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Am I Blue or Seeing Red? The NLRB Sees Purple When Employer Communication Policies Unduly Restrict Section 7 Activities

By Christine Neylon O'Brien

Introduction

May employer communications policies prohibit or restrict employee use of workplace email systems when employees are engaging in protected concerted activity (PCA) under section 7 of the National Labor Relations Act (NLRA)?¹ What standard does the National Labor Relations Board (NLRB) apply to determine if employer email communication rules or practices violate the NLRA? Must employers provide employees with access to workplace email? May an employer prohibit employees who are authorized to use the workplace email system from using it for other personal or union organizational reasons? The answers to these questions are relevant to employers and employees alike, and to unions who are assessing the changing technological landscape for organizing and rallying employee support. All of these parties are affected by the NLRB's recent *Purple Communications*² decision regarding employer email systems. This is so because the NLRA applies to private sector businesses, whether they are unionized or not, and many companies have written or unwritten communication and/or social media policies that may be in violation of the NLRA.³ Employers should review their electronic communications policies, and where necessary, revise them to comply with the Board's latest view of the law.⁴ Clearly, employees are well advised to know their rights under the NLRA as well as limitations on these rights in order to engage in section 7 activities while avoiding adverse employment consequences.

Section 7 of the NLRA grants employees the right to engage in PCA which includes communication regarding: organization (or refraining from such), wages, hours, working conditions, and other concerted activities for mutual aid or protection, effectively providing employees with a workplace bill of rights.⁵ Employees must be acting in concert and within these defined subject areas in order for their communication to fall within the umbrella of section 7's protection.⁶ The concept of acting in concert may involve two or more employees acting together or one employee involving another coworker before acting, or acting on the behalf of others, for the benefit of more than just the acting employee.⁷ Employees engaging in conduct that is not concerted, or that exceeds the boundaries of protected activity because it is reckless, malicious, violent, etc., are not

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protected by section 7.⁸ Employer email communication and social media policies that unduly restrict employees from engaging in protected concerted activities violate section 8 (a)(1) of the NLRA.⁹

This paper analyzes the NLRB's *Purple Communications* decision which specifically overruled the Board's 2007 holding in *Register Guard* that employers are free to restrict employee use of employer email systems even if the conduct involves concerted activities.¹⁰ The *Purple* Board expressed its belief that the majority deciding *Register Guard* "was clearly incorrect," and determined that the "consequences of that error are too serious to permit it to stand."¹¹ The *Purple* majority agreed with the *Register Guard* dissenters that "email's flexibility and capacity make competing demands on its use considerably less of an issue than earlier forms of communications equipment the Board has addressed."¹² The parameters and implications of the Board's *Purple Communications* decision, as well as concerns raised in the dissents, are examined and evaluated, and solutions recommended.

I. The NLRB's Decision on Work Email in *Purple Communications, Inc.*

A. Background

Purple Communications, Inc. is a business that provides sign-language interpretation by two-way telecommunication.¹³ Employees utilize company-provided workstation computers to facilitate video calls between hearing parties and deaf parties.¹⁴ Employees are issued a company email address that they use every day that they are at work, and the company email is accessible from other home computers and smart phones.¹⁵ The interpreters were provided with Internet access on computers in the break area, but Internet access was limited on their actual workstations.¹⁶ The Board noted the absence of information on the record regarding incidents of using work email for nonbusiness use or discipline for such.¹⁷ The company maintained an electronic communications policy that restricted use of company equipment and internet and email access to "business purposes only."¹⁸ Further, the policy prohibited using the company's equipment or systems "on behalf of organizations with no professional or business affiliation with the Company" or "sending uninvited email of a personal nature."¹⁹

The ALJ found that the electronic communications policy was lawful under the standard set by the Board in *Register Guard*, and the General Counsel and Charging Party filed exceptions.²⁰ The General Counsel argued that *Register Guard* was wrongly decided in that the Board

balanced employees' section 7 rights against employer property rights when it should have balanced the section 7 rights against the employer's managerial interests.²¹ The proper standard would balance limitations on employees' right to use the systems against management's interest in production and discipline.²² The Board then reviewed the positions of the Charging Party, the Respondent, and Amici supporting both sides, with each 'side' representing the arguments presented by majority and dissenting opinions in *Register Guard*.²³ The *Purple* majority discussed the arguments and practical concerns expressed by the parties and various amici and then outlined its own conclusions.²⁴

B. The Majority Opinion

In its long awaited decision on employer email policies,²⁵ the National Labor Relations Board divided three to two along political party lines.²⁶ The majority opinion agreed with scholars that the Board's 2007 decision in *Register Guard* was wrongly decided.²⁷ This was so because *Register Guard* overemphasized employers' property interests at the expense of employees' section 7 rights, and ignored the importance of email for workplace communication.²⁸ The majority found that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted" but limited this ruling to those employees who were provided access to the email system, specifically excluding any mandate that employers *must* provide such access.²⁹ In addition, the Board noted that employers may apply consistently enforced controls on the email system as necessary to maintain production and discipline, even projecting that an employer could justify a total ban on non-work use of email by demonstrating special circumstances.³⁰ Importantly, the *Purple Communications* majority did not address either nonemployee access or to other forms of electronic communication, as the case did not contain these issues.³¹ The Board remanded the issue to the Administrative Law Judge (ALJ) to reconsider the case in light of its newly adopted standard.³²

In its discussion in *Purple Communications*, the Board majority outlined the serious flaws in *Register Guard*, highlighting its undervaluing of "employees' core Section 7 right to communicate in the workplace about their terms and conditions of employment" while at the same time giving too much importance to the property rights of employers.³³ The Board majority in *Register Guard* defaulted to reliance upon past decisions relating to use of employer equipment that were inadequate to support its findings, and failed to register the importance of business email for communication purposes, which the *Purple* Board noted had "increased dramatically" since that case was decided.³⁴

The *Purple* majority underscored the foundational importance of communication to employees' section 7 rights, noting that "collective action cannot come about without communication."³⁵ Such freedom of communication must be effective and the workplace is critical to the exchange of views.³⁶ The Board noted the prevalence and effectiveness of email as a means of business communication as well as evidence that its use will only increase.³⁷ Thus, the Board overruled *Register Guard's* holding and reverted to the well-settled framework for analysis that the dissent recommended in *Register Guard*.³⁸

The Board in *Purple Communications* affirmed the longstanding *Republic Aviation* "presumption that a ban on oral solicitation on employees' nonworking time" was unreasonable and restriction on PCA "must be justified by 'special circumstances' making the restriction necessary in order to 'maintain production and discipline.'"³⁹ The *Purple Communications* majority quoted extensively from the dissent in *Register Guard* regarding the inapplicability of the equipment cases in light of the expansive capability of email in comparison to more finite property items such as bulletin boards.⁴⁰ The Board noted that the *Register Guard* majority's "broad pronouncements in the equipment cases, to the effect that employers may prohibit all nonwork use of such equipment" was "dicta" that exceeded the principles in the underlying decisions.⁴¹ The *Purple* majority noted that many of these cases did not endorse an outright ban on all non-work use of the employer's equipment; rather, they merely found that there was no discriminatory enforcement of bans on equipment use.⁴² The Board in *Purple* specifically rejected the principle that employees have no right to use employer equipment for section 7 purposes on nonworking time if they regularly use the equipment in their work.⁴³

The Board built its ruling in *Purple Communication* upon the following principles: section 7 provides a foundational right to engage in protected concerted activity (PCA) at the jobsite, email is a fundamental forum for communication, and nonworking time is time the employee is free to engage in such communication even while on company property.⁴⁴ Applying the *Republic Aviation* framework, the *Purple Communications* Board presumed that a ban on oral solicitation on nonworking time is an "unreasonable impediment" that may only be permitted where an employer demonstrates "special circumstances ma[king] the rule necessary in order to maintain production or discipline."⁴⁵ Not only is an employer email system different from other property of employers, it is also not readily characterized as solicitation or distribution; instead it is a "forum for communication" where individual messages may be either, neither, or both, but clearly the

key is whether they are protected concerted activities according to the Board.⁴⁶ The Board also refused to classify email systems as work or non-work areas, finding that in most cases, the use would be mixed and thus restrictions on distribution that normally apply to work areas would not apply.⁴⁷

Importantly, the Board refused to restrict the application of a *Republic Aviation* analysis to situations where employees are entirely deprived of their rights to freely associate.⁴⁸ This was so because in *Republic Aviation*, and in other cases applying its framework, the Board and the courts have found bans on PCA on non-work time in non-work areas to be illegal even though PCA were permitted in some non-work areas.⁴⁹ The Board focused on the requirement that the nature of an employer's business must create the "special circumstances" that would justify a ban in certain locations within the employer's facility.⁵⁰

The Board specifically limited its decision in *Purple* to employees who are afforded access to an employer's email system for work purposes and limited its decision to email, reserving judgment on other interactive electronic communications for a later date.⁵¹ The Board noted that access to reasonable alternative means of communication for concerted activities is not a relevant inquiry with respect to employees, although such an inquiry is relevant when nonemployees seek access to employer property.⁵² The Board adopted and adapted the presumption from *Republic Aviation* to the medium of email, finding that employees with rightful access to the email for work have a right to communicate about section 7 concerns on nonworking time.⁵³

Despite this presumption in favor of employee use, an employer may still establish "special circumstances necessary to maintain production and discipline justify restricting its employees' rights."⁵⁴ The Board predicted that it would be rare that special circumstances would permit a total ban and that restrictions must be connected to the interest the employer asserts.⁵⁵ The Board also clearly emphasized that employers would not be required to grant email access to employees without it, and that the presumption is limited to nonworking time.⁵⁶ Employers may justify monitoring use during working time based upon legitimate management reasons such as maintaining productivity and preventing harassment, and imposing restrictions relating to size of attachments and video/audio due to demonstrated system limitations.⁵⁷

The Board announced that its new policy regarding workplace email would apply retroactively absent "manifest injustice."⁵⁸ The danger of such is lessened by the fact that the presumption is rebuttable so that even in the instant case, *Purple Communications* had an opportunity

upon remand to justify its restrictions based upon special circumstances.⁵⁹ In addition, remedies for maintaining such a policy will ordinarily be limited to rescission of the policy along with notifying employees of such.⁶⁰ The *Purple Communications* Board, in overruling *Register Guard*, quoted from the dissent in the earlier decision, and noted that it sought to be “responsive to the enormous technological changes that are taking place...”⁶¹ The Board added that technological advances are accelerating and expressed their willingness to weigh these questions in light of the “importance of electronic means of communication to employees’ exercise of their rights under the Act...[rather than]... smother employees’ rights under a blanket rule that vindicates only the rights of employers.”⁶² The Board indicated that the Supreme Court’s *Republic Aviation* precedent was the correct precedent to be applied to future cases.⁶³

C. Dissenting Opinions

Members Miscimarra and Johnson each filed dissenting opinions in *Purple Communications*, both preferring to maintain the Board’s prior rule on workplace email from the *Register Guard* decision.⁶⁴

1. Member Miscimarra Dissenting

Member Miscimarra took issue with the Board instituting a presumption rather than a clear standard that would define what may be done with certainty.⁶⁵ He cited four reasons why the majority’s creation of a statutory right for employee use of employer email systems for non-business purposes was “unfortunate and ill- advised.”⁶⁶ Member Miscimarra disagreed with the majority’s view that an employer limiting email to business purposes was “an unreasonable impediment to self-organization” under the standard in *Republic Aviation*.⁶⁷ Other types of email services and electronic communication platforms including social media provide many more opportunities for communication about section 7 concerns than single purpose business email systems.⁶⁸ In addition, Member Miscimarra expressed concern that requiring employers to allow employees to use the workplace email system for concerted activities could itself be an unfair labor practice; namely that of employer domination or interference with the formation or administration of any labor organization, which includes the concept of contributing financial or other support to an organization because that interferes with employee free choice.⁶⁹

Member Miscimarra’s third concern was that the *Purple* Board’s new requirement would lend itself to unlawful employer surveillance of section 7 activity and mire the bright line standard that “working time is for work.”⁷⁰

Miscimarra’s final objection to the new rule was the difficulty of applying it and that it displaced the *Register Guard* rule that was easier to understand and apply.⁷¹ The earlier rule, providing that employees did not have the right to use their employer’s email system for PCAs, was clear and “longstanding.”⁷² In contrast, the presumption enunciated by the *Purple* Board is likely to negatively impact productivity and discipline.⁷³ In addition, it could lull employees into engaging in conduct on email that oversteps the boundaries of section 7, or is unprotected because the employer chooses to rebut the presumption by demonstrating special circumstances.⁷⁴ If the employer is successful in doing so, its restriction of email use would be lawful and employee use in defiance of the restriction could result in employee discipline.⁷⁵

Member Miscimarra disagreed with the *Purple* majority’s premise that employees need to use their employer’s email in order to engage in PCAs, and that *Register Guard* both placed too much protection upon employer property rights and too little on employees’ right to engage in protected concerted activity.⁷⁶ The employer in *Purple* restricted use of the company email system and related electronic equipment to business purposes only.⁷⁷ Member Miscimarra noted that with the “virtually unlimited opportunities” available for employees to engage in concerted activities other than on the employer’s email, there was no need for the Board to balance the interests of employers and employees in the way that it did, culminating in the requirement that employers make its email systems available for this purpose.⁷⁸ Member Miscimarra expressed concern about the inappropriate electronic communications that the Board has deemed protected by the Act.⁷⁹ He inferred that such will make it harder to decipher what conduct is protected, and will require employers to engage in unlawful surveillance when reviewing such communications.⁸⁰ He noted further that the use of an employer’s email system is a “thing of value” that could violate section 302(a) of the Labor Management Reporting Act, as well as influence employees, thus interfering with free choice under section 7.⁸¹ Thus, Member Miscimarra foresaw that the majority’s creation of this new statutory right would create nothing but problems.⁸² The Board’s presumption in favor of the right, combined with qualifications that could take away the right, will lead to uncertainty and difficulty in application on a case-by-case basis.⁸³

2. Member Johnson Dissenting

Member Johnson wrote a thirty-two page dissent in *Purple Communications*, a length exceeding that of the majority and other dissenting opinion combined.⁸⁴ Member Johnson objected to the requirement that employers make their

email systems “public for Section 7 purposes” when they are a “private virtual space paid for by the employer.”⁸⁵ He would not have overruled *Register Guard* to replace it with an “overbroad rule.”⁸⁶ The sweeping changes brought about by social networking over the seven years since *Register Guard* was decided made it unnecessary to change the rule.⁸⁷ The majority’s new rule will erode the longstanding restriction of working time as time for work, in Member Johnson’s view.⁸⁸ It essentially requires employers to pay employees for time spent on section 7 activities, and to provide its email system as a host for such discussions.⁸⁹

Member Johnson took issue with the majority’s characterization of email as a forum for workplace communication.⁹⁰ He viewed the considerable differences between physical workspaces and email, and expressed concern that it will be difficult to discern between working and nonworking areas on email, unlike the boundaries that are clear in a real or physical work environment.⁹¹ Member Johnson noted further that email is a user-created and directed communication that may exceed the audience of water cooler discussions.⁹² Further, email is neither bounded by time or place, defying analogy to a more natural gathering place such as a water cooler.⁹³ In addition, email communications are more persistent than face-to-face communication which fades when the participants walk away.⁹⁴ In contrast, email may address the entire workforce and remain on the system despite individual deletions, reappearing in ill-advised and difficult to subdue ‘repl[ies] to all’.⁹⁵ Member Johnson objected to the employer being obliged to pay for these communications and maintain them on its system.⁹⁶ Member Johnson saw the use of business email for non-work purposes as a “boundless, permanent distraction.”⁹⁷

Member Johnson argued that employers make a significant investment in an email system and should be able to limit its use to its intended (business) purposes.⁹⁸ He agreed with the *Register Guard* majority’s view that the employer has a property right in its equipment that permits it to regulate and restrict employee use.⁹⁹ Thus, the *Purple* majority’s claim that the Board never stated that an employer may prohibit all nonwork use of its equipment is “simply wrong” in Member Johnson’s view because the Board in *Mid-Mountain Foods* held that there was no statutory right for an employee to use an employer’s equipment.¹⁰⁰ Member Johnson questions the *Purple* majority’s finding that email is the “predominant means of communication for nonwork purposes in many workplaces.”¹⁰¹ The statistics combined various modes of communication with email, were dated, and far from adequate to support this conclusion in his view.¹⁰² Just because email is convenient and used for work does not

mean it must be the medium for section 7 communication by means of a concept “akin to adverse possession.”¹⁰³ Further, simply because the employer uses its equipment and property for communication does not mandate that employees and unions may use it.¹⁰⁴ Member Johnson noted further that the majority did not establish that the use of email was necessary, nor that it had eliminated or rendered ineffective other means of communication in the workplace, especially face-to-face communication.¹⁰⁵

Further, Member Johnson noted that even if the majority’s view that employee use of employer email should be analyzed using the *Republic Aviation* framework were correct, which he did not concede, “the majority’s application [of such] is dead wrong.”¹⁰⁶ This was so, in Member Johnson’s view, because “there is no Section 7 right arising to employer equipment,” and because the majority did not correctly balance section 7 rights with employer property rights in light of the available alternative means of communication that in some respects are preferable to email.¹⁰⁷ Adequate avenues of communication provide effective opportunities for communicating and engaging in section 7 activities without requiring the use of the employer’s email system.¹⁰⁸ Such is “simply unnecessary” in light of the availability of face-to-face solicitation and the prevalence of other forms of electronic communication besides the employer’s email.¹⁰⁹

In the absence of Supreme Court precedent regarding electronic communication and the balancing of section 7 rights with employer property rights, Member Johnson looked to the Court’s *Republic Aviation* and *Beth Israel* decisions for guidance.¹¹⁰ He posed the question “whether adequate avenues of communication exist to effectively communicate about protected concerted activity without the use of business email” and concluded that the balance weighed against finding a presumptive right to use typical business email networks.¹¹¹ This was so because the primary function of business email is business communication, an operational area rather than an employee service or natural gathering place.¹¹²

In addition, Member Johnson wrote that employer email is an unnecessary avenue in light of the availability of alternative electronic means of communication including personal email, social media and text messaging.¹¹³ He noted that as of 2012, three quarters of all email accounts were personal ones, rather than business accounts, and as of 2014, 90 percent of American adults have mobile phones, 60 percent owning smartphones, and that percentage is expected to rise.¹¹⁴ In light of these ready and versatile alternatives including personal email and social media, there is no need for employees to use their business email to communicate, in Member Johnson’s view.¹¹⁵

Since the *Register Guard* era, the use of social media has risen sharply, and is projected to increase further.¹¹⁶ The various platforms are integrated and provide opportunities to connect with co-workers, notably through algorithms that search for and suggest connections based upon place of work, etc.¹¹⁷ As the Board itself noted in its recent decisions and General Counsel Memoranda, social media is clearly a place where employees communicate about work, and employers should not limit employee use of social media for section 7 purposes.¹¹⁸ Noting that social media “is here to stay as a means of communication among and between employees,” Member Johnson predicted that such will become even more useful for employee communication in future.¹¹⁹ Finally, he noted that employees use text messaging on their personal equipment.¹²⁰ Texting is fast, generally alerts the recipient or recipients, and is more frequently used than email or the internet on mobile phones.¹²¹

Member Johnson objected to the majority’s creation of an unlimited right to use the employer’s business email for section 7 communications in light of the interference such will undoubtedly cause to employees’ work productivity.¹²² This was especially problematic in his view because Purple Communications chose a policy that the employer’s email was for business use only, unlike the looser policies at many companies that allow for some personal use.¹²³ In addition, the fact that section 7 communications arrive via the employer’s business email creates an obligation for employees to deal with such, depriving employees of their section 7 right to refrain from engaging in such activity.¹²⁴ Further, employer monitoring of employee section 7 communications on workplace email could be deemed unlawful surveillance in Member Johnson’s view.¹²⁵ With the vast majority of electronic communication that exists outside of the extremely tiny portion of communications that take place on business email, it makes no sense to require business email to carry section 7 communications, in Member Johnson’s opinion.¹²⁶

The use of employer email for section 7 communications will inevitably drain productivity when these emails are drafted and read on worktime, an outcome which conflicts with the *Republic Aviation* principle that “working time is for work.”¹²⁷ Email does not neatly fit into the traditional working time/break time boundary and thus will result in a loss of productive time.¹²⁸ Member Johnson noted that “no employer would last long in business if its only output was the exercise of Section 7 rights.”¹²⁹ Johnson saw this “unfunded mandate” as beyond the power of the NLRB.¹³⁰ He lamented the regulatory taking that occurs when the government requires employers to host and maintain section 7 emails.¹³¹

Member Johnson’s disagreed with the *Purple* majority about whether the alternative means of communication matters: he maintained it does whereas the majority does not.¹³² The majority looked to alternatives only where third party rights to enter an employer’s physical property pertain.¹³³ Member Johnson viewed the alternative means of communication as inherent to any balancing test regarding the adequacy of avenues for employees to engage in section 7 activity.¹³⁴ The destruction of employer property rights should be minimized while still maintaining section 7 rights, and precedents involving physical property decisions on section 7 rights illustrate the inevitability that alternatives must and have been examined in the past.¹³⁵

Member Johnson maintains that the consideration of alternatives is required when the Board formulates a presumption such as the majority did in the *Purple Communications* case.¹³⁶ Johnson took issue with the majority’s interpretation of the Board’s physical property nonemployee access cases because the majority applies these while discounting the necessity of considering alternative means, which makes little sense in Johnson’s view when the Board is faced with a new medium of communication.¹³⁷ The majority is focused on business email as a means of facilitating communication among the workforce but Member Johnson sees this as just another way of saying it is “convenient” which was not reason enough to make access to the employer’s email system a right.¹³⁸

Member Johnson found further problems with the majority’s rule in that it violates the First Amendment to force employers to subsidize hostile speech.¹³⁹ Employees will inevitably compose and read such hostile speech on working time and the employer will pay for maintaining the system, as well as for increased storage space.¹⁴⁰ Compelling the employer to subsidize speech that the employer does not support is worse in Member Johnson’s view than requiring an employer to post Board notices as to employees’ rights, an initiative that was struck down, and the Board has not appealed.¹⁴¹

Finally, Member Johnson noted that the parameters of the majority’s rule make it unworkable, and the Board’s guidance is insufficient, serving only to point out all the problems with the presumption.¹⁴² If an employer must allow its system to fail because of additional strain before demonstrating special circumstances that would allow it to restrict system use, this standard engenders property destruction which hardly seems an appropriate requirement under the Act.¹⁴³ In addition, the Board should give employers guidance regarding their monitoring of email rather than let “hundreds or thousands of employers [be] wrung through the Board’s litigation processes.”¹⁴⁴ Member Johnson expressed concern that employers will

be required to monitor the content of emails in order to determine the use of email which creates an impression of surveillance regarding protected concerted activities.¹⁴⁵ Member Johnson made clear that he would not have overturned *Register Guard*, and he inferred that the *Purple* majority acted like Rip Van Winkle because it ignored the changes that have taken place in electronic communication over the past ten years which made the Board's new rule in *Purple Communications* unnecessary.¹⁴⁶

D. The Administrative Law Judge's Supplemental Decision on Remand in *Purple Communications*

The NLRB's remand of *Purple Communications* affirmed that the company's email policy violated the NLRA.¹⁴⁷ The Board remanded the case to the same ALJ in order "to reopen the record and afford the parties an opportunity to present evidence relevant to the [new] standard" that the board adopted in *Purple*.¹⁴⁸ Pursuant to the Board's remand, the ALJ evaluated the *Purple* email restrictions under the newly announced standard, finding that the electronic communications policy "presumptively interferes with employees' Section 7 rights [absent rebuttal] that the restrictions are justified by special circumstances necessary to maintain production and discipline."¹⁴⁹ Since *Purple* declined to submit additional evidence or argument in an attempt to justify its limitation on email use, and the burden was on the employer to rebut the presumption, the ALJ found that the *Purple* policy violated section 8 (a)(1) of the Act.¹⁵⁰ In light of the Respondent/employer's failure to assert special circumstances, the ALJ decided not to take additional evidence from the Charging Party.¹⁵¹ The ALJ found that the matters the Charging Party sought to illuminate were precluded by the NLRB's decision in *Purple*.¹⁵² The Board clearly outlined the parameters of the presumption regarding *nonworking* time and set out the remedies for violations as simply "rescission of the policy and standard notifications to employees" such that the Charging Party's requested opportunity to provide evidence regarding the policy's restriction during working time or special remedies must be excluded.¹⁵³ Thus, rescinding the email usage restrictions and notifying employees of such with a revised insertion for the employee handbook, or the equivalent, would satisfy the Board's requirements.¹⁵⁴

E. Analysis of the Board's Decision

1. Political Affiliation

As the Board noted in *Purple Communications*, the *Register Guard* decision was criticized for its elevation of employer

property rights over employee section 7 rights.¹⁵⁵ Now that the Board has overturned *Register Guard*, it stands to reason that supporters of the *Register Guard* decision will criticize the *Purple Communications* decision, as was evidenced by the detailed dissents of two Board members.¹⁵⁶ In reviewing the dissents in *Purple Communications*, one notes how the political affiliations appear to coincide with their interpretations of various precedents,¹⁵⁷ as well as dictate how to apply the older rules regarding exercise of section 7 rights to new technology. It seems that the outcome in *Register Guard* vs. *Purple Communications* is, at least in part, based upon the composition of the NLRB at the date of decision.¹⁵⁸ In the *Purple Communications* decision, the Democratic majority upheld employee rights to engage in PCAs on nonworking time,¹⁵⁹ while the two Republican appointees dissented in favor of protecting employer property rights in light of the availability of alternative means for engaging in PCAs.¹⁶⁰ In contrast, in the *Register Guard* decision, the opposite paradigm of three Republicans and two Democrats resulted in a majority decision that was decidedly pro-employer, with two Democratic dissenters.¹⁶¹ The *Purple Communications* majority specifically adopted arguments from the *Register Guard* dissent. Most readers of these opinions would simply infer that a Board with a Republican majority upholds the rights of employers, in contrast to a Board with a Democratic majority which upholds employees' statutory rights.

2. Arguments For and Against the *Purple* Holding and Recommendations

Having criticized the majority's rule in *Register Guard*, as the Board noted in its *Purple Communications* decision,¹⁶² this author nonetheless reviews next what, if any, flaws may be evident in the *Purple* majority's ruling. Thus, the merits of the arguments in the *Purple Communications* dissents are analyzed, starting with a brief summary of the similarities within the dissents. Both dissenters in *Purple* thought that the Board's pronouncement of a presumption in favor of employees having a right was overbroad. The dissenters made clear that they would prefer to leave the *Register Guard* holding in place, finding it a better balancing of rights in light of the many alternative means of communication that employees have available. In addition, both *Purple* dissenters found the *Register Guard* rule easier to apply than the presumption which they conclude is destined to create uncertainty.¹⁶³ The dissents expressed concern about employer monitoring of email containing section 7 activity amounting to unlawful surveillance under section 8 (a)(1). However, it is clear that

this problem can be avoided by having a lawful policy in place, clearly notifying employees of parameters of surveillance as well as employer's valid reasons for such, and perhaps having employees sign off that they understand the policy, particularly if the employees are communicating from their own devices.¹⁶⁴ The dissenters also worried about the Board's new policy creating unfair labor practices under section 8 (a)(2) domination and assistance theories because of the employer sponsoring the email system plus its potential interference with employee free choice, and the inevitability of employees reading such emails during employer-paid working time.¹⁶⁵ This problem can be avoided by announcing that such emails are to be read on nonworking time, and the employers' monetary support need be no more significant than providing space on physical bulletin boards, and telephones for engaging in PCAs. The *Purple* dissenters noted how the new rule will negatively impact productivity and discipline.¹⁶⁶ This issue may also be remedied by nondiscriminatory rules regarding time and extent of use.

Perhaps the most striking criticism raised by the dissenters regards whether the Board has created an unworkable rule that will cause employers and employees to act at their peril in terms of violating the NLRA or the employer's valid policies.¹⁶⁷ It is questionable how much the public knows about the NLRA and PCAs. As former Chair of the NLRB, Wilma Liebman quoted, the scope of section 7 and the fact that the NLRA covers nonunion employees is perhaps the "best kept secret in labor law."¹⁶⁸ And as the *Purple* dissent noted, the Board's rulemaking to get informational notices posted in workplaces has not been successful.¹⁶⁹ Such a requirement surely would have done much to spread the word among the affected public about the existence, breadth, and limits of section 7 rights. One thing that the Board did do in an effort to publicize information about employee rights is improve its website to include examples of protected concerted activities.¹⁷⁰ Even more effective in my view has been the prosecution of numerous unfair labor practice cases involving social media policies and infractions which have caught the public's attention and thus had an educational impact about the NLRA.

In addition, to support the dissents' arguments regarding unpredictability regarding what conduct is protected by section 7, such has been evidenced in numerous cases regarding section 7 rights involving everything from the instant case on employer email policies where the Board in 2014 overturned its 2007 rule, to whether nonunion employees have *Weingarten* rights,¹⁷¹ to whether an employee seeking help from fellow employees regarding a sexual harassment charge is protected by section 7.¹⁷² Thus,

it is clear that even the *Board* changes its mind from time to time about what is protected by section 7 of the Act. Of course, of necessity, the Board is always updating its perspective on issues based upon the changes in the modern workplace, and the Supreme Court has noted that it is an important role of the NLRB to adapt the NLRA to "changing patterns of industrial life."¹⁷³

Since the question remains whether there is enough clear guidance for those affected by the new rule in *Purple* as to what concerted activity is protected, and what employers may do regarding employee access to email, employer monitoring, etc. without violating the NLRA, it would be helpful for the Board's Office of General Counsel to issue guidance that is specifically directed at the implications of this decision, with particular examples of what is lawful and what is not, similar to the guidance the General Counsel's office provided on social media cases¹⁷⁴ and that very recently issued on employer rules.¹⁷⁵ The Board prefers employer policies that provide tangible examples of acts that are permitted and prohibited as such are concrete and less ambiguous, and thus less likely to cause employees to interpret the policy as unlawfully interfering with section 7 rights. Bright line guidance from the Board teaches employers and employees, as well as unions how to abide by the Board's new rule on employer email. Such could assuage some of the concerns expressed by Member Johnson regarding the ambiguity of the Board's new rule, and by Member Miscimarra regarding the uncertainty of the application of the Board's new rule.¹⁷⁶

Member Johnson worried about the larger audience of email than amidst employees at the water cooler, and email's persistence in comparison to face-to-face communication. He disputed the major role that the majority asserts business email plays and his ultimate inquiry would stop at the availability of alternate means of communication. Member Johnson found that convenience of method is not the key, as long as there are other means of communicating. But this overlooks the fact that employer email is what most employees who have access to it will actually read...it is still a preferred mode of communication for those employees who avoid Facebook, Twitter, LinkedIn, etc., and for those who do not have access to the Internet at home or smartphones in their pockets. The NLRA was not crafted to protect only the workplace communications of those with access to their own alternative means outside of work. Section 7 activities should have a place on employer email as the communication is work related and statutorily protected.¹⁷⁷ Employees who disagree with the content of emails are free to delete them, and need not read those that are forwarded from groups that they do not wish to support. Finally, Member Johnson's arguments

regarding First Amendment violations are neither clear nor supported by precedent.¹⁷⁸

Predicting the future of communications is not as important as assessing what the environment is currently in terms of employee communication concerning concerted activities.¹⁷⁹ Member Johnson's dissent is too focused on all the alternative media available ... such is the test for allowing access for nonemployees, which is not and should not be the test for employees who are rightfully on the employer's property and authorized to use the email system. The *Purple* Board majority does not say that employers *must* provide access, only that if they do, then they can't exclude use for section 7 communications on nonworking time. Member Johnson presumes employees will engage in concerted activities on working time even though many employees have access to work email when not on working time and, if told not to do it, should honor the rules. The whole arena of work/non-work is different than in 1945 when *Republic Aviation* was decided, and the rule was "working time is for work" ... in most jobs. Working time is not as segregated or clear cut as it was prior to the rise in technology, but that does not mean that employers can not insist that concerted activities are engaged in on the employees own time. All of the dissenters arguments failed to convince the *Purple* majority that it reaffirm the holding in *Register Guard*.

Conclusion

The Board majority in *Register Guard*, operating at the tail end of the Bush era, could not make the leap from its rule on face-to-face communication in *Republic Aviation* to the parallel universe of email, finding the use of the employer's equipment for email communication to be a significantly different matter from direct communication, and one that involved an unnecessary imposition on the employer's property. In some respects, the NLRB missed the boat in 2007 when it chose to elevate employer property rights over employee electronic communication involving section 7 rights, but it is far from too late to redress the issue. The Obama Board looked for the right case to overturn *Register Guard*. It found it in *Purple Communications*, a company whose

business was all about communications, that had the word communications in its name, but that, somewhat ironically, had a policy to limit employee communications on email that resulted in an unfair labor practice charge that gave the Board a fresh case in which to reconsider the holding in *Register Guard*.

The Board majority in *Purple* established that if employees have to use the email for their work, they should be able to use it for protected concerted activities absent special circumstances established by the employer. The dissenters in *Purple* were united in their desire to retain the *Register Guard* rule, but they were too focused on the available alternative means of communication which is the wrong standard for employees who are rightfully at work. The dissenters wrung their hands about the burdens the new rule would place on employers, making analogies to adverse possession and forced speech, but worried not about the essence of section 7 employee rights. The majority deemed work email such a basic form of communication among employees that it virtually defied common sense to say that employees who must use it for work should be prevented from using it to exercise section 7 rights on nonworking time, in light of the substantive right to engage in concerted activities that section 7 embodies, and the line of precedents that have allowed employees to engage in concerted activities on nonworking time.

The employee right announced in *Purple Communications* is neither unlimited nor particularly intrusive. It does not require employers to provide email access if they do not already have it for work use. The burden on employers is far less onerous than the burden on employees if they are barred from using their work email for concerted activities. Employers are free to monitor employee use of email and may discipline those who use the system for section 7 purposes during working time as long as other nonbusiness-related use is similarly treated. As employers, employees and unions move forward in the post-*Purple* environment, they will adjust to the Board's new policy on email. Clear guidance directed at the implications of the *Purple* decision from the Board's Office of General Counsel would certainly ease any confusion on the application of the Board's rule.

ENDNOTES

¹ Section 7 of the National Labor Relations Act affords individuals the right to engage in protected concerted activity:

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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]. 29 U.S.C. § 157 (2006).

² 361 N.L.R.B. No. 126 (Dec. 11, 2014).

³ See Christine Neylon O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 CHARLESTON L. REV. 411, 411-412 (2014); Christine Neylon O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 ORE. L. REV. 337, 339 (2013).

⁴ See RICHARD F. GRIFFIN, JR., OFFICE OF THE

GENERAL COUNSEL, NLRB MEMORANDUM GC 15-04, REPORT OF THE GENERAL COUNSEL REGARDING EMPLOYER RULES, (March 18, 2015) (providing policy guidance to employers regarding unlawful and lawful employer rules involving, inter alia, employee email use)[hereinafter GC Rules Memo] available at <http://www.nlr.gov/reports-guidance/general-counsel-memos>. The GC Rules Memo included advice that an employer rule that bans personal electronic devices (PEDs) would be overbroad as employees reasonably would interpret the rule to prohibit use of such equipment to engage in section 7 activity while on breaks or other non-work time. Rules that ban use or possession of PEDs are unlawfully overbroad. *Id.* at 15-16. Rules that require employees to self-identify on emails, posts, comments and blogs were also deemed an unwarranted burden on section 7 rights as were prohibitions on blogging related to the job, including requirements that employees be pre-authorized by legal and communications groups in order to engage in a blog or online group. *Id.* at 22. Similarly, bans on soliciting and distributing literature on company premises without prior approval were unlawfully overbroad. *Id.* at 24.

⁵ See The National Labor Relations Board, Rights We Protect, Protected Concerted Activity, <http://www.nlr.gov/rights-we-protect/protected-concerted-activity> (last visited Dec. 31, 2014).

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ Section 8 (a)(1) of the Act provides "It shall be an unfair labor practice for an employer - to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158 (a) (1) (2006). See also GC Rules Memo, *supra* note 4 (discussing GC's view of lawful employer rules on email and social media).

¹⁰ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, at 5 (Dec. 11, 2014) (overruling *Register Guard*, 351 N.L.R.B. 1110 (2007)).

¹¹ *Id.* at 1.

¹² *Id.* at 8.

¹³ *Id.* at 2.

¹⁴ See *id.* at 62.

¹⁵ See *id.* at 3, 62.

¹⁶ See *id.*

¹⁷ See *id.* at 3.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 2-3.

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.*

²³ See *id.* at 3-4.

²⁴ *Id.*

²⁵ Lawrence E. Dubé, *NLRB 3-2 Finds Presumptive Employee Right to Use Company E-Mail for Protected Activity*, 238 Daily Lab. Rep. (BNA) at A-1 (12/11/2014).

²⁶ The three members who authored the majority opinion, Chairman Pearce and Members Hirozawa and Schiffer, were all Democratic appointees; the two dissenting members of the Board, Miscimarra and Johnson, were both Republican appointees.

See Members of the Board Since 1935, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Dec. 30, 2014).

²⁷ *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 1, n.5 (noting scholars criticizing the *Register Guard* decision).

²⁸ *Id.* at 1; Christine Neylon O'Brien, *Employees on Guard: Employer Policies Restrict NLRA-Protected Concerted Activities on E-Mail*, 88 ORE. L. REV. 195, 222 (2009). The majority noted that the Board in *Register Guard* failed in its responsibility to "adapt the Act to the changing patterns of industrial life." *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 1, n. 6 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 523 (1976), citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

²⁹ *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 1.

³⁰ See *id.*

³¹ See *id.* Member Johnson noted in his dissent that the prevalence of other forms of electronic communication including personal email and social media means that there are adequate alternative electronic channels of communication beyond business email that employees can avail themselves of for engaging in PCA. *Id.* at 39-41 (Member Johnson, dissenting).

³² 361 N.L.R.B. No. 126, at 2.

³³ *Id.* at 4.

³⁴ *Id.* at 4-5.

³⁵ *Id.* at 5.

³⁶ *Id.* at 5-6.

³⁷ *Id.* at 6-8.

³⁸ *Id.* at 5; *Register Guard*, 351 N.L.R.B. 1110, 1123-1127 (2007) (Members Liebman & Walsh, dissenting).

³⁹ *Purple Commc'ns*, at 6 (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 803-04 (1945)).

⁴⁰ *Id.* at 8 & n.35 (quoting from *Register Guard*, 351 N.L.R.B. at 1125-26 (dissenting opinion)).

⁴¹ *Id.* at 9.

⁴² *Id.* at 9-10.

⁴³ *Id.* at 10 (citing *Johnson Technology*, 345 N.L.R.B. 762 (2005) (overruling decision by divide Board that employer's property right in used copier paper allowed it to prohibit its re-use for protected purpose)).

⁴⁴ *Id.* at 11.

⁴⁵ *Id.* (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, at 804, n.10 (1945)).

⁴⁶ *Id.* at 12-13.

⁴⁷ *Id.* at 13.

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ *Id.* at 13-14 (quoting *Marriott Corp.*, 223 N.L.R.B. 978, 978 (1976)).

⁵¹ *Id.* at 14 & n. 70.

⁵² See *id.* at 14.

⁵³ See *id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 14-15.

⁵⁷ See *id.* at 15.

⁵⁸ *Id.* at 16 (citing *Pattern Makers (Michigan Model Mfrs.)*, 310 N.L.R.B. 929, 931 (1993)).

⁵⁹ *Id.* at 17.

⁶⁰ *Id.*

⁶¹ *Id.* (quoting *Register Guard*, 351 N.L.R.B. 1110, at 1121 (2007)).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 18, 20, 29, 61 (dissenting opinions) (citing *Register Guard*, 351 N.L.R.B. 1110 (2007) with approval).

⁶⁵ *Id.* at 18 (Member Miscimarra dissenting).

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting *Republic Aviation*, 324 U.S. at 803, n. 10).

⁶⁸ *Id.*

⁶⁹ See *id.* at 19, n.6 (quoting precedents involving Section 8 (a) (2) violations).

⁷⁰ *Id.* (quoting *Peyton Packing*, 49 N.L.R.B. 828, 843 (1943)).

⁷¹ *Id.* at 19-20.

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ *Id.* at 20.

⁷⁷ *Id.* at 22.

⁷⁸ See *id.* The Board's requirement applies if the employees had authorized access to use the employer's email for business purposes already, and in the absence of the employer demonstrating special circumstances that would afford a restriction on use.

⁷⁹ *Id.* at 26 & n.53 (citing *Triple Play Sports Bar and Grille*, 361 N.L.R.B. No. 31, at 9 (2014) (holding by Board that electronic communications policy prohibiting 'inappropriate' conduct violates NLRA) (Member Miscimarra, dissenting)).

⁸⁰ *Id.* at 26.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 29-61 (Member Johnson, dissenting).

⁸⁵ *Id.* at 29.

⁸⁶ *Id.* at 30.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 31.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 32-33.

⁹⁴ See *id.* at 33.

⁹⁵ See *id.* at 32-33.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *id.* at 34.

⁹⁹ See *id.* at 35 (citing *Register Guard*, 351 N.L.R.B. 1110, 1114 (2007)).

¹⁰⁰ See *id.* at 34-35 & n. 11 (citing *Mid-Mountain Foods*, 332 N.L.R.B. 229, 230 (2000)). Somewhat ironically, in light of Member Johnson's own lengthy dissent, he notes that the Board's brevity of expression in *Mid-Mountain Foods* did not mean that its statement was dicta because, as the *Purple* majority alluded, "the Board does not explain or justify it. ... the amount of ink spilt is not the basis for determining whether something is a holding or merely dicta...." *Id.* at 35, n. 11.

¹⁰¹ *Id.* at 35.

- ¹⁰² See *id.*
- ¹⁰³ See *id.* at 36.
- ¹⁰⁴ See *id.* (citing *N.L.R.B. v. Steelworkers (Nutone)*, 357 U.S. 357, 363-64 (1958)).
- ¹⁰⁵ See *id.*
- ¹⁰⁶ *Id.* at 37.
- ¹⁰⁷ *Id.*
- ¹⁰⁸ See *id.*
- ¹⁰⁹ *Id.* at 38.
- ¹¹⁰ *Id.* (citing *Republic Aviation v. NLRB*, 324 U.S. 793 (1945) and *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978)).
- ¹¹¹ *Id.* at 38-39 (italics omitted).
- ¹¹² *Id.* at 39.
- ¹¹³ *Id.*
- ¹¹⁴ *Id.* at 40 (citations omitted).
- ¹¹⁵ See *id.* at 40-41.
- ¹¹⁶ *Id.* at 40.
- ¹¹⁷ *Id.*
- ¹¹⁸ *Id.* at 41-41.
- ¹¹⁹ See *id.* at 42.
- ¹²⁰ *Id.*
- ¹²¹ See *id.* at 42.
- ¹²² *Id.* at 42-43.
- ¹²³ See *id.* at 42.
- ¹²⁴ See *id.* at 43 & n. 40.
- ¹²⁵ *Id.* at 43.
- ¹²⁶ See *id.* at 43-47.
- ¹²⁷ *Id.* (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 803, n.10 (1945)).
- ¹²⁸ *Id.* at 49.
- ¹²⁹ *Id.*
- ¹³⁰ *Id.* at 50.
- ¹³¹ See *id.* at 51.
- ¹³² *Id.*
- ¹³³ *Id.* at 52.
- ¹³⁴ *Id.*
- ¹³⁵ See *id.* at 52-53 (citing *Republic Aviation v. NLRB*, 324 U.S. 793, 802 (1945); *Beth Israel v. NLRB*, 437 U.S. 483, 506 (1978)).
- ¹³⁶ See *id.* at 53.
- ¹³⁷ See *id.* at 54-55.
- ¹³⁸ See *id.* at 55.
- ¹³⁹ *Id.* at 56.
- ¹⁴⁰ See *id.*
- ¹⁴¹ See *id.* at 57-58 (citing *National Association of Mfrs. v. NLRB*, 717 F. 3d 947, 956 (D.C. Cir. 2013)).
- ¹⁴² *Id.* at 59.
- ¹⁴³ See *id.*
- ¹⁴⁴ *Id.* at 60.
- ¹⁴⁵ *Id.*
- ¹⁴⁶ *Id.* at 61. Member Johnson paraphrases from the *Register Guard* dissent by referencing Rip Van Winkle. *Register Guard*, 351 N.L.R.B. 1110, 1121 (2007) (Members Liebman and Walsh, dissenting).
- ¹⁴⁷ *Purple Commc'ns, Inc.*, N.L.R.B. No. 21-CA-95151 (A.L.J. Paul Bogas, March 16, 2015) See also Lawrence E. Dubé, *Unfair Labor Practices, ALJ Confirms Purple E-Mail Rule is Unlawful; NLRB Remanded for Application of New Test*, 52 Daily Lab. Rep. (BNA) A-2 (March 16, 2015).
- ¹⁴⁸ *Purple Commc'ns, Inc.*, N.L.R.B. No. 21-CA-95151 (A.L.J. Paul Bogas, March 16, 2015), at 1 (quoting *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, at 2). Judge Bogas heard and decided the initial *Purple* cases on October 24, 2013. *Id.*
- ¹⁴⁹ *Id.* at 4.
- ¹⁵⁰ *Id.*
- ¹⁵¹ *Id.* at 5.
- ¹⁵² *Id.* at 6.
- ¹⁵³ See *id.* (quoting *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 17).
- ¹⁵⁴ *Id.* at 6-7.
- ¹⁵⁵ See *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 1, n.5.
- ¹⁵⁶ *Id.* at 18-61 (Members Miscimarra & Johnson, dissenting).
- ¹⁵⁷ See Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PENN. J. LAB. & EMP. L. 707 (2006) (compiling many who have noted the close parallel between political affiliation and voting on NLRB matters); David P. Twomey, *Policymaking under the Bush II National Labor Relations Board: Where Do We Go From Here?*, 59 LAB. L. J. 141, 149-50 (2008) (recommending appointment of NLRB members from nonpartisan pool of qualified NLRB professional staff rather than from those who have backgrounds in either union or management work, as a means to avoid politicization of NLRB decision making with its inevitable overturning of precedents based upon political majority).
- ¹⁵⁸ Judge Harry T. Edwards noted the tendency of the NLRB to change its interpretation of substantive provisions from time to time based upon "the changing compositions of the Board." *Epilepsy Foundation of N.E. Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001).
- ¹⁵⁹ The right was upheld with several qualifications. See *supra* notes 39 – 43 & 45-57 and accompanying text (discussing the Board's holding in *Purple*).
- ¹⁶⁰ See *Purple Commc'ns*, 361 N.L.R.B. No. 126. Members of the *Purple* majority opinion were Pearce, Hirozawa, and Schiffer, all Democratic appointees, whereas dissenting Members Miscimarra and Johnson were Republican appointees. See NLRB, Board Members since 1935 available at <http://www.nlr.gov/who-we-are/board/board-members-1935> (containing dates of appointment and political party affiliations of appointees).
- ¹⁶¹ See *Register Guard*, 351 N.L.R.B. 1110 (2007). Members of the majority opinion were Chairman Battista and Members Schaumber and Kirsanow, all Republican appointees, whereas dissenting Members Liebman and Walsh were Democratic appointees. See NLRB, Board Members since 1935 available at <http://www.nlr.gov/who-we-are/board/board-members-1935>.
- ¹⁶² See *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 1, n.5 (quoting O'Brien, *supra* note 24, at 222); see also Christine Neylon O'Brien, *Employer E-Mail Policies and the National Labor Relations Act: D.C. Circuit Bounces Register-Guard Back to the Obama Board on Discriminatory Enforcement Issue*, 61 LAB. L. J. 5, 7 (2010) (predicting that the *Register Guard* dissent's theory may ultimately prevail); Christine Neylon O'Brien, *The Impact of Employer E-Mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act*, 106 DICK. L. REV. 573, 587-89 (2002) (reviewing the impact of the NLRA regarding employer email rules in early cases prior to the Board's *Register Guard* decision, and recommending that where employees use their work email as a work station, employers should not restrict employee PCAs on that email, but where employees do not use the work email for work, restrictions on work computers preventing non-business use could survive scrutiny).
- ¹⁶³ See *id.* at 27 (Member Miscimarra, dissenting).
- ¹⁶⁴ See Patrick J. Beisell, Note: *Something Old and Something New: Balancing "Bring Your Own Device" to Work with the Requirements of the National Labor Relations Act*, 14 U. ILL. J. L.TECH. & POL'Y 497, 528-29 (2014) (outlining policy to avoid unfair labor practice concerns regarding surveillance or employer email on employee devices).
- ¹⁶⁵ See *id.* at 26 (Member Miscimarra, dissenting); *id.* at 30 (Member Johnson, dissenting).
- ¹⁶⁶ See *id.* at 20 (Member Miscimarra, dissenting); *id.* at 34 (Member Johnson, dissenting).
- ¹⁶⁷ See *id.* at 28 (Member Miscimarra, dissenting) (noting uncertainty brought about by presumptions and lack of advance warning of what employees, unions and employers can and cannot do); see *id.* at 59-60. Member Johnson's dissent discusses the unworkability of the majority's broad rule that leaves parties without guidance until after "hundreds or thousands of employers have been wrung through the Board's litigation processes" and notes that "the special circumstances test is amorphous at best and impossible to meet at worst." In contrast, Member Johnson expresses no dismay for the confusion any employees might suffer from what he terms the Board's "expansive rule." *Id.* at 60.
- ¹⁶⁸ See Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 583 (2007) (quoting 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, 267 (2002) (internal citation omitted). See also William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23 (2006)).
- ¹⁶⁹ See *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 57 (Member Johnson, dissenting) (noting that Board's notice posting initiative failed for one of the same reasons that the *Purple* rule should fail, that it compels employers to funding of a huge volume of speech that the employer does not support").
- ¹⁷⁰ See The National Labor Relations Board, *Rights We Protect, Protected Concerted Activity*, <http://www.nlr.gov/rights-we-protect/protected-concerted-activity> (last visited Dec. 31, 2014) (containing definitions of concerted activities protected by section 7 and a number of current examples of cases involving unfair labor practices regarding same).
- ¹⁷¹ See 341 IBM Corp. 1288 (2004) (overturning *Epilepsy Foundation v. NLRB*, 331 NLRB 676, 678 (2000) which proclaimed right of nonunion workers to have a coworker present at an investigatory interview that reasonably could lead to

discipline); see also Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 LOYOLA UNIV. CHIC. L. REV. 111(2005)(chronically the Board's progress of changing the rule on the *Weingarten* rights regarding nonunion employees).

¹⁷² See *Fresh & Easy Neighborhood Market, Inc.*, 361 N.L.R.B. No. 12 (Aug. 11, 2014) (overturning *Holling Press*, 343 N.L.R.B. 301 (2004) regarding employee soliciting testimony to bolster her sexual harassment complaint not being PCA and finding employee's bid for support was for mutual aid or protection under section 7).

¹⁷³ *NLRB v. J. Weingarten*, 420 U.S. 251, 265-67 (1975).

¹⁷⁴ See Office of the Gen. Counsel, NLRB, Memorandum OM 11-74, Report of the Acting General Counsel Concerning Social Media Cases (Aug. 18, 2011) [First Report]; Office of the Gen. Counsel, NLRB, Memorandum OM 12-31, Report of the Acting General Counsel Concerning Social Media Cases (Jan. 24, 2012) [Second Report]; Office of

the Gen. Counsel, NLRB, Memorandum OM 12-59, Report of the Acting Gen. Counsel Concerning Social Media Cases (May 30, 2012) [Third Report]. These reports are available at <http://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies> (last visited March 23, 2015). As Professor Hirsch noted, employers who use policy language that the General Counsel finds lawful will not face unfair labor practice complaints until the Board issues a decision disagreeing with the General Counsel. See Jeffrey S. Hirsch, *Worker Collective Action in the Digital Age*, 117 WEST VA. L. REV. ____ (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551117, at 26.

¹⁷⁵ See, e.g., GC Rules Memo, *supra* note 4 (discussing examples of employer rules that are lawful and not in light of section 7).

¹⁷⁶ See *Purple Commc'ns*, 361 N.L.R.B. No. 126, at 28 (Member Miscimarra, dissenting); *id.* at 59-

60 (Member Johnson, dissenting)(fearing that the public will be acting in the dark with Board's ambiguous new rule).

¹⁷⁷ The Board ensured that the right is limited to those with access to the employer email for work and that such should take place on nonworking time.

¹⁷⁸ See Hirsch, *supra* note 174, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551117, at 35-37 (discussing why Member Johnson's First Amendment arguments are unconvincing).

¹⁷⁹ See generally Robert Sprague, *Employee Electronic Communication in a Boundaryless World*, 53 UNIV. LOUISVILLE L.REV. ____ (forthcoming, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510919, at 2 (noting three quarters of U.S. workers are mobile, meaning "tethered to their 'workplace' with mobile communications services and devices").