columnist at The Kansas City Star. She can be reached at [stafford@kcstar.com](mailto:stafford@kcstar.com). Source:

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