to drive down salaries. In June 2013, Intuit, Lucasfilm, and Pixar settled the claims against them for $20 million.

Subsequently, the plaintiffs received favorable rulings from the district court. First, on October 25, 2013, the court certified a class of technical employees. Second, the court denied requests from Apple, Google, Intel, and Adobe (collectively, "the remaining defendants") to dismiss the case without a trial. Finally, the court denied the remaining defendants' request to exclude the testimony of the plaintiffs' expert witness, who opined that the total damages to the class exceeded $3 billion in wages class members would have earned if the antisolicitation agreements didn't exist.

## *Proposed settlement*

One month before trial was set to commence, the plaintiffs and the remaining defendants asked the court to approve the $324.5 million proposed settlement of the class action lawsuit. The proposed settlement allowed the plaintiffs' counsel to seek up to $81 million in attorneys' fees and $1.2 million in costs, $80,000 per class representative in incentive payments, and an average of $3,750 in lost wages for the class members.

On August 8, 2014, the court found that the proposed settlement amount "falls below the range of reasonableness." The class members would recover less on a proportional basis from the proposed settlement with the remaining defendants than from the settlement with Intuit, Lucasfilm, and Pixar a year ago, even though the case had progressed in the plaintiffs' favor. Further, there was compelling evidence against the remaining defendants. The court noted that Steve Jobs, the cofounder of Apple, was the central figure in the alleged conspiracy and sent a threatening e-mail to Google cofounder Sergey Brin stating, "If you hire a single one of these people that means war."

The court stated that the "remaining defendants should, at a minimum, pay their fair share as compared to [Intuit, Lucasfilm, and Pixar], who resolved their case with [the] plaintiffs at a stage of the litigation where [the] defendants had much more leverage over [the] plaintiffs."

## *Bottom line*

Companies that conspire not to solicit or hire each other's employees face significant potential liability. According to the district court judge, $324.5 million is an unreasonably low amount to settle this class action antitrust lawsuit against Apple, Google, Intel, and Adobe. The amount of press given to this case and the enormous potential liability faced by these high-tech giants will surely deter other companies from agreeing not to solicit each other's employees in the future.

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*LABOR LAW*

# Union access to employer's e-mail systems: Are times a-changin'?

by Jeff Sloan and Eugene Park
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*Besides having the liberty to invoke the words of seers like Bob Dylan, one of the more fascinating pastimes in our work as labor lawyers is observing the ebb and flow of labor law policy. And there's no better example of the potential drift from one end of the spectrum to another than Purple Communications, Inc., a controversial case currently before the National Labor Relations Board (NLRB). The case presents a basic question: Can the federal government require private employers to allow union adherents to use the employers' own e-mail systems to engage in concerted activity against them? The NLRB's Register Guard ruling, which was decided under the George W. Bush administration, answers with a resounding "No!"*

## *Register Guard*

*Register Guard* held that employees don't have a right to use employers' e-mail or other electronic communications systems to communicate among themselves about working conditions and to self-organize. Under this rule, an employer doesn't violate the National Labor Relations Act (NLRA) by prohibiting employee use of its e-mail system for "non-job-related solicitations." The NLRB's decision was based on the employer's "basic property right" to restrict employee use of company property, including its e-mail system.

The two Democrats on the NLRB at the time dissented, opining that the Board had become the "Rip Van Winkle of administrative agencies" because of its inability to recognize that e-mail revolutionized communications and couldn't be compared "to bulletin boards, telephones and pieces of scrap paper."

## *Purple Communications*

Fast-forward to *Purple Communications.* Similar to the one in *Register Guard,* Purple's employee handbook declared that all company computers, Internet access, voice mail, and the e-mail system were the exclusive property of the company and were to be used only for business purposes. It also prohibited employees from using that company property to engage in activities on behalf of organizations or persons with no business affiliation with the company.

A union organizing drive ultimately challenged Purple's policy. An administrative law judge rejected union allegations that the policy violated the NLRA, observing that he was bound to apply *Register Guard*.

The NLRB transferred the case to itself and invited comment from interested groups on whether *Register Guard* should be overruled and, if so, what standards should apply.

Over 15 organizations representing a broad range of unions and management interests accepted the NLRB's invitation. On one side, unions argued that the times have changed dramatically. The AFL-CIO observed that 92 percent of American employers officially allow personal use of company e-mail and that contrary policies were impractical.

The Service Employees International Union (SEIU) asserted that the *Register Guard* standard had become obsolete because workplace electronic systems have blurred the line between personal and work time. The SEIU also placed great weight on the fact that employees rely on employers' electronic systems for communication with coworkers.

Several briefs in favor of overruling *Register Guard* pointed to a more tailored approach under *Republic Aviation Corp. v. Labor Board*, a 1945 U.S. Supreme Court case that called for case-by-case balancing of employees' rights to self-organize with employers' rights to maintain productivity through reasonable work rules.

Other briefs argued for management, reiterating employers' strong property right in their communication systems and maintaining that overruling *Register Guard* would threaten their free-speech rights. They also pointed to the many legitimate nondiscriminatory reasons for restricting employees' personal use of company e-mail, including curtailing distracting solicitations, reducing liability risk, and protecting data privacy. Even if *Register Guard* were overruled, they argued that reasonable limitations should be allowed, such as limiting the frequency of e-mails, the size of attachments, and the time of day they're sent.

## Potential impact

This case is relevant for all private employers, whether unionized or not. For nonunion employers, a reversal of *Register Guard* would facilitate union organizing efforts through company e-mail systems. Unionized employers would need to open their e-mail systems to allow employees to communicate with each other and with unions on employment and labor matters for purposes of "mutual aid and protection." *Forbes* recently commented that overturning *Register Guard* would give plaintiffs' lawyers "perhaps the single best tool to target employees in their recruitment efforts for class action lawsuits or assembly-line, single-plaintiff actions."

A reversal would likely affect public employers as well because the majority of state labor boards give strong weight to NLRB precedent (and sometimes, as in California, they can be more left-leaning than the Obama NLRB). Current precedent in California (*Los Angeles County Superior Court*) follows *Register Guard*, so a reversal by the NLRB could trigger one by California's Public Employment Relations Board (PERB). *Purple Communications, Inc.* (2013) NLRB Case Nos. 21-CA-095151; *Guard Publishing Co. (Register-Guard)* (2007) 351 NLRB 1110 (enforced 571 F.3d 53 (D.C. Cir. 2009)).

## Bottom line

Adding an element of mystery to this policy tug-of-war, the NLRB recently affirmed *Register Guard* in *Weyerhaeuser Co.* (2013) 359 NLRB No. 138. Also, as we await final resolution of *Purple Communications,* consider what the conservative U.S. Supreme Court would do if the Obama NLRB overruled *Register Guard*. That is to say, when the times change in law, they usually change slowly. Stay tuned!

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*TERMINATION*

# Court upholds tenured teacher's termination despite procedural error

by Michael Futterman
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*A school district terminated a tenured elementary-school teacher on the charge that he physically and abusively disciplined his students. The teacher filed suit, challenging the dismissal on the grounds that the charges against him were presented to the school board orally rather than in writing, in violation of the California Education Code. The trial court found that the procedural error did not harm the teacher and upheld his termination. The California Court of Appeal agreed.*

## Students complain of physical and verbal abuse by teacher

Vince DeYoung worked as a tenured teacher in the Hueneme Elementary School District. He taught a combination class of second- and third-grade English learners whose first language was Spanish. In March 2010, he allegedly became angry and frustrated with students who were talking and laughing during a classroom movie. He grabbed some of the students, told them to "shut up," called them "stupid," struck one student in the foot with a chair, hit three students on the top of the head with a yardstick or metal desk leg, and threw a pencil at other students. The students told their parents, who complained to the school principal.