EMPLOYEE ELECTRONIC COMMUNICATIONS IN A BOUNDARYLESS WORLD

Robert Sprague*

I. INTRODUCTION

Keeping abreast of new communications technologies has been a daunting task, not just for sophisticated technophiles but also for businesses and the law.1 It was only recently that e-mail “transformed modern communication” in the workplace.2 More recently, the National Labor Relations Board (NLRB or the Board) ruled that “Liking” a conversation on Facebook could constitute protected concerted activity under the National Labor Relations Act.3 Even the United States Supreme Court has acknowledged the breadth of information available through cell phones: “Today, . . . it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.”4

Three quarters of American workers are considered “mobile,”5 meaning they are tethered to their “workplace” via mobile communications services and devices. As more and more workers are electronically “linked into” their employers through a variety of communications services and devices, they are simultaneously engaging in personal social interactions, often

---

* J.D., M.B.A. Associate Professor of Legal Studies in Business, University of Wyoming College of Business Department of Management and Marketing. The author thanks Kellsie Jo Nienhuser, J.D. 2015, University of Wyoming College of Law, for her excellent research assistance.


3 See Three D, LLC, 361 N.L.R.B. No. 31, 2014 WL 4182705 (Aug. 22, 2014); see also infra notes 13, 131 and accompanying text.

4 Riley v. California, 134 S. Ct. 2473, 2490 (2014) (citing City of Ontario v. Quon, 560 U.S. 746, 760 (2010)); see also Quon, 560 U.S. at 760 (“Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.”).


433
through the same services and with the same devices. While waiting in line for a latte, a person may be juggling a client inquiry and a child’s soccer schedule on the same device.\(^6\) Employees may often use those same “dual-use” services and devices to discuss working conditions among themselves. And before mobile devices “freed” employees from the confines of the workplace, work demands still overlapped with personal time, blurring the distinction between home and work life, as Justice Blackmun acknowledged more than twenty-five years ago:

It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work. Consequently, an employee’s private life must intersect with the workplace, for example, when the employee takes advantage of work or lunch breaks to make personal telephone calls, to attend to personal business, or to receive personal visitors in the office. As a result, the tidy distinctions . . . between the workplace and professional affairs, on the one hand, and personal possessions and private activities, on the other, do not exist in reality.\(^7\)

This Article accepts that American employers will, to some degree, monitor their employees’ communications.\(^8\) It also considers the “dual-use” nature of communications services and devices—i.e., for both work and personal uses—to sometimes be boundaryless, where the distinction between work and personal use is sometimes lost or, at a minimum, blurred.\(^9\) The reality is that employers frequently discipline and discharge

---


\(^7\) O’Connor v. Ortega, 480 U.S. 709, 739 (1987) (Blackmun, J., dissenting) (citations omitted).


employees based on their electronic communications. This Article examines the boundaries (pun intended) within which employers can access and act upon employees’ private communications. Part II reviews the NLRB’s earlier decisions regarding employers’ abilities to limit use of their internal electronic communications systems. Part III examines the NLRB’s most recent decision regarding employees’ statutory rights to use their employers’ e-mail systems for “nonwork” communications. Part IV argues that developing technologies require a reexamination of employer practices with respect to employees’ personal communications; it explores various ways in which employers can find themselves liable for accessing those personal communications, as well as procedures to avoid such liabilities. This Article concludes with final arguments that the NLRB and employers’ focus just on e-mail use is outdated and archaic.

II. RESTRICTING EMPLOYEE ELECTRONIC COMMUNICATIONS UNDER THE NATIONAL LABOR RELATIONS ACT


11 Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the NLRA. 29 U.S.C. § 158(a)(1). 29 U.S.C. § 157 is the codification of section 7 of the NLRA, and the guarantees thereunder are often referred to as “section 7 rights.” Section 7 protects employees’ concerted activities. Id. § 157 ("Employees shall 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 . . . ‘"). In order to be protected, employee activity must be (1) concerted, (2) for the objective of mutual aid or protection, and (3) not unlawful, overly disloyal, or constitute a breach of contract. See William R. Corbett, Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again, 23 BERKELEY J. EMP. & LAB. L. 259, 279 (2002); see also Robert Sprague, Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices, 14 U. PA. J. BUS. L. 957, 958–60 (2012) (discussing the interplay between sections 7 and 8(a)(1)).
their employers’ policies prohibiting employees from using the employers’ e-mail systems for nonwork-related communications. Those two earlier decisions are discussed below.

A. 2007: The Guard Publishing Company (Register-Guard) Decision

In 1996, The Guard Publishing Company, doing business as The Register-Guard, implemented a “Communications Systems Policy” (CSP) when it installed a new computer system that provided e-mail to most of its employees. The CSP provided, in pertinent part:

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.12

In 2000, Suzi Prozanski, a Register-Guard employee and president of the local newspaper guild, was disciplined for violating the CSP after sending union-related e-mail messages to her fellow employees through Register-Guard’s e-mail system: the first from her computer at work,13 and two subsequent messages three months later from her computer at her union office.14 An NLRB Administrative Law Judge (ALJ)15 subsequently ruled that Register-Guard had committed an unfair labor practice in violation of section 8(a)(1) of the NLRA by (1) discriminatorily enforcing the CSP to prohibit union-related e-mail messages while allowing a variety of other

---

13 Id.
14 Id. at 1112.
15 An unfair labor charge under the NLRA is initiated by filing a charge with the appropriate NLRB regional office. See 29 C.F.R. § 101.2 (2014). If, after investigation, there is no settlement and the regional director believes the charge has merit, a formal complaint will be issued. See id. § 101.8. Formal complaints of unfair labor practices are initially heard before an ALJ. See id. § 101.10(a). The ALJ’s decision is filed with the NLRB, which becomes the decision of the Board unless either or both parties file exceptions. See id. §§ 101.11, 101.12(b). If any party files exceptions, the Board will review the record and issue a decision and order in which it may adopt, modify, or reject the findings and recommendations of the ALJ. See id. § 101.12(a). Board decisions may be appealed to the appropriate United States Court of Appeals. See id. § 101.14. There is no private right of action under the NLRA.
nonwork-related e-mail messages, and (2) specifically by disciplining Prozanski for her union-related e-mail messages.\textsuperscript{16}

A divided Board decided that the employees had no statutory right to use Register-Guard’s e-mail system for section 7 matters.\textsuperscript{17} Noting that whether employees have a specific right under the NLRA to use an employer’s e-mail system for section 7 activity was an issue of first impression before the Board, the majority began its analysis by pointing out that “[a]n employer has a ‘basic property right’ to ‘regulate and restrict employee use of company property.’”\textsuperscript{18} Here, the communications system, including its e-mail system, was Register-Guard’s property and was purchased for use in operating its business.\textsuperscript{19}

The Board majority cited numerous cases uniformly supporting the rule that there is “no statutory right . . . to use an employer’s equipment or media” (such as a television in a break room, bulletin boards, telephones, and public address systems) as long as the restrictions are nondiscriminatory.\textsuperscript{20} The key dispute between the Board majority and dissent was whether this rule should apply to e-mail communications. Indeed, the dissent accused the Board of being the “Rip Van Winkle of administrative agencies” for its failure to recognize that e-mail has revolutionized communications within and outside the workplace.\textsuperscript{21}

\textsuperscript{16} See Register-Guard, 351 N.L.R.B. at 1112.
\textsuperscript{17} Id. at 1114.
\textsuperscript{18} Id. (quoting Union Carbide Corp. v. NLRB, 714 F.2d 657, 663–64 (6th Cir. 1983)); see also Baudler v. Am. Baptist Homes of the W., 798 F. Supp. 2d 1099, 1106 (N.D. Cal. 2011), modified, No. C 11-2480, 2011 WL 555592 (N.D. Cal. Nov. 1, 2011). In Union Carbide, an employee-union activist was reprimanded and instructed not to use the company’s telephone system for personal or union business; however, this instruction was later limited just to prohibiting union-related calls because the company had permitted reasonable use of the company’s telephone system for personal calls. Union Carbide, 714 F.2d at 663. Noting that “Union Carbide unquestionably had the right to regulate and restrict employee use of company property,” id., the Sixth Circuit Court of Appeals agreed with the ALJ, however, that Union Carbide had violated section 8(a)(3) of the NLRA by discriminatorily prohibiting union-related phone calls while allowing other nonwork-related calls, id. at 663–64.
\textsuperscript{19} Register-Guard, 351 N.L.R.B. at 1114; see also id. (“The General Counsel concedes that [Register-Guard] has a legitimate business interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees’ inappropriate e-mails.”).
\textsuperscript{20} Id. (alteration in original) (quoting Mid-Mountain Foods, Inc., 332 N.L.R.B. 229, 230 (2000)) (internal quotation marks omitted).
\textsuperscript{21} Id. at 1121 (Liebman & Walsh, Members, dissenting in part) (quoting NLRB v. Thill, Inc., 980 F.2d 1137, 1142 (7th Cir. 1992) (Posner, J.)) (internal quotation marks omitted); see also id. (“In 2007, one cannot reasonably contend, as the majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper.”).
The dissent’s principal argument was that employees have the right “to communicate in the workplace regarding section 7 matters, subject to the employer’s right to maintain production and discipline,” and that the majority’s reasoning was flawed in three respects:

First, it fails to recognize that e-mail has revolutionized business and personal communications, and that cases involving static pieces of “equipment” such as telephones and bulletin boards are easily distinguishable. Second, the majority’s approach is based on an erroneous assumption that [Register-Guard’s] ownership of the computers gives it a “property” interest that is sufficient on its own to exclude Section 7 e-mails. Third, the majority’s assertion that Republic Aviation created a “reasonable alternative means” test, even regarding employees who are already rightfully on the employer’s property, is untenable.

The dissent recognized that e-mail had “transformed modern communication,” and that it was absurd to consider it analogous to the telephone, a television set, or bulletin boards. And ownership of the equipment used for the e-mail system does not, in and of itself, supply Register-Guard with “an absolute right to exclude Section 7 e-mails.” In particular, the dissent noted, Register-Guard had not demonstrated how allowing employee e-mail messages on section 7 matters interfered with its alleged property interest. The dissent emphasized that Register-Guard already allowed its employees to use the computers and e-mail system for personal messages; additional text e-mail messages did not impose any additional costs on Register-Guard and e-mail systems, unlike older communications media, accommodate multiple, simultaneous users.

The majority, however, focused on the fact that Register-Guard’s employees still had the “full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in

\[\text{Id. at 1124 (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (affirming the Board’s holding that a rule prohibiting solicitation anywhere on company property was overly broad because it restricted solicitation during nonworking time)). A rule “prohibiting union solicitation by an employee outside of working hours, although on company property . . . must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.” Republic Aviation, 324 U.S. at 803 n.10 (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843–44 (1943) (internal quotation marks omitted)).}\\]

\[\text{Id. at 1125 (Liebman & Walsh, Members, dissenting in part).}\\]

\[\text{Id.; see also supra text accompanying note 21.}\\]

\[\text{Register-Guard, 351 N.L.R.B. at 1125 (Liebman & Walsh, Members, dissenting in part).}\\]

\[\text{Id.}\\]
While acknowledging that e-mail had revolutionized business communications, the majority concluded that its use, and particularly Register-Guard’s restrictions, had not eliminated face-to-face communication among Register-Guard’s employees or reduced such communication to an insignificant level.28

B. 2013: The Purple Communications, Inc. Decision

Purple Communications, Inc., a provider of communication services for deaf and hard-of-hearing individuals, maintained an employee handbook that provided, in pertinent part:

Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.

......

27 Id. at 1115 (majority opinion).
28 Id. at 1116. The majority noted also that while the telephone had revolutionized business communications, the Board had never found that employees have a general right to use their employer’s telephone system for section 7 communications. Id.

The Board majority and dissent also disagreed as to whether Register-Guard’s CSP had been enforced in a discriminatory manner in violation of the NLRA. The majority held that discrimination applies only when communications of a similar character are treated differently. Id. at 1118. For example, banning pro-union messages while allowing anti-union messages would constitute discrimination. Id. at 1118 (“[A]n 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 nonbusiness-related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.”). In contrast, the dissent argued that since Register-Guard allowed employees to use the e-mail system for personal communications, it was unlawfully discriminatory to then ban union-related e-mail messages. Id. at 1130 (Liebman & Walsh, Members, dissenting in part) (“Taken to its logical extreme, the majority’s holding that an employer need only avoid ‘drawing a line on a Section 7 basis’ is a license to permit almost anything but union communications, so long as the employer does not expressly say so. It is no answer to say that a rule prohibiting all noncharitable solicitations or all solicitations for a group or organizations is not discriminatory because it would also prohibit selling Avon or Amway products. The [NLRA] does not protect against interference with those activities; it does protect against interference with Section 7 activity.” (footnote omitted)).
Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:

. . . .

2. Engaging in activities on behalf of organization [sic] or persons with no professional or business affiliation with the Company.

. . . .

5. Sending uninvited email of a personal nature.29

In response to an unfair labor charge brought by the Communications Workers of America, AFL-CIO, the NLRB General Counsel argued that Purple Communications interfered with employees’ exercise of section 7 rights in violation of section 8(a)(1) “by maintaining overly-broad rules that prohibit the use of its equipment, including computers, internet, and email systems for anything other than business purposes,” and specifically prohibiting “the use of that equipment for ‘engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company.’”30 The ALJ dismissed the General Counsel’s allegations in deference to Register-Guard, noting that an employer does not violate section 8(a)(1) by maintaining a prohibition on employee use of its e-mail system for “non-job-related solicitations.”31 The General Counsel had argued, unsuccessfully, that Register-Guard should be overruled “because of the increased importance of email as a means of employee communication.”32

When the General Counsel and the union filed exceptions to the ALJ’s decision, the Board took the opportunity to revisit Register-Guard, issuing a Notice and Invitation to File Briefs addressing the issue of whether the Board should overrule Register-Guard and “adopt a rule that employees who are permitted to use their employer’s email for work purposes have the right to use it for Section 7 activity, subject only to the need to maintain

---

30 Id. at *12–13.
31 Id. at *13 (internal quotation marks omitted).
32 Id. In declining to overrule Register-Guard the ALJ stated “those merits are for the Board to consider, not me.” Id.
production and discipline." Three amici briefs were filed in response to the Board’s invitation: eleven urged the board to affirm Register-Guard; three argued in favor of reversal; and one amicus was neutral.

33 Notice and Invitation to File Briefs, Purple Commc’ns, Inc., 361 N.L.R.B. No. 126 (Dec. 11, 2014) (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584). The General Counsel was already concerned about employers restricting employees’ e-mail use. In February 2014, the General Counsel issued a memorandum requiring all regional directors to submit to the General Counsel for advice all cases involving “the issue of whether employees have a Section 7 right to use an employer’s e-mail system or that require application of the discrimination standard enunciated in Register-Guard,” because it was an area of the law and labor policy of particular concern. Memorandum from Richard F. Griffin, Jr., Gen. Counsel of the NLRB, to Regional Directors, Officers-in-Charge, and Resident Officers, 2014 WL 798018, at *1 (Feb. 25, 2014). In certain types of cases involving novel and complex issues, regional directors may be required to submit the case for advice from the General Counsel before issuing a complaint. See 29 C.F.R. § 101.8 (2014).


35 Brief of the AFL-CIO as Amicus Curiae, Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584); Brief to the NLRB by Amicus Curiae Professor Jeffrey M. Hirsch, Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584); Brief of Service Employees International Union as Amicus Curiae, Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584).

36 Brief Amicus Curiae of the National Right to Work Legal Defense Foundation, Inc., Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584). Rather than argue for or against reversal of Register-Guard, the National Right to Work Legal Defense Foundation argued that anti-union communications should be given the same rights as pro-union communications. Id. at 3–4 (“[I]f the Board is going to allow employees to use their employer’s e-mail system to communicate regarding union business, then employees who oppose unionization generally, or a specific union representing or seeking to represent their unit, must also be allowed the same access to communicate and share information with their fellow employees. Given unions’ aggressive and well funded organizing campaigns, equal access for employee opponents of unionization is of paramount importance under the NLRA.”).
Many of the amici briefs in support of Register-Guard first argued that employees have no statutory right to use an employer’s property, as long as the restrictions are not discriminatory.\textsuperscript{37} Three of the amici briefs in support of Register-Guard argued “that compelling an employer to make his means of communication available to those with whom he does not agree, or to those who espouse views contrary to his views or interests, infringes upon the employer’s First Amendment rights.”\textsuperscript{38}

Many of the amici supporting Register-Guard also argued that reversing Register-Guard would create a workplace communications free-for-all, overwhelming employers’ communications systems, opening the door to spam and cyber attacks, crashing systems,\textsuperscript{39} and generally interfering with the employers’ ability to monitor communications systems use.\textsuperscript{40} Further, some of the amici supporting Register-Guard argued that employees already have personal electronic communications options, such

\textsuperscript{37} See Brief of Amicus Curiae Arkansas State Chamber of Commerce in Support of Purple Communications, Inc., supra note 34, at 3; Brief of Amicus Curiae Council on Labor Law Equality, supra note 34, at 5–6; Brief of Employers Ass’n of New Jersey as Amicus Curiae, supra note 34, at 2; Brief of the Amici Curiae by the National Grocers Ass’n on Behalf of Respondent Purple Communications, Inc., supra note 34, at 6 ("[A]n employer’s property rights must give way to an employee’s Section 7 activity only where the employer’s rules cause an ‘unreasonable impediment to self-organization.’" (quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945)); Brief of Amici Curiae U.S. Postal Service, supra note 34, at 4; see also supra text accompanying note 18.

\textsuperscript{38} Brief of Amicus Curiae the Chamber of Commerce of the United States of America in Support of Respondent Purple Communications, Inc., supra note 34, at 12; see also Brief of Amici Curiae Coalition for a Democratic Workplace et al. in Support of Respondent, supra note 34, at 4; Amicus Brief of the Food Marketing Institute, supra note 34, at 17–18.

\textsuperscript{39} See Brief of Amicus Curiae American Hospital Ass’n in Support of the Respondent Employer, supra note 34, at 16–17 (asserting that employees may deliberately overload an employer’s system during the heat of an organizing campaign); Brief of Amicus Curiae Arkansas State Chamber of Commerce in Support of Purple Communications, Inc., supra note 34, at 8 ("Should Register Guard be reversed, thus preventing an employer from having a policy against non-business-related e-mail communications, the proverbial e-mail floodgates will open and the torrent of e-mails not related to work will cut into workplace productivity by sinking the employee’s inbox and impeding workers’ focus on work-related tasks."); Amicus Brief of the Food Marketing Institute, supra note 34, at 8; Brief of Amicus Curiae U.S. Postal Service, supra note 34, at 5–6, 9–10.

\textsuperscript{40} See Brief of Employer’s Ass’n of New Jersey as Amicus Curiae, supra note 34, at 4 ("[R]eversing Register Guard and preventing employers from legally exercising their property right to monitor [their] email system[s] would turn the very act of monitoring into an unfair labor practice charge."); Brief of the Amici Curiae by the National Grocers Ass’n on Behalf of Respondent Purple Communications, Inc., supra note 34, at 14 ("Allowing employee use of employer email systems for Section 7 purposes would likely leave employers completely unable to ‘police abuse’ of their email systems without creating the impression that they are surveying union activity."); Brief of Amicus Curiae U.S. Postal Service, supra note 34, at 11.
as Facebook and private e-mail accounts, through which they can converse.\(^{41}\)

The three amici briefs that supported overruling *Register-Guard* focused primarily on the communication realities of the modern workplace. For example, the Service Employees International Union noted that many employers, under policies known as BYOD, or “bring your own device,” actually encourage workers to use their own personal devices for work-related communications, inevitably leading to the blurring between work and personal time “as people send personal emails at work, and work emails on personal time.”\(^{42}\) The AFL-CIO argued that allowing personal use of the employer’s e-mail system is actually more productive than banning it.\(^{43}\)

Professor Hirsch argued that the employer’s property rights must be balanced against employees’ section 7 rights, and that the *Register-Guard* majority never explained why the employer’s property interest in its e-mail system trumped its employees’ section 7 rights.\(^ {44}\) Professor Hirsch encouraged the Board to “fashion a rule that reflects modern workplaces’ reliance on electronic communications, while still respecting employees’ right to discuss Section 7 matters with each other at work.”\(^ {45}\) Professor Hirsch recognized that in the modern workplace, “the distinction between nonwork and work time may be fuzzy or nonexistent. Instead, many employees will use electronic equipment in their office throughout the day, for both personal and business reasons.”\(^ {46}\) Professor Hirsch argued that the Board should adopt a rule to replace “the Republic Aviation work time and

\(^{41}\) Brief of Amicus Curiae Arkansas State Chamber of Commerce in Support of Purple Communications, Inc., *supra* note 34, at 19–20 (“[E]mployees are not limited to their work e-mail address to communicate by e-mail. There are plenty of free email providers, such as Gmail and Yahoo Mail, offering services that can be accessed at the local library or on their home or personal devices. These personal e-mail platforms have virtually the same ability and functionality as an employer’s communication system and can be used for Section 7 purposes without infringing on the employer’s rights.”); Brief of Amici Curiae Coalition for a Democratic Workplace et al. in Support of Respondent, *supra* note 34, at 17 (“[T]he proliferation of personal electronic devices strongly militates against the notion that employees need to be able to use their employer’s electronic communication systems in order to engage in Section 7-protected activity.”); Brief of the Amicus Curiae by the National Grocers Ass’n on Behalf of Respondent Purple Communications, Inc., *supra* note 34, at 7–9; Brief of Amicus Curiae Retail Litigation Center, *supra* note 34, at 13–16.

\(^{42}\) Brief of Service Employees International Union as Amicus Curiae, *supra* note 35, at 3–4; see also *id.* at 4 (asking whether a worker sending an e-mail “to a union from his or her personal smartphone while using the employer’s wireless Internet network” is transmitting a personal or business e-mail); *infra* text accompanying notes 96–97.

\(^{43}\) See Brief of the AFL-CIO as Amicus Curiae, *supra* note 35, at 5–6; see also *infra* note 99.

\(^{44}\) Brief to the NLRB by Amicus Curiae Professor Jeffrey M. Hirsch, *supra* note 35, at 6.

\(^{45}\) *Id.* at 13.

\(^{46}\) *Id.* at 14; see also *supra* text accompanying note 7.
work area presumptions with a single rebuttable presumption that all employer restrictions on electronic communications violate Section 8(a)(1). The employer could rebut this presumption by showing that its restrictions are based on a valid, nondiscriminatory business justification.

The NLRB General Counsel filed a brief in response to the amici briefs. The General Counsel’s amici brief first addressed arguments that overruling Register-Guard would compel employers to tolerate speech with which they did not agree in violation of their First Amendment rights. The General Counsel disagreed, arguing that overruling Register-Guard would not compel employers to accommodate other speakers’ messages to the detriment of their own, which is what the Supreme Court’s precedents prohibit. The General Counsel also argued that overruling Register-Guard would not prevent employers from monitoring their employees’ electronic communications for legitimate and nondiscriminatory business reasons, including ensuring employee productivity, though targeted monitoring intended to chill employee section 7 activity would remain unlawful.

III. OVERRULING REGISTER-GUARD

By a vote of 3-to-2, the Board overruled Register-Guard in late 2014: “[W]e decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by

---

47 Brief to the NLRB by Amicus Curiae Professor Jeffrey M. Hirsch, supra note 35, at 15.
48 Id. (citing, as examples, a past history of employees excessively reading and writing nonwork e-mail messages, security concerns, or messages that impose unusual disruptions).
50 See supra text accompanying note 38.
51 Id. at 5.
52 Id. at 6. The General Counsel and the Communications Workers of America also filed briefs in response to the Notice and Invitation to File Briefs, and the Communications Workers of America filed a brief in response to the amici briefs—all three of which essentially reiterate why Register-Guard should be overruled. See Brief of the General Council, Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584); Charging Party/Petitioner’s Reply Brief I, Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584); Charging Party/Petitioner’s Reply Brief II, Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584). Purple Communications likewise filed a brief in reply to the amici briefs, essentially reiterating why Register-Guard should not be overruled. See Responsive Brief of Employer and Respondent Purple Communications, Inc., Purple Communications, 361 N.L.R.B. No. 126 (Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584).
employers who have chosen to give employees access to their email systems.” Paramount to the Board majority’s decision is the recognition that “in many workplaces, email is a large and ever-increasing means of employee communication for a wide range of purposes,” and that in many offices, “email is the predominant means of employee-to-employee communication.” Since employee-to-employee communication is a sine qua non for section 7, e-mail communications through an employer-provided system to which all or most employees have access can be a vital means of exercising section 7 rights.

The Purple Communications majority did not hold that employees have an absolute right to use their employers’ e-mail systems for section 7 activities, let alone for any nonwork-related purpose. Instead, the Board adopted a presumption that employees who have been given access to the employer’s email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions. However, it is the employer’s burden to articulate the special circumstances that would allow it to curtail what would otherwise be statutorily protected e-mail communications. But the majority’s decision

54 Purple Communications, 361 NLRB No. 126, 2014 NLRB LEXIS 952, at *2. Chairman Pearce and Members Hirozawa and Schiffer comprised the majority, while Members Miscimarra and Johnson each filed their own dissent. Id. While the combined dissenting opinions are nearly double the length of the majority decision, they essentially repeat the arguments put forward by the amici supporting Register-Guard, which are incorporated in the majority’s rationales for its decision. See id. at *77–126 (Miscimarra, Member, dissenting); id. at *126–259 (Johnson, Member, dissenting). The Board had earlier issued a ruling that expressly severed and held for further consideration whether Purple Communications’ electronic communications policy was unlawful. Purple Commc’ns, Inc., 361 N.L.R.B. No. 43, 2014 NLRB LEXIS 730, at *2 & n.3 (Sept. 24, 2014).

55 Purple Communications, 2014 NLRB LEXIS 952, at *21–22 ( Miscimarra, Member, dissenting). Id. at *126–259 (Johnson, Member, dissenting). The Board had earlier issued a ruling that expressly severed and held for further consideration whether Purple Communications’ electronic communications policy was unlawful. Purple Commc’ns, Inc., 361 N.L.R.B. No. 43, 2014 NLRB LEXIS 730, at *2 & n.3 (Sept. 24, 2014).

56 “The necessity of communication among employees as a foundation for the exercise of their Section 7 rights can hardly be overstated.” Id. at *21; see also id. at *22 (noting that the exercise of section 7 rights “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite” (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 491–92 (1978)) (internal quotation marks omitted)); Jeffrey M. Hirsch, Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action, 44 U.C. Davis L. Rev. 1091, 1101 (2011) (“W)orkplace discourse plays a vital role in determining whether employees are able to act together to promote their common interests.”), cited with approval in Purple Communications, 2014 NLRB LEXIS 952, at *22 n.16.


58 Id. at *20. In addition, an “employer contending that special circumstances justify a particular
does not provide much guidance as to what those special circumstances could be. As noted above, some of the amici argued that overturning Register-Guard would create a free-for-all, overwhelming employers’ communications systems, opening the door to spam and cyber attacks, and crashing systems. The Board majority did note, however, that employers could consistently enforce restrictions, such as prohibiting large files, that would interfere with the e-mail system’s efficient functioning, and can certainly continue to prevent e-mail use for the “purposes of harassment or other activities that could give rise to employer liability.” Ultimately, though, the majority anticipates “that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees.”

More typically, employers are expected to “uniform[ly] and consistently enforce[ ] controls over their email systems to the extent that such controls are necessary to maintain production and discipline.”

Closely associated with restrictions on workplace e-mail use is the issue of monitoring. Some amici argued that overturning Register-Guard would inhibit employers’ ability to legitimately monitor their systems’ use without creating the impression that they were attempting to inhibit section 7 activities. However, the Board majority believes its decision will not prevent employers from monitoring their computers and e-mail for legitimate management reasons, which will continue to “be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.” The Board majority also noted that its decision will not prevent an employer from notifying its employees that it monitors computer and e-mail use for legitimate restriction must demonstrate the connection between the interest it asserts and the restriction.”

See id. at *63. Further, the “mere assertion of an interest that could theoretically support a restriction will not suffice.” Id.; see also id. at *63 n.68 (noting that the “prior existence of an employer prohibition on employees’ use of email for nonwork purposes will not itself constitute a special circumstance”).

See id. at *252–53 (Johnson, Member, dissenting) (“[I]t appears that the employer can never assert an interest against nonbusiness communications simply because they are nonbusiness communications. . . . Moreover, just as with face-to-face communications, employees seemingly will be free to ignore an employer’s request to ‘take it offline’ to stop group emails or require a face-to-face conversation instead.”).

See supra note 39 and accompanying text.

See Purple Communications, 2014 NLRB LEXIS 952, at *64–65.

Id. at *67.

Id. at *62.

Id.

See supra note 40 and accompanying text.

See Purple Communications, 2014 NLRB LEXIS 952, at *67 (“We are confident . . . that we can assess any surveillance allegations by the same standards that we apply to alleged surveillance in the bricks-and-mortar world.”).

Id. at *68.
management reasons, nor will it prevent an employer from notifying its employees that they “may have no expectation of privacy in their use of the employer’s email system.”

The Board’s majority decision discussed in detail—at a level beyond the scope of this Article—employees’ rights to use employers’ equipment for section 7 purposes. Briefly, the majority concluded that e-mail systems are different “in material respects from [other] types of workplace equipment.” The majority agreed with the Register-Guard dissenters that, fundamentally, employee use of the e-mail system will not deprive other workers of the use of that system or add significantly to its cost—in contrast to older, more limited forms of workplace communication, such as a single-line telephone system or a bulletin board.

The Board majority also rejected any notion that allowing employees to use their employer’s e-mail system would infringe on the employee’s First Amendment rights. “We are simply unpersuaded that an email message, sent using the employer’s email system but not from the employer, could reasonably be perceived as speech by, or speech endorsed by, the employer—particularly a message reflecting a view different from the employer’s.”

Finally, the Board majority ruled that its new policy of presuming employees have a statutory right to use their employers’ e-mail systems for section 7 activity will apply retroactively:

Access to work email to engage in protected activity on nonworking time significantly promotes the core Section 7 rights of millions of employees who use that email for other purposes . . . . In contrast, current prohibitions on such access deny employees their rights on a daily basis. Applying today’s decision prospectively only would continue a far-reaching, wrongful denial of those rights, potentially for several more years in some pending cases.

---

68 Id. (emphasis added).
69 Id. at *35.
70 See id. at *35–47; see also supra note 21 and accompanying text.
71 See Purple Communications, 2014 NLRB LEXIS 952, at *69–72; see also supra note 38 and accompanying text.
72 Purple Communications, 2014 NLRB LEXIS 952, at *69.
73 Id. at *73.
IV. EMPLOYEES’ BOUNDARYLESS COMMUNICATIONS

In its Notice and Invitation to File Briefs, the Board invited amici to specifically address: “Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers’ rights and employees’ Section 7 rights to communicate about work-related matters?”

Many of the amici briefs supporting Register-Guard argued that employees have many alternatives to their employers’ e-mail system to communicate, such as through online social media accounts. Ironically, however, the Board majority stated that even if it agreed with the dissent (and presumably the amici supporting Register-Guard), which argued “that social media, texting, and personal email accounts constitute adequate alternative means for employee communications,” such alternative means were not germane to the majority’s analysis.

The Board majority discounted alternative, personal electronic communication methods—no matter how common—because they “simply do not serve to facilitate communication among members of a particular work force.” In the majority’s view:

[W]ork email networks came about—and thrive—exactly because they facilitate communication among the employees in particular work forces. . . . In short, these supposed alternative means are simply not natural gathering places for employees of a particular employer in the same way that their employer’s email network is.

Consequently, the majority’s decision is limited strictly to employee use of employer e-mail systems, “not any other electronic communications systems.” This is unfortunate, for as the majority readily concedes:

[The Purple Communications] decision cannot resolve all the questions that will arise as a result of our recognizing the right of employees to use

---

74 Notice and Invitation to File Briefs, supra note 33, at 2.
75 See supra note 41 and accompanying text.
76 Purple Communications, 2014 NLRB LEXIS 952, at *23 n.18.
77 Id.
78 Id.
79 Id. at *64. But see id. at *256 (Johnson, Member, dissenting) (“My colleagues’ decision is actually fairly sweeping. They have established a rule that essentially says that you can use your employer’s communications technology or device for any Section 7 purpose as long as you also use it for work.”).
their employers’ email systems for protected communications on nonworking time, let alone as a result of the still more advanced electronic communications systems now in existence and yet to come.80

Workers do communicate through a vast array of devices and services of which the employer’s e-mail system is only one—and one that is, perhaps, becoming less and less relevant. Consider, for example, Santiago Victor, an outside sales representative who was issued an Apple iPad and iPhone owned by his employer, Sunbelt Rentals.81 Victor created and paid for an Apple account that was linked to both devices.82 When Victor later informed Sunbelt that he was leaving to join a competitor, at which point Sunbelt terminated his employment, Victor returned his iPad and iPhone.83 Victor was subsequently issued an iPhone by his new employer, which he linked to his existing Apple account.84 Sometime later, when Victor was attempting to link an iPad provided by his new employer to his Apple account, he discovered his Sunbelt-issued iPhone was still linked to his account—meaning that all of his personal data as well as electronic messages sent while working for the new employer could be accessed by Sunbelt through the iPhone and iPad that it had previously issued to him.85

Just as likely, employees will insist on bringing their own personal devices to work—often much more technologically advanced than the ones being provided by the employer—and linking them to the employer’s communications systems. In 2012, over one-half of workers were using their own technology for work purposes.86 Younger workers moving into the workplace who have grown up with the Internet “are less inclined to draw the line between corporate and personal technology.”87

Regarding a more “traditional” workplace e-mail scenario, consider Diane Borchers’ situation. Borchers began working for the Franciscan Tertiary Province of the Sacred Heart, Inc., d/b/a Mayslake Village, in 1994

80 Id. at *76 (majority opinion).
82 Id.
83 Id. at 1029.
84 Id.
85 Id.
as a food service director. Mayslake issued Borchers a CompuServe account that she used to place orders via the Internet and occasionally correspond with vendors via e-mail. In 2004, while Mayslake was transitioning to a faster Internet connection, Borchers used her personal AOL account to handle work-related e-mail messages. Prior to this, she had never accessed her personal AOL account from a work computer. Once the transition was complete, Borchers was issued a new work e-mail account, which she used exclusively for work, though she neglected to remove access to her AOL account from her work computer. In 2007, Borchers reported to Mayslake that her supervisor was sexually harassing her. Borchers subsequently took a medical leave of absence, which was followed by a sexual harassment charge against Mayslake. While Borchers was on medical leave, a Mayslake administrative assistant used Borchers’ work computer to access her personal AOL account, printing out more than thirty messages sent or received from friends, family members, and others.

Victor’s Apple account, the “bring your own device” trend, and Borchers’ AOL account exemplify the blurring between personal and business communication in the modern workplace—realities that demonstrate that many of the arguments raised by the Purple Communications dissenters and amici in support of Register-Guard are simply outdated and archaic. For example, one brief suggests that “an employee during his or her non-work time can easily send a quick text message, or make a phone call, or access the Internet via smartphone in order to send a message through a social media site and communicate with co-workers,” and thus does not need the employer’s e-mail system. This brief seems to miss the forest for the trees: Here, sending the quick text message or accessing the Internet via smartphone will in all probability make use of other aspects of the employers’ communications system.

---

89 Id.
90 Id. at 33.
91 Id.
92 Id. (noting that Borchers testified that she never used her AOL account at work, except possibly on one occasion in 2007).
93 Id.
94 Id. at 34.
95 Id.
96 Brief of Amicus Curiae Arkansas State Chamber of Commerce in Support of Purple Communications, Inc., supra note 34, at 13.
something the brief argues that the employees have no right to do in the first place.97 And contrary to assertions by the Arkansas State Chamber of Commerce that personal e-mail use at work is unproductive,98 the Supreme Court has recognized that permitting some personal e-mail in the workplace can actually be more productive than a total ban.99

The Purple Communications dissenters and many of the amici briefs supporting Register-Guard argue that employees have many alternatives to their employers’ e-mail system to communicate, such as through online social media accounts.100 This argument ignores the fact that employees have been disciplined and fired as a direct result of communications in personal online accounts—often without any legal recourse.

While the focus of Register-Guard and Purple Communications has been employee use of the companies’ e-mail systems, with respect to communications services and equipment, this can include not just e-mail, but also computers, laptops, tablets, smartphones, Internet access, text messages, as well as YouTube, Twitter, and Facebook accounts used for business purposes. If an employee forwards company e-mail to his or her personal Gmail account because it is more efficient at times to access messages from that account, is the employee using company property? And since there may also be personal e-mail messages in that personal Gmail account, is the employee using company property for personal messages? Since, for many employees, “nearly every aspect of their lives” are digitally recorded through a smartphone,101 it is impractical to expect employees to not use an employer-issued smartphone for personal communications.102 And consider when employees provide their own smartphone but use it

97 Id. at 3.
98 Id. at 7–8 (arguing that “[f]orcing the allowance of unsolicited e-mails to a company’s employees will inevitably lead to more ‘junk mail’ or ‘spam’ in the employee’s inbox,” which will then result in decreased productivity as workers deal with that increase in junk mail and spam).
99 See City of Ontario v. Quon, 560 U.S. 746, 759 (2010) (“[M]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency.”), cited with approval in Purple Comme’ns, Inc., 361 N.L.R.B. No. 43, 2014 NLRB LEXIS 730, at *30 (Sept. 24, 2014); see also Schill v. Wis. Rapids Sch. Dist., 786 N.W.2d 177, 182–83 (Wis. 2010) (“[E]mployees who are forbidden or discouraged from occasional personal use of e-mail may simply need to take more time out of the day to accomplish the same tasks by other means.”), cited with approval in Purple Communications, 2014 NLRB LEXIS 730, at *30; Brief of the AFL-CIO as Amicus Curiae, supra note 35, at 5–6.
100 See, e.g., Purple Communications, 2014 NLRB LEXIS 730, at *98–102 (Miscimarra, Member, dissenting); see also supra note 41 and accompanying text.
102 Would it be efficient for a company to require employees to carry two smart phones—the first owned by the company using a company-owned account, the second owned by the employee using a personal account?
through an employer-provided account—again, personal use through a company’s communications system.\textsuperscript{103}

\textit{A. Employees’ Electronic Section 7 Communications Should Not Be Protected Solely Through Personal Accounts}

In 2010, three sales personnel in the Haight-Ashbury Bettie Page store were having difficulties with their store manager; in particular, the three employees believed their store should close earlier, like other stores in the neighborhood, because of safety concerns.\textsuperscript{104} The three employees were fired after the following Facebook exchange:

\begin{quote}
Holli Thomas[:]
needs a new job. I’m physically and mentally sickened.

Vanessa Morris[:]
It’s pretty obvious that my manager is as immature as a person can be and she proved that this evening even more so. I’m am (sic) unbelievably stressed out and I can’t believe NO ONE is doing anything about it! The way she treats us in NOT okay but no one cares because everytime we try to solve conflicts NOTHING GETS DONE!!

Holli Thomas[:]
bettie page would roll over in her grave.

Vanessa Morris[:]
She already is girl!

Holli Thomas[:]
800 miles away yet she’s still continues our lives miserable. Phenomenal!

Vanessa Morris[:]
And no one’s doing anything about it! Big surprise!

Brittany [Johnson:] “bettie page would roll over in her grave.” I’ve been thinking the same thing for quite some time.

Vanessa Morris[:]
hey dudes it’s totally cool, tomorrow I’m bringing a California Worker’s Rights book to work. My mom works for a law firm
\end{quote}

\textsuperscript{103} If an employee sends a “pro-union” text message to a coworker using her personal smartphone linked to her employer’s account which her coworker receives on his personal device but forwards to his work e-mail account, does Purple Communications apply?

that specializes in labor law and BOY will you be surprised by all the crap that’s going on that’s in violation 8) see you tomorrow!105

The Board agreed with the ALJ that this conversation constituted concerted activity protected under section 7 of the NLRA: “Thomas and Morris were engaged in protected concerted activity when they presented the concerns of the employees about working late in an unsafe neighborhood to their supervisor and to [Bettie Page’s] owner, and that their Facebook postings were a continuation of that effort.”106 The Board further concluded that the Facebook postings, standing alone, constituted protected concerted activity:

The Facebook postings were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management’s refusal to address the employees’ concerns. The employees also discussed looking at a book about the rights of workers in California so that they could determine whether [Bettie Page] was violating labor laws. Such conversations for mutual aid and protection are classic concerted protected activity . . . .107

Similarly, when two employees were fired after participating in a Facebook discussion complaining about having to pay state taxes because their employer had not properly calculated their state withholding taxes, the Board ruled that they were engaged in protected concerted activity.108 In particular, one employee merely “Liked” the conversation rather than posting any express comments. The Board found this equivalent to expressing agreement with one of the other employees’ initial, protected complaints.109

The Board has been quite proactive in protecting employees’ section 7 rights by invalidating a number of employer policies pertaining to employee communications. For example, in Hills & Dales General Hospital, the Board ruled that employer prohibitions against making negative comments about fellow team members and engaging in or listening to negativity or gossip unlawfully interfered with employees’ section 7 rights.110 If a work

105 Id. at *11.
107 Id. (emphasis added); see also Design Technology Group, 2014 NLRB LEXIS 835, at *2 n.1 (agreeing that the employees’ Facebook discussion was protected, concerted activity).
109 Id. at *20.
rule does not explicitly restrict section 7 activity, it will still be found unlawful if: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”111 The Board agreed with the ALJ that the rule prohibiting negative comments about team members could implicitly restrict section 7 activities because it prohibits negative comments about managers.112 The Board also agreed with the ALJ’s holding that while prohibiting gossip is not unlawful,113 the “prohibition of ‘negativity’ is so patently ambiguous, imprecise and overbroad that a reasonable employee would construe it as prohibiting protected discussions about working conditions and the terms and conditions of employment.”114

Triple Play Sports Bar and Grille maintained an “Internet/Blogging” policy that stated:

The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate

111 Id. at *3 (citing Martin Luther Mem’l Home, Inc., 343 N.L.R.B. 646, 647 (2004)).
112 Id. at *3–4; see also Three D, 2014 NLRB LEXIS 656, at *28–29 (“An employer rule is unlawfully overbroad when employees would reasonably interpret it to encompass protected activities.”); KSL Claremont Resort, Inc., 344 N.L.R.B. 832, 832 (2005) (holding that employer rule prohibiting negative conversations about managers “would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities”).
114 Id. at *22. The Board disagreed with the ALJ’s conclusion that the hospital’s rule stating employees “will represent Hills & Dales in the community in a positive and professional manner in every opportunity,” id. at *4, was “a lawful call for employees to maintain a high standard of professionalism with potential (or actual) customers at every opportunity,” id. at 18–19. The Board considered this provision “just as overbroad and ambiguous as the proscription of ‘negative comments’ and ‘negativity.’” Hills & Dales, 2014 NLRB LEXIS 236, at *6. See generally Robert Sprague & Abigail E. Fournier, Online Social Media and the End of the Employment-at-Will Doctrine, 52 Washburn L.J. 557, 563–69 (2013) (reviewing the Board’s, ALJs’, and General Counsel’s approach to various social media policies).
regarding any aspect of the Company, you must include a disclaimer that
the views you share are yours, and not necessarily the views of the
Company. In the event state or federal law precludes this policy, then it is
of no force or effect.\textsuperscript{115}

Here, the Board believed that employees would reasonably interpret Triple
Play’s rule as proscribing any discussions about their terms and conditions
of employment deemed “inappropriate” by the employer.\textsuperscript{116} The Board
found the term “inappropriate” to be sufficiently imprecise that employees
would reasonably understand it to encompass discussions and interactions
protected by section 7.\textsuperscript{117} As for the saving clause, the Board noted that it
did not shield the fired employees’ protected activity and, therefore, other
employees “would reasonably construe the Internet/Blogging policy to
prohibit Section 7 activity such as the Facebook discussion of tax
withholding issues involved in this case.”\textsuperscript{118}

Finally, by encouraging employees to turn to personal online accounts
to communicate, which almost invariably leads to discussions about work,
employers face the risk of having their “dirty laundry” exposed to the
public, coupled with rather vitriolic language. What would otherwise be
protected concerted activity can lose protection if the employees publicly
disparage their employer.\textsuperscript{119} For example, the Triple Play employees’
Facebook conversation concerning their employer’s inability to properly
withhold state taxes involved at least one patron and contained some rather
unflattering comments about Triple Play’s owner.\textsuperscript{120} The Board concluded
that the Facebook conversation was still protected:

First, the Facebook discussion here clearly disclosed the existence of an
ongoing labor dispute concerning the [employer’s] tax-withholding
practices. Second, the evidence does not establish that the discussion in
general, or [the fired employees’] participation in particular, was directed
to the general public. The comments at issue were posted on an

\textsuperscript{115} Three D, 2014 NLRB LEXIS 656, at *26–27.
\textsuperscript{116} Id. at *29 (internal quotation marks omitted).
\textsuperscript{117} Id. (internal quotation marks omitted). The Board also believed the prohibition against revealing
confidential information to be imprecise because it provided no illustrative examples to employees of
what the employer considered to be inappropriate. Id.
\textsuperscript{118} Id. at *31.
\textsuperscript{119} See Jefferson Standard Broad. Co., 94 N.L.R.B. 1507, 1510–11 (1951) (holding that handbill
distributed by employees accusing the employer of defrauding the public by furnishing “technically
inadequate, ‘second-class’ television service,” was not protected), rev’d sub nom. Local Union No.
\textsuperscript{120} See Three D, 2014 NLRB LEXIS 656, at *5–9.
individual’s personal page rather than, for example, a company page providing information about its products or services. Although the record does not establish the privacy settings of [the Facebook page in question], or of individuals other than [one of the fired employees] who commented in the discussion at issue, we find that such discussions are clearly more comparable to a conversation that could potentially be overheard by a patron or other third party than the communications at issue in Jefferson Standard, which were clearly directed at the public.\textsuperscript{121}

Closely related to Jefferson Standard, concerted activity can also lose protection if it is highly opprobrious.\textsuperscript{122} Whether the activity loses protection depends on “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”\textsuperscript{123} However, the Board has stated that “the Atlantic Steel framework is not well suited to address issues that arise in cases . . . involving employees’ off-duty, offsite use of social media to communicate with other employees or with third parties.”\textsuperscript{124} As a general matter, the Atlantic Steel framework is tailored to workplace confrontations.\textsuperscript{125} As specifically applied in Three D, there was no direct confrontation with management.\textsuperscript{126}

There seems very little justification for the Board to protect section 7 communications only through employer e-mail systems instead of the entire communications system while still providing significant leeway for online personal accounts. Employers and the NLRB have themselves created a

\begin{footnotes}
\footnotemark[121] Id. at *21–22.
\footnotemark[122] Atlantic Steel Co., 245 N.L.R.B. 814, 816–17 (1979) (holding that employee lost section 7 protection when, on the shop floor during working time, he lashed out at his foreman with obscenities after the foreman had responded to his question about overtime).
\footnotemark[123] Id. at 816.
\footnotemark[125] Id. at *14.  But cf. Starbucks Corp., 354 N.L.R.B. 876, 877 (2009) (finding that employee lost protection when she followed for two blocks, taunted, and intimidated a manager after a union rally outside the employer’s coffee shop), withdrawn, Nos. 2-CA-37548, 2-CA-37599, 2-CA-37606, 2-CA-37688, 2-CA-37689, 2-CA-37798, 2-CA-37821, 2-CA-38187 (N.L.R.B. Aug. 17, 2010), and aff’d on reh’g, 355 N.L.R.B. 636 (2010), enforced in part and remanded in part sub nom. NLRB v. Starbucks Corp., 679 F.3d 70 (2d Cir. 2012).
\footnotemark[126] Three D, 2014 NLRB LEXIS 656, at *13.  Use of social media alone will not automatically negate the Atlantic Steel framework. See Memorandum from Barry J. Kearney, Assoc. Gen. Counsel of the NLRB, to Ray Kassab, Acting Regional Director of Region 7, 2012 WL 1795803, at *3 (Jan. 10, 2012) (applying Atlantic Steel framework and refusing to file complaint against employer because, while disciplined employee’s Facebook comments implicated section 7 concerns, they contained racial stereotypes and slurs which caused significant racial tension in the workplace).
\end{footnotes}
communications “free-for-all” with greater section 7 protections for personal accounts while protecting merely internal e-mail systems, and communications that would otherwise remain in-house may be open for the general public to see. Further, employers may be exposing themselves to additional liability risks by encouraging employees to use personal accounts.

B. Additional Protections for Employees’ Personal Communications

When employees talk about work—or simply talk about subjects an employer for some reason is interested in—using their personal communications devices and services, employers appear sorely tempted to gain access to those communications. In some circumstances, employers have been held liable for improperly accessing employees’ personal communications.

Sometime in the 1990s, Robert Konop, a Hawaiian Airlines pilot, created a website to post comments critical of Hawaiian Airlines, its officers, and the Air Line Pilots Association. To view the website’s contents, visitors had to login with a username and password; Konop kept strict control of authorized users and expressly prohibited access by any member of Hawaiian’s management. In 1995, a Hawaiian Airlines vice president asked two authorized users for their login credentials for Konop’s website; the users consented and the vice president viewed the contents of the site. Konop sued Hawaiian Airlines for, inter alia, violating the Stored Communications Act (SCA). The SCA makes it unlawful for anyone to intentionally access without authorization a facility through which an electronic communication service is provided, or to intentionally exceed an authorization to access that facility, and thereby obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage in such system. The Ninth Circuit Court of Appeals

127 Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 872 (9th Cir. 2002).
128 Id. at 872–73.
129 Id. at 873.
131 18 U.S.C. § 2701(a). The Electronic Communications Privacy Act defines “electronic storage” as “(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.” Id. § 2510(17). “The [SCA] reflects Congress’s judgment that users have a legitimate interest in the confidentiality of
concluded that Hawaiian Airlines had violated the SCA by gaining unauthorized access to Konop’s restricted-access website.  

More recently, when Brian Pietrylo worked at a Hillstone Restaurant Group-owned Houston’s restaurant as a server, he created an access-controlled MySpace page called the “Spec-Tator” for invited employees to “vent about any BS we deal with [at] work without any outside eyes spying in on us.” After a Hillstone manager asked for, and received, access information to the page from an employee, Pietrylo and another employee were fired because management believed posts on the Spec-Tator were offensive. The United States District Court for the District of New Jersey upheld the jury’s verdict that Hillstone had violated the SCA by accessing the Spec-Tator without authorization, as it believed that the employee who provided the access information was coerced into providing it.

Even when an employee accesses his or her personal e-mail using the employer’s equipment—and leaves the username and password information stored on that equipment—the employer can still violate the SCA by viewing the employee’s personal messages. Recall Mayslake employee Diane Borchers. Although Mayslake claimed that the administrative assistant innocently accessed Borchers’ AOL account while searching for work-related communications, that did not explain why, although Mayslake used a Comcast account for its work e-mail, the assistant clicked on Borchers’ AOL icon, nor why she printed out over thirty messages that communications in electronic storage at a communications facility.” Theofel v. Farey-Jones, 359 F.3d 1066, 1072 (9th Cir. 2004).

132 Konop, 302 F.3d at 880. Although the SCA allows a person to authorize a third party access to an electronic communication if the person is a user of the service and the communication is of or intended for that user, see 18 U.S.C. § 2701(c)(2), the Ninth Circuit concluded that the people who supplied the access information to the Hawaiian vice president did not qualify as “users” under the statute because they had never actually accessed—i.e., used—the service, see Konop, 302 F.3d at 880.

133 Pietrylo v. Hillstone Rest. Grp., No. 06-5754 (FSH), 2008 WL 6085437, at *1 (D.N.J. July 25, 2008) (internal quotation marks omitted). The MySpace page also stated: “This group is entirely private, and can only be joined by invitation.” Id. (internal quotation marks omitted).

134 Id. at *2.


136 See supra text accompanying notes 88–95.
were clearly personal.\footnote{Borchers v. Franciscan Tertiary Province of the Sacred Heart, Inc., 962 N.E.2d 29, 41 (Ill. App. Ct. 2011) ("[A]lthough the initial accessing of the AOL account could be viewed as innocent if [the assistant] had immediately logged out of the account once she had seen that the in-box contained material not clearly related to work, that is not what happened here. [The assistant] deliberately chose to click additional times to travel from the first screen she viewed, the in-box, to the portion of the AOL account displaying e-mails that the plaintiff had sent, actions that could be viewed as additional acts of ‘accessing’ the plaintiff’s emails through the AOL ‘facility.’").} The court concluded that this evidence was more than sufficient to withstand a motion for summary judgment.\footnote{Id.}

One can certainly understand the concern that the owner of a small business may have when a former employee opens a competing business; for example, has the former employee improperly used confidential information to start his new business? Perhaps the evidence may be found in the former employee’s personal e-mail account, easily accessible on one of the former employer’s computers with prepopulated username and password fields.\footnote{See Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 552 (S.D.N.Y. 2008).} Not only did the former employer, Lauren Brenner, owner of Pure Power Boot Camp, use this information to access the Hotmail account of her former employee, Alexander Fell, she was also able to access Fell’s personal Gmail account because he had e-mailed his Gmail username and password information to his Hotmail account; and Brenner was able to access a third personal e-mail account of Fell by making a “lucky guess” at his password, which turned out to be the same password that he used for his other accounts.\footnote{Id.} Brenner advanced two theories for why her access of Fell’s personal e-mail accounts was authorized and therefore not a violation of the SCA.

First, Brenner claimed that the Employee Handbook’s e-mail policy provided authorization.\footnote{Id. at 552–53.} However, as the court pointed out, the e-mail policy was, by its own terms, limited to company equipment; therefore, it could not apply to e-mails on systems maintained by outside entities such as
Microsoft (Hotmail) or Google (Gmail). Further, there was no evidence that any of the personal e-mails were created on, sent through, or received from Pure Power's computers, and some of Fell's accounts may have never been accessed by Fell at work, or may not have even have existed until after Fell left Pure Power's employ.

Brenner's second theory of authorized access was based on the fact that Fell had left his Hotmail username and password information stored on Pure Power's equipment—providing implied consent to access (at least) the Hotmail account. Here, though, as noted above, Fell's e-mails were stored with third-party services, not on Pure Power's computer system. The court declined to hold "that if an employee simply views a single, personal e-mail from a third party e-mail provider, over [Pure Power] computers, then all of [his] personal e-mails on whatever personal e-mail accounts he uses, would be subject to inspection." The court rejected "the notion that carelessness equals consent." One might argue that an employer could require authorization to access personal accounts as a condition of employment. Of course, the employer runs the risk that a court may consider such consent to be coerced, as in Pietrylo. However, state legislatures have become so concerned over employers demanding access to employees' and job applicants' personal online communications accounts that eighteen states have banned the

---

142 Id. at 559.
143 Id.
144 Id.
145 Id. at 560.
146 Id.
147 Id. at 561 ("There is no sound basis to argue that Fell, by inadvertently leaving his Hotmail password accessible, was thereby authorizing access to all of his Hotmail e-mails, no less the e-mails in his two other accounts. If he had left a key to his house on the front desk at [Pure Power], one could not reasonably argue that he was giving consent to whoever found the key, to use it to enter his house and rummage through his belongings. And, to take the analogy a step further, had the person rummaging through the belongings in Fell's house found the key to Fell's country house, could that be taken as authorization to search his country house[?] We think not."); see also Levinson, supra note 1, at 524 ("Scholars and courts generally agree that a person who circumvents a code-based restriction, such as by guerrilla a password to an employee's personal e-mail, accesses the electronic communications without authorization."); cf. Sherry F. Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 122-23 (2002) (noting that giving a neighbor a key to one's house so the neighbor can water the plants while the owner is away does not grant the neighbor permission to invite friends into the owner's house). But see Sitton v. Print Direction, Inc., 718 S.E.2d 532, 536 (Ga. Ct. App. 2011) (distinguishing Pure Power and finding no unauthorized access under criminal offenses of computer theft, computer trespass, and computer invasion of privacy where manager moved employee's mouse on personal computer used at work, revealing e-mail account).
148 See supra text accompanying note 135.
practice, and an additional nineteen have or are considering doing so, along with Congress. These statutes and bills fundamentally prohibit employers from requiring or requesting employees and job applicants to disclose their usernames and passwords to personal online accounts, often including personal e-mail accounts. These laws and bills make a compelling public policy argument that requesting access to employees’ personal online accounts as part of the employment agreement would constitute coerced—and therefore unauthorized—access.

Employers may also violate an employee’s common law right to privacy by accessing the employee’s personal e-mail account. For example, in 2007 Marina Stengart used her employer-issued laptop to access her personal Yahoo! E-mail account, which she used to correspond with her attorney regarding a possible hostile work environment case against her employer. In an effort to preserve electronic evidence for discovery, the employer hired forensic experts who created an image of the hard drive in the laptop used by Stengart; among the items retrieved were temporary Internet files containing the contents of e-mail messages that Stengart had exchanged with her attorney via her Yahoo! account. The New Jersey Supreme Court concluded that Stengart had a reasonable expectation of privacy in those e-mail messages—and not just because they were


154 Id. at 656.
potentially privileged: It first held Stengart had a subjective expectation of privacy in the messages because she used a personal, password-protected e-mail account instead of her company e-mail account and did not save the account’s password on her computer. The court also held that Stengart had an objective expectation of privacy because the employer’s electronic communication policy did not address the use of personal, web-based e-mail accounts accessed through company equipment, nor did it warn employees that the contents of e-mail messages sent via personal accounts could be forensically retrieved and read by the company. In stark contrast, courts generally have not found any employee privacy expectations in e-mail communications sent through the employer’s communications system, even when the messages also involve potentially privileged communications with an attorney.

There is some support for the argument that an employee may have an expectation of privacy in restricted-access online social media account information. For example, after being disciplined for a Facebook post, Deborah Ehling sued her employer for, inter alia, invasion of privacy.

155 Id. at 663.
156 Id. For a fuller discussion of employee privacy in light of employer electronic communications policies, see infra text accompanying notes 162–66.
158 See, e.g., Holmes v. Petrovich Dev. Co., 119 Cal. Rptr. 3d 878, 883 (Ct. App. 2011) (concluding that employee had no privacy right in personal e-mail messages sent to her attorney through employer’s e-mail system and analogizing her e-mail messages “to consulting her lawyer in her employer’s conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him”).
159 Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369, 372 (D.N.J. 2012). Ehling, a nurse, was reported by her employer to the state nursing board over concerns of her willingness to treat objectionable patients based on the following Facebook post:

An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards [. . .] go to target practice.

Id. at 370.
The United States District Court for the District of New Jersey initially denied the employer’s motion to dismiss the privacy claim, noting that Ehling “may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing.” However, Ehling’s invasion of privacy claim was subsequently dismissed when it was discovered that a coworker, who had “Friend” access to the Facebook post, voluntarily revealed its contents to the employer.

Much of the Stengart decision discussed above hinged on what was missing in the employer’s electronic communications policy—notice that even personal e-mail messages could be stored on employer equipment and subsequently accessed by the employer. Stengart’s employer could have eliminated any objective expectation of privacy by providing clear notice that any e-mail messages—personal or otherwise—stored on the employer’s equipment or accessed through its electronic communications system could be retrieved and reviewed. Employers can ultimately “notice out” any expectations of privacy in electronic communications stored on their equipment or passing through their systems. Today,


161 See Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659, 674 (D.N.J. 2013) (“The evidence does not show that Defendants obtained access to Plaintiff’s Facebook page by, say, logging into her account, logging into another employee’s account, or asking another employee to log into Facebook. Instead, the evidence shows that Defendants were the passive recipients of information that they did not seek out or ask for. Plaintiff voluntarily gave information to her Facebook friend, and her Facebook friend voluntarily gave that information to someone else.”).

162 See supra text accompanying note 156.

163 Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 665 (N.J. 2010) (“Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy.”).

164 See In re Info. Mgmt. Servs., Inc. Derivative Litig., 81 A.3d 278, 287 n.4 (Del. Ch. 2013) (citing numerous court decisions finding no expectation of privacy in e-mail messages due to employers’ policies); see also Corey A. Ciocchetti, The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring, 48 AM. BUS. L.J. 285, 301 (2011) (“[F]or the most part, private employers must intrude into very private places—such as restrooms or locker rooms—to face liability for intrusion upon seclusion.”); Determann & Sprague, supra note 8, at 1034 (“Employers are free to eliminate actual employee privacy expectations through detailed, specific notices and deploy even
courts generally recognize that whether an employee has a reasonable expectation of privacy in communications sent and received through the employer’s system depends upon whether the employer had a policy in place regarding the monitoring of such communications, as well as whether the employee was aware that the employer may be monitoring those communications.\(^{165}\) And that awareness would come through notice. But the notice—i.e., the employer’s policy—must be specific:

Because an employer’s announced policies regarding the confidentiality and handling of email and other electronically stored information on company computers and servers are critically important in determining whether an employee has a reasonable expectation of privacy in such materials, the cases in this area tend to be highly fact-specific and the outcomes are largely determined by the particular policy language adopted by the employer.\(^{166}\)

The argument can therefore clearly be made that if employers want to snoop on employee communications, they can much more easily do so—technically and legally—if those communications pass through their own systems. Banning personal use of employer communications systems merely sets up employers for potential liability without highly fact-specific policies that are still subject to case-by-case interpretation. However, *Purple Communications*’ limited ruling may still drive employees’ personal work-related communications into often-open forums that have greater NLRB section 7 protections but potential liabilities for employers.

V. CONCLUSION

On an extraordinarily cold January day in Baltimore in 1959, seven machinists were fired after they walked off the job because their workshop was too cold; the Supreme Court held that their actions were protected under section 7 of the NLRA.\(^{167}\) In particular, the workers “were wholly unorganized. They had no bargaining representative and, in fact, no highly intrusive monitoring technologies, except where prohibited by a few, narrowly worded statutory prohibitions of extremely intrusive employer monitoring in some states (such as video surveillance in locker rooms and restrooms).”\(^{168}\) Recall that the *Purple Communications* majority decision reiterated that employers can notify employees they have no expectation of privacy in their use of their employer’s e-mail system. See supra note 68 and accompanying text.


representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. It is when employees have no union representation that they especially need the protections afforded by section 7, as they must speak for themselves as best as they can. The underlying basis for the NLRA itself is that by discussing with one another common problems of the workplace and not being afraid to bring them to the attention of management, workers will have begun to exercise their right of association in the workplace. And, as Professor Hirsch has pointed out, the most serious impediments to employees exercising the collective action rights under the NLRA are restrictions on employee discourse. Purple Communications is a significant step in eliminating those restrictions on employee discourse. However, by limiting itself to just e-mail communications, it may not be a far enough step.

As Christine Neylon O’Brien has argued, as technology changes and e-mail plays a less-central role in employee communications, the question will ultimately be one of content. With so many different types of communications intermingling work and personal messages, focusing just on e-mail is about as relevant in the modern workplace as the typewriter. Despite e-mail’s current role as a work-related communications device, evolving technologies are quickly eclipsing e-mail as the communications conduit of choice, meaning the NLRB remains one step behind in protecting employee-to-employee communications, the sine qua non of section 7 activity.

---

168 Id. at 14.
170 Hirsch, supra note 56, at 1093.
172 See supra note 56 and accompanying text.