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UNION ORGANIZING

Union access to employer e-mail: navigating through the *Purple* haze

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In our last issue, we discussed Purple Communications, a case in which the National Labor Relations Board (NLRB) considered whether employees and unions could use an employer's e-mail systems to engage in concerted activity against the employer (see "NLRB delivers decision, rules that facilitate union organizing" on pg. 9). Such access was prohibited under Register Guard, the previous NLRB precedent. On December 11, 2014, a 3-2 majority of the NLRB ruled that employer e-mail systems could indeed be used for union activity.

The Board's Purple Communications decision, like some of Jimi Hendrix's singles, is both significant and ambiguous. The NLRB overruled Register Guard but also preserved an employer's right to prohibit access to its e-mail systems under certain "special circumstances."

Purple Communications decision

The core rule from *Purple Communications* is that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." The three-member Democratic majority of the Board arrived at that conclusion by using a balancing test set forth in *Republic Aviation*, a U.S. Supreme Court decision that recognized employees' rights to self-organization on the one hand and employers' rights to maintain business production and discipline on the other.

E-mail has become a mainstay in business operations, and therefore, the majority argued, it's virtually indispensable for concerted activity. Furthermore, there is less operational impact in allowing union-related communications on employer e-mail systems than on traditional employer "equipment" such as telephones and bulletin boards.

The majority's rule has a couple of important caveats. First, it applies only to employers that have already granted employees access to their e-mail systems. In other words, employers are not forced to give business e-mail access to employees who typically don't have such access. Second, employees can use business e-mails for union purposes only on "nonworking" time.

Third, employers may still control their e-mail systems to the extent necessary to "maintain production and discipline." That includes monitoring e-mails to ensure informational security or even implementing an absolute ban on nonwork use of e-mail if there are "special circumstances" warranting such a ban. Fourth, the *Purple Communications*

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decision doesn't create any rights for nonemployees (such as outside union representatives) to access business e-mail systems and doesn't address other types of electronic communications systems (such as social media accounts).

Vocal dissent, or 'Stone Free' to do what you want

The two-member Republican minority of the NLRB lodged forceful dissents highlighting a number of legal and practical concerns. One fundamental problem is that the *Purple Communications* decision essentially creates a statutory right to use employer e-mail systems for union purposes—the exceptions for "special circumstances" are sufficiently vague that it is virtually guaranteed that employees will have unfettered access to e-mail.

Practically speaking, opening up business e-mail systems to union communications could prove costlier than traditional watercooler discussions because the number of employees contacted and the times and frequency with which they are contacted are limitless. Nor is it feasible to limit such communications to "working time" given that e-mail access is ubiquitous and virtually impossible to monitor. *Purple Communications, Inc.* (Dec. 11, 2014) 361 NLRB No. 126.

Impact

Setting aside talk of "rebuttable presumptions" and "special circumstances," *Purple Communications* virtually guarantees that private employees and unions will use business e-mails for concerted activity. Employers, unionized or not, face an uphill and costly battle if they attempt to rationalize a ban on union communications through their e-mail systems.

Public employers will likely be subject to the same rule because the Public Employment Relations Board (PERB) often follows the NLRB. Public education and higher education employees already have access to employer e-mail systems under their respective statutes. Employees covered by the other PERB-administered statutes are subject to precedent that relied on *Register Guard,* which is now overturned, or the issue hasn't yet been addressed by PERB.

Ultimately, it's unclear to what extent *Purple Communications* will affect employer operations. There will likely be an uptick in union-related literature on business e-mail servers, and there will probably be a proportional impact on employee productivity. On the other hand, union-related e-mails will need to stand out in an in-box already crowded with non-work-related e-mails and junk mail. And the fact that employers can still monitor their e-mail systems will dissuade employee organizations from sending out confidential information, such as strike directives, through company e-mails.

Of course, *Purple Communications* may still be challenged through the judicial appeals process. We can certainly imagine that the U.S. Supreme Court, as it's currently constituted, would take umbrage at *Purple Communications* and seek to reinstate *Register Guard.*

Bottom line

This is not the end of the NLRB's examination of employers' electronic communications systems. Emerging technologies provide the ideal cover for labor boards (which almost always have a partisan majority) to influence labor relations. Still, *Purple Communications* is a ratcheting in favor of employees' organizational rights as current technologies drift farther away from physical "equipment."

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As technologies evolve, and the NLRB majority changes with every president, we might take a cue from Hendrix and embrace the fact that balancing interests between labor and management is an inherently ambiguous task: "Yeah, Purple haze all in my eyes. Don't know if it's day or night."

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