

Zinsergram a/k/a Legal Update



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GRIFFIN APPROVED AS NLRB GENERAL COUNSEL

On October 29, 2013, by a vote of 55 to 44, the U.S Senate approved the nomination of Richard Griffin to be General Counsel of the National Labor Relations Board. Griffin's nomination was controversial – for good reason. Before he was approved as NLRB General Counsel, he had recently been one of President Obama's unconstitutional recess appointees.

Prior to his recess appointment to the NLRB, Griffin was General Counsel to the International Union of Operating Engineers. Currently, he is also a named defendant in a lawsuit in California, wherein both he and the union are accused of RICO violations. Griffin's nomination was clearly part of the administration's longstanding attitude of, "We are going to do what we want, try to stop us if you can!"

After the U.S. Court of Appeals for the D.C. Circuit ruled Obama's recess appointees to be unconstitutional, Republican members of the U.S. Senate blocked Griffin's nomination to the NLRB. Figuratively giving the Senate "the finger," President Obama then nominated Griffin to be NLRB General Counsel. Unfortunately, by a vote of 62 to 37, enough Republican Senators broke ranks on October 28, 2013 to stop the filibuster of Griffin's nomination.

This nomination's approval comes none too soon for the administration. Just last month, the U.S. District Court for the Western District of Washington dismissed an NLRB 10(j) injunctive relief case against an Employer. In dismissing the case, the Court ruled that the NLRB did not have authority to bring the lawsuit because, under the so-called Federal Vacancies Reform Act, Acting General Counsel Lafe Solomon was not validly appointed to that role.

Solomon had been "Acting" for over two and a half years, and there was no way he would have ever been confirmed by the U.S. Senate. You will remember that Solomon is the person who prosecuted Boeing for opening a plant in South Carolina. However,

newly confirmed General Counsel Griffin is expected to be just as unabashedly pro-union as Solomon. The NLRB General Counsel post is a very powerful position, as the General Counsel decides which cases are to be prosecuted.

NLRB ALJ UPHOLDS REGISTER-GUARD DECISION

On October 24, 2013, NLRB ALJ Paul Bogas ruled that Purple Communications, Inc. could lawfully enforce its e-mail policy. That policy prohibits employees' use of Company equipment, including computers, Internet, and e-mail systems, for anything other than business purposes. The employees are prohibited from exchanging e-mails with individuals who have no professional or business affiliation with the Company.

The NLRB General Counsel argued that the Judge should overrule the NLRB's 2007 *Register-Guard* Decision. That Decision held that employees have no right under the National Labor Relations Act to use their Employer's e-mail system for union organizing purposes. The NLRB General Counsel said *Register-Guard* should be overruled because of the increased importance of e-mail as a method of communication.

Upholding the Company's policy, ALJ Bogas stated that he was bound by *Register-Guard*, and that only the NLRB could overrule it. (*Editor's Note: The Zinser Law Firm, P.C., represented Register-Guard in the 2007 NLRB case.*)

The NLRB is looking for the right case to try to overrule *Register-Guard*. All NLRB Regional Offices have been directed to send any new unfair labor practice charges implicating e-mail issues to the NLRB's Division of Advice in Washington, D.C.

NLRB MEMBER KENT HIROZAWA PREDICTS THE FUTURE

Newly appointed NLRB Board Member Kent Hirozawa gave a peak at the Board's agenda in his speech on October 30, 2013 in New York City. He stated that NLRB Chairman Mark Pearce is likely to engage in the rulemaking process.

Previously, the NLRB has attempted to impose new rules requiring notice-posting in the workplace and "quickie elections." Those rules have been found to be unconstitutional by the courts, and they are further complicated by the fact that unconstitutional recess appointees imposed the rules. Now, with a confirmed Board of five members, Chairman Pearce is likely to revisit both of those issues.

Hirozawa also stated that the NLRB will continue to pursue and attack Employers' handbook rules and policies, including the at-will doctrine, off-duty access to the Employer's premises, social media, and confidentiality.

Warning: All Employers should expect an active and unfriendly NLRB in 2014.

COURT SMACKS DOWN EEOC FOR ARROGANCE

The EEOC filed suit against Bass Pro Outdoor World, alleging Title VII violations. In its defense, Bass Pro claimed that the EEOC did not "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." The EEOC, however, claimed sovereign immunity and that its actions were not reviewable in court.

The District Court disagreed with the EEOC, noting that the lower courts remain free to scrutinize the EEOC's conciliation attempts. In addressing the sovereign immunity claim, the Court stated, "That cannot be right. Not only does the EEOC misapprehend [the test], it misunderstands 'relief.'"

Admonishing the EEOC, the Court stated:

It would make little sense for Congress to impose certain conditions precedent on the EEOC's authority to bring suit if the EEOC could just turn around and claim sovereign immunity from judicial enforcement of that condition.

In dismissing the EEOC's claims, the Court noted, "In support of its unusual argument, the EEOC has not cited any case in which a statutorily prescribed precondition to suit was found unreviewable. Instead, it relies on the legislative history to Title VII..." It continued, "The EEOC thus essentially uses the minority opinion in Congress – on an issue not even identical to the one in dispute here, to support the argument it urges this Court to adopt. The Court is not convinced."

This is yet another case where the EEOC engaged in a frivolous action against an Employer.