HENRY & MCCORD

Henry, McCord, Bean, Miller, Gabriel & LaBar, P.L.L.C.

CLIENT ALERT

NLRB OVERRULES REGISTER-GUARD: Allows Employees' Use of Email and Computer Systems for Union Organizing Purposes

DECEMBER 15, 2014

By: John R. LaBar

On December 11, 2014, the National Labor Relations Board (NLRB) issued a stunning reversal of its 2007 Register Guard decision which held that employees have no statutory right to use their employers' e-mail systems for union organizing purposes.[1] In *Purple Communications, Inc.*[2], the NLRB, in a 3-2 decision, held that an employees' use of e-mail for organizing purposes on nonworking time must presumptively be permitted.

In Purple, the employer had an employee handbook that set forth its policies and procedures. The unfair labor practices alleged by the Board in the case concerned two handbook policies that the employer had maintained since about June 19, 2012, and which were stipulated by the parties to be in effect at all times relevant to the litigation.

The first policy provided that:

> "The following acts are specifically prohibited and will not be tolerated by Purple. Violations will result in disciplinary action, up to and including terminations of employment.
>
> . . . .
>
> Causing, creating, or participating in a disruption of any kind during working hours on Company property;"

The second handbook policy at issue concerned internet, intranet, voicemail and electronic communications. The portions alleged by the Board to violate the Act provided that:

> "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.
>
> . . . .

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 or persons with no professional or business affiliation with the Company.

. . . .

5. Sending uninvited email of a personal nature."

The Employer was authorized to punish an employee's violation of these policies with discipline up to and including termination.

The Board in its decision stated that:

"We believe, as scholars have pointed out, that the *Register Guard* analysis was clearly incorrect. The consequences of that error are too serious to permit it to stand. By focusing too much on employers' property rights and too little on the importance of email as a means of workplace communication, the board failed to adequately protect employees' rights under the Act and abdicated its responsibility to adapt the Act to the changing patterns of industrial life."

As such, the Board, having concluded that *Register Guard's* analysis failed "to adapt the Act to changing patterns of industrial life", found that *Regiser Guard* was not supported by the precedents on which it relied, and therefore ultimately fails to protect employees' right to engage in activity protected by the Act while on nonworking time. Therefore, the Board stated that it must formulate a new analytical framework for evaluating employees' use of their employer's email systems. The Board went on to state that it agreed with its General Counsel, the Charging Party, and others who maintain that *Republic Aviation* should be the Board starting point for establishing a new analytical framewor.[3]

The Board in its analysis which followed stated that empirical evidence demonstrates that email has become such a significant conduit for employees' communications with one another that it is effectively a new "natural gathering place" and a forum in which coworkers who "share common interests" will "seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." For all of these reasons, the Board found *Republic Aviation* to be a more appropriate foundation for its assessment of employees' communication rights than its own equipment precedents. In doing so, the Board stated that it recognized that significant differences exist between an employer-owned email system, like that at issue here, and an employer's bricks-and-mortar facility and the land on which it is located, which were involved in *Republic Aviation* and many subsequent cases. Indeed, the Board noted that an email system is substantially different from any sort of property that the Board has previously considered, other than in *Register Guard* itself. Accordingly, the Board stated that it was applying *Republic Aviation* and related precedents by analogy in some but not all respects. In particular, the Board did not find it appropriate to treat email communication as either solicitation or distribution per se. Rather, the Board determined that an email system is a "forum for communication, and the individual messages sent and received via email may, depending on their content and context, constitute solicitation, literature

(i.e., information) distribution, or—as we expect would most often be true—merely communications that are neither solicitation nor distribution, but that nevertheless constitute protected activity."

The Board also stated that it found it unnecessary to characterize email systems as "work areas" or "nonwork areas" in that in the vast majority of cases, an employer's email system will amount to a "mixed-use area", in which the work-area restrictions permitted on literature distribution generally will not apply.

The Board went on to conclude that it was consistent with the purposes and policies of the Act, with its responsibility to adapt the Act to the changing work environment, and with its obligation to accommodate the competing rights of employers and employees for it to adopt a presumption in this case like the one that it adopted in *Republic Aviation*. As such, the Board held that:

> "it will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. [4]"

The Board did provide that an employer may rebut the above presumption by demonstrating that special circumstances are necessary to maintain production or discipline justify restricting its employees' rights. However, because limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, the Board stated that it anticipated that "it will be the rare case where special circumstances justify a total ban on nonwork email use by employees." Rather, in more typical cases, where special circumstances do not justify a total ban, employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline.

The Board finished its decision by providing that its decision was a limited one. That is, the Board only addressed email systems, not any other electronic communications systems, because only email systems were at issue in the case. Also, the Board held that its decision encompassed email use by employees only; that it did not find that nonemployees have rights to access an employer's email system, nor did the Board require an employer to grant employees access to its email system, where it has not chosen to do so.

Finally, the Board held that, after its careful consideration, that it was appropriate to apply its new policy retroactively to the parties in the case.

Notwithstanding the majority's decision, Board Member Harry Johnson III, in a blistering and lengthy dissent, stated among other objections to the majority's decision, that:

> "Email is not a water cooler: My colleagues misapprehend the crucial differences between email and physical space, and thus impermissibly undermine the rights to own and operate an email network for business purposes."

And that:

> "The Majority's New Rule – Which forces an employer to subsidize hostile speech, both by compensating for it and paying for the email system to send, receive, and store" the speech. For these reasons, Board Member Johnson found that the majority's rule compels employer funding of a huge volume of speech that the employer does not support and that "Today's transgression against the First Amendment is worse. Instead of one notice poster, the Board now requires the employer to sponsor and underwrite a never-ending electronic procession of hostile speech.

This decision will have far ranging implications as it will make it virtually impossible to tell who is reading an email sent from another employee who is participating in union organizing efforts from legitimate business related emails. This decision will also affect the property rights of employers in their computer systems as it represents a significant erosion of their rights to control use of their computer systems and especially their company email.

John R. LaBar is available to consult with employers regarding a review of their employment law and HR needs.

John R. LaBar is a named member of Henry, McCord, Bean, Miller, Gabriel & LaBar, P.L.L.C. His practice includes assisting business and corporate clients in business/corporate, real property, tax, intellectual property, creditor bankruptcy (including collection of accounts), corporate litigation and employment law. Mr. LaBar is the Town Attorney for the Town of Morrison, Tennessee. He serves as an Adjunct Professor of Law at the University of Tennessee College of Law, is a frequent author in legal newsletters, and is often a speaker and acts as faculty for legal education seminars on employment law topics.

---

[1] *Register-Guard*, 351 NLRB 1110 (2007). 2007), enfd. in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

[2] *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, Cases 21-CA-095151, 21-RC-091531, and 21-RC-091584.

[3] *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

[4] Section 7 of the National Labor Relations Act guarantee employees the right to organize and engage in protected concerted activities.