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Author: Christine Neylon O'Brien

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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

By Christine Neylon O'Brien*

I. Introduction

An employee sends three e-mails to her co-workers with messages related to work and the local union. Some of the messages seek employee support for the union. Her employer warns her that she is violating the company’s communications systems policy, which prohibits non-job related solicitations. At the same time, the employer allowed all types of non-job related and personal e-mails, including some which solicited responses, to circulate without warning or discipline. Is the employer’s policy and its manner of enforcement lawful? Does the employer’s policy unfairly restrict employee rights? Is the employer’s selective enforcement of its policy discriminatory?

This paper considers the legality of company policies that restrict employee communication on employer e-mail systems, where the activity is protected under section 7 of the National Labor Relations Act (NLRA).¹ Section 7 protects employee communications, whether employees are represented by a union or not.² These important employee rights include “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 activi-

*Christine Neylon O’Brien is Professor of Business Law, Carroll School of Management, Boston College. The author wishes to express her sincere appreciation to Margo E.K. Reder, Research Associate and Lecturer in Law, Boston College, for all of her ideas and assistance with this paper.
ties 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." The "other concerted activities" language in the latter part of section 7 permits employees to discuss matters related to wages, hours and working conditions, as well as other matters for their mutual aid or protection, such as items related to safety, wrongdoing, or the fairness of discipline. The mutual aid or protection part of section 7 requires that the employee is acting in concert for the benefit of other employees and not just for his or her own benefit. This paper focuses on the Register-Guard case which involved an organized group of employees and an employer communications systems policy that restricted use of workplace e-mail in a manner that interfered with section 7 rights, highlighting the D.C. circuit court’s recent partial reversal and remand of the National Labor Relations Board’s decision.

II. Facts in Register-Guard

Concerned about use of its IT infrastructure, as well as security and liability, in 1996 the Register-Guard updated its Communications Systems Policy (CSP) which provided in relevant part: “Company communication systems and the equipment used to operate the communication systems are owned 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.” As the D.C. circuit court noted, the definition of “solicit” is “[t]o try to obtain by entreaty, persuasion, or formal application,” and to “proselytize” is to attempt “[t]o convert from one faith or belief to another.” Notably, the Register-Guard did not explicitly restrict non-work related communications, as opposed to non-job-related solicitations and proselytizing. Despite the CSP’s mention that the communication systems were “to assist in conducting the business,” the company allowed countless non-business e-mails to circulate in contravention of the policy. These included personal missives, as well as mass solicitations concerning the sale of tickets, social invitations, dog walking services and so forth. Notwithstanding these persistent breaches of the CSP at every level throughout the organization, there were no warnings, reprimands or other negative outcomes for these mailings. This pattern changed abruptly in 2000, after an employee who was also the local union’s president, Ms. Suzi Prozanski, sent a union-related e-mail while at work, and later sent two other e-mails while off-site, all to addresses hosted on the employer’s e-mail system. The company disciplined Ms. Prozanski, citing her violation of the CSP as the basis for its action.

A related issue arose when a district manager, who interacted with newspaper carriers and occasionally with subscribers, donned a green armband in support of the union and displayed a pro-union placard in his car. The district manager’s supervisor requested that he remove his armband and the sign from his car and he acquiesced. After the union filed unfair labor practice charges, the Board’s General Counsel issued complaints for violations of sections 8(a)(1) and (3), based upon the Register-Guard’s maintenance of its CSP, its discriminatory enforcement of the CSP, and its policy against union insignia and signs. An Administrative Law Judge (ALJ) found no violation with respect to maintaining the CSP, because an employer may limit employee use of its equipment. However, the ALJ had found discriminatory enforcement with respect to Ms. Prozanski’s union-related e-mails, and also violations with respect to the union insignia rule and its enforcement.

III. The National Labor Relations Board’s Holding—A Split (3-2) Decision

The Board majority, comprised of then-Chairman Battista and Members Kirsanow and Schaumber, ruled that the Register-Guard did not violate the Act with respect to maintenance of its CSP. The Board concluded that Section 7 does not provide employees an automatic right to use the employer’s equipment or e-mail system, noting a long line of cases regarding
use of employer equipment. The Board began with the premise that the company had the legal right to bar employees' non-work-related use of its e-mail system. The Board did not find that the CSP discriminated against Section 7 activity on its face, thus concluding that there was no unfair labor practice on the promulgation of the CSP itself. The next question became the critical issue: Whether the Register-Guard discriminated against Section 7 activities when enforcing its CSP. The Board re-worked its previous discrimination analysis, henceforth announcing that unfair labor practice claims would be limited to instances of "unequal treatment of equals," where discrimination occurred "along section 7 lines," citing several Seventh Circuit opinions where Board orders were not enforced because the court was dissatisfied with the Board's definition of discrimination. The Board's new discrimination standard, as announced in Register-Guard, requires evidence of disparate treatment of communications of a similar character, which was not the case in Register-Guard. The Board used the following examples of drawing a line on section 7 grounds that could prove legally problematic: employees being allowed to solicit for one union and not another, or permitting solicitation by anti-union employees, but not by pro-union employees. The Board was careful to note that even under this analysis, employers could send antiunion messages over their equipment, but at the same time would not be required to allow its equipment to be used for the sending of pro-union messages.

The Board did find that the first e-mail sent was not a solicitation and, thus, was not in violation of the CSP. Thus, the union president should not have been disciplined for sending it. Ms. Prozanski's later e-mails, found to be solicitations, were rightfully subjected to warnings in accordance with the CSP, the Board ruled. The Board upheld the ALJ's finding that the rule against wearing or displaying union insignia and its enforcement violated section 8(a)(1). In summary, as far as a section 7 right to access employer e-mail systems is concerned, according to the Bush Board, employees do not have a statutorily protected right to use employer e-mail systems for solicitations or communications, or for other concerted activities including unionizing, but an employer that treats activities of a like character differently along section 7 lines commits discriminatory enforcement of an otherwise valid rule. As one scholar concluded while referencing the dissent in Register-Guard, the Board majority "ruled in favor of employers drawing their own line on what is permissible regarding employees' work e-mail use, as long as the line is not drawn on union grounds."26

A. The Register-Guard Dissent: "The Act is Surely Dead"

The dissent in Register-Guard is particularly important as it was authored by former Member Wilma Liebman, who is now Chairman of the Board. In her dissent, she was joined by former Member, Dennis Walsh. On the most significant threshold issue in the case, the legality of the CSP, the dissent disagreed with the Board majority, asserting that the CSP unduly interfered with section 7 rights. Further, where employer rules or conduct interfere with section 7 rights, the dissent would require the employer to establish a legitimate business reason that outweighs the interference, and "limitations on communication should not be 'more restrictive than necessary' to protect the employer's interests." In addition, the General Counsel has indicated that he views employees e-mails to management about working conditions to be more job-related than personal communications. This may lend further support to the views expressed by the dissent in Register-Guard, namely that where CSPs interfere with section 7 communications, the policy must meet a business justification test.

Thus, in future cases involving similarly restrictive workplace e-mail policies, a new Board, under Chairman Liebman's leadership, may prove more sympathetic to employees' right to communicate at work. In addition, in light of the D.C. circuit court's subsequent reversal
of the *Register-Guard* majority’s decision with respect to the discriminatory enforcement aspect of the case, the dissent’s theory may ultimately prevail.

The *Register-Guard* dissent strongly objected to the concept that the employer’s property interest should prevail over the interests of employees who engage in normal workplace communications, which typically include a mix of work and non-work content. E-mail is a standard method of communication in the workplace and *Register-Guard* employees were allowed to use the workplace e-mail for other non-business purposes. The e-mails in question originated with employees of the *Register-Guard*, not non-employees. Thus, the dissent felt that the majority applied the wrong paradigm, namely the more restrictive standard for non-employee access to company property, when in fact the employees were lawfully on the employer’s property.

Applying the standard for non-employee access to company property meant that the majority incorrectly found that it was acceptable to prohibit e-mail use as long as there were alternate means for communication available for employees.

The dissent in *Register-Guard* pointed out that section 7 concerted activities are entitled to affirmative protection under the Act. These are important employee rights that exist even in the absence of a union and, to the extent that an employer interferes with these rights, the employer should justify this with a legitimate business reason. Wrongful interference leads to a violation of section 8(a)(1) of the NLRA. The dissent would find policies such as the *Register-Guard* CSP, that is, policies that allow non-work-related e-mail use, but ban non-job-related ‘solicitations,’ presumptively invalid. The Act requires a balancing of employees’ section 7 rights to communicate against an employer’s business interests, and employers should not place limits on statutorily protected communication that are not necessary to protect those legitimate business interests.

The *Register-Guard* dissent would apply the test for oral solicitation on non-work time, namely, that restrictions are unlawful, absent special circumstances that relate to the employer’s need to maintain production and discipline. The employer’s need to manage is at stake, where employees are lawfully at work and using company property. If e-mail is equated to distribution of material rather than solicitation, labor law precedent permits restrictions on distribution to non-work time and non-work areas. It should be noted that this could be interpreted to allow employees to open and read e-mails on non-work time, but the non-work area restriction could be more problematic if employees are using their work area or computer to read the e-mail. Nonetheless, because e-mail was in fact permitted for other non-work-related purposes with the employer’s knowledge and implicit permission, the issue of non-work areas for distribution seems less critical. In addition, the *Register-Guard* is a newspaper, not a hospital setting where, for example, patient privacy concerns might compel a need for more restrictions on distribution.

Additionally, with regard to *Register-Guard*, the dissent noted that the CSP was enforced only against union-related communications. This critical fact was also noted by the D.C. Circuit in its opinion reversing the Board’s decision. The *Register-Guard*’s policy prohibiting non-work-related solicitations was honored in the breach and, thus, the notion that the enforcement of the CSP was not discriminatory simply did not hold water, in the dissent’s view. The fact that *Register-Guard* allowed its employees to use the e-mail for all sorts of non-business-related purposes, but
singled out union-related e-mails for discipline, negated the importance of the employee rights protected under section 7 of the Act. The dissent emphasized that e-mail travels through cyberspace, which the employer does not own, and that simultaneous users are accommodated, which thereby acts to diminish the importance to the employer's asserted property interests.

As the dissent noted, the majority’s reference to a standard for discriminatory enforcement from the Court of Appeals for the Seventh Circuit resulted in an inadequate analysis of discrimination. The dissent also wrote that even the Seventh Circuit’s test was not appropriately applied by the majority in Register-Guard. The majority’s standard permits an employer to draw lines between various types of activities as long as the policy is “facially neutral” without regard to whether there is a ‘business justification’ or a ‘legitimate business reason’ for the distinctions. So some non-work related uses could be permitted but not others and as long as the distinctions were not deemed to be “along section 7 lines,” they would withstand the majority’s scrutiny.

This standard would not satisfy the dissent where section 7 activities were eliminated, because section 7 creates affirmative rights to engage in concerted group action for mutual aid or protection. An employer’s interference with these rights doesn’t need to be based upon an improper motive in order to violate the Act. Instead, the interference itself violates section 8(a)(1) of the Act, absent an adequate business justification to outweigh the infringement. To satisfy the dissent, an employer would need to establish a legitimate business reason for excluding union related e-mails amongst employees when other non-work e-mails were allowed.

Finally, in the dissent’s view, the two Seventh Circuit cases that the Register-Guard majority relied upon involved a very different medium from e-mail, employer bulletin boards. E-mail has become a primary means of workplace communication today, certainly a medium with far greater impact on communication than bulletin boards. Consequently, where the Seventh Circuit in the Fleming case ruled that the exclusion of all organizational notices from company bulletin boards did not violate section 8(a)(1), since all organizational notices were barred, this had a lesser impact on protected activity than exclusion of all e-mail communications of an organizational nature.

After the Board’s decision in Register-Guard, the Seventh Circuit issued an opinion that applied a more stringent standard for discrimination with respect to employer interference with section 7 rights. In St. Margaret Mercy Healthcare Centers v. NLRB, the court found that a hospital’s enforcement of a no-solicitation rule in a hospital break area amounted to interference with the right to organize, and that the hospital discriminated against a union activist. Other organizational and commercial solicitations (other than union solicitations) were permitted at the nurses’ station, but only union solicitations were subject to discipline.

Writing for the court, Judge Posner could discern no reason for permitting employees “hawking bikini lotion” or “to organize charitable or social functions” at the nurses’ station, while disciplining employees for union solicitation in the same area.

The Seventh Circuit’s St. Margaret decision took exception to the hospital’s singling out of union or concerted activities for discipline,
while allowing other activities that were also prohibited under the hospital’s policy. The court found this clearly amounted to discriminatory enforcement of the hospital’s no-solicitation rule. In addition, the court noted that enforcing a no solicitation rule in employee break rooms, a non-work area, was unlawful. While face-to-face solicitation is admittedly different than e-mail solicitation, nonetheless, the St. Margaret’s opinion indicated that even the Seventh Circuit recognizes discrimination where only protected concerted activity is singled out for discipline. The Seventh Circuit’s St. Margaret Mercy Healthcare decision undercut the circuit’s previously announced standard for a finding of discriminatory enforcement, the same standard that the Board adopted in Register-Guard. The key fact that union activity was the only conduct targeted for discipline, while myriad other violations of company policies were ignored in both Register-Guard and in St. Margaret Mercy Healthcare seemed to presage the outcome of the Register-Guard appeal.

IV. Register-Guard – D.C. Circuit Overturns Board’s 3-2 Decision

When the Court of Appeals for the District of Columbia decided the Register-Guard appeal in July 2009, the union received a victory, as the court granted in part and denied in part the petition for review. The court affirmed that portion of the Board’s decision, finding the employer violated the Act by disciplining the local union president for sending a non-solicitation e-mail. The D.C. Circuit set aside the portion of the Board’s order ruling that the employer’s discipline of the union president for her later e-mails was not an unfair labor practice, and remanded that issue for further proceedings consistent with the court’s opinion. The court did so because there was not substantial evidence to support the Board’s finding that the employer lawfully disciplined the union president for the two solicitation e-mails that violated the employer’s CSP. As far as those e-mails were concerned, the court noted that Register-Guard’s policy made no distinction based upon solicitation by groups, as compared to individuals and, instead, forbade all non-job-related solicitations. The company’s warning to the union president focused upon the union-related content of her e-mails, not the ‘organizational vs. individual’ line, and this was indicative of discrimination. It was noteworthy, the court wrote, that the only e-mails that resulted in discipline were union-related. The court referenced the St. Margaret Mercy Healthcare v. NLRB decision, which found discrimination based upon employer conduct singling out union activity and a union supporter for discipline, while allowing all other violations of the company solicitation and distribution policy to avoid sanctions.

As the NLRB considers the Register-Guard case on remand, the Board will be reviewing the evidence on the record with respect to the allegations of discriminatory enforcement of the CSP on the union president’s later e-mails that were categorized as non-job-related solicitations. The circuit court denied the employer’s petition to review the Board’s finding of violations of the NLRA with respect to Ms. Prozanki’s first e-mail and other matters relating to restrictions on display of union insignia, thus, upholding the Board’s finding of unfair labor practices.

A. The Legality of the CSP – The Broader Issue Awaits a Fresh Case

The legality of the CSP was not challenged on appeal and, thus, the D.C. Circuit took no position on the legality of maintaining such a policy. This was actually the more important issue in Register-Guard, and one that is likely to be considered in the future, when there is potential for a more union-friendly Obama Board. Neither party requested review of the Board’s general holding allowing employers to restrict access to e-mail systems. The Register-Guard obviously did not appeal this issue because they had won at the Board level. The Eugene Newspaper Guild did not appeal the issue because they deemed the Board’s interpretation of the statute to be a policy issue within the Board’s discretion, and one that the appellate court was unlikely to reverse.
Prior to the Board’s decision in *Register-Guard*, the general rule was that an employer should be consistent with respect to restricting union or concerted activities use of employer property, and other non-business uses of the property.\textsuperscript{70} The dissent in *Register-Guard* cited the long line of precedent holding that an employer violates section 8(a)(1) when it allows employees use of employer equipment for other non-work-related uses, while prohibiting section 7 related uses.\textsuperscript{80} Of particular interest were several e-mail cases where employers’ ban on union-related messages only, yet their failure to restrict other non-business-related e-mails, were deemed to violate section 8(a)(1).\textsuperscript{81}

The Board’s *Register-Guard* decision created a much broader loophole for employers to delineate categories for permissible and impermissible uses of equipment, including use of equipment or systems on non-working time and in non-work areas. After *Register-Guard*, these categories need not be justified by legitimate business reasons, so long as they do not facially discriminate along section 7 lines. It seems unlikely that a reconstituted Obama Board will reconfirm the *Register-Guard* Board majority’s view that an employer’s property rights outweigh employee section 7 rights, with respect to equitable access to e-mail along with other non-business uses. The new Board may be more inclined to consider the views expressed in the *Register-Guard* dissent.

**V. Impact of the D.C. Circuit Court’s Decision in *Register-Guard***

The court’s opinion was very fact-specific and limited in scope, so the decision may not have broad application. For the immediate future, pursuant to the Board’s rule in *Register-Guard* employer rules may specify that employees may not use employer e-mail, to the extent a CSP is clear and represents a neutrally drafted and applied policy. Employers may, therefore, prohibit employee use of e-mail, so long as the CSP is drafted to be facially neutral and consistently applied. Employers may face liability exposure if policies bar use of systems for unionizing and engaging in other concerted activities, while permitting use for other similar non-work-related activities if the distinction made is construed as being an unequal treatment of equals and discrimination along section 7 lines. Employers certainly must avoid disciplining employees selectively for communications protected under section 7 unless, for example, its CSP clearly distinguishes between organizational and personal solicitations, and is uniformly applied to punish every single non-job-related organizational solicitation. Even then, it is possible that an employer’s categories of permitted and prohibited activities may be scrutinized more closely under a more employee-friendly standard in future.

**VI. Prospects for Change Under an Obama Board***

The current Chairman of the NLRB, Wilma Liebman, has been a strong advocate for section 7 rights over the course of her career, highlighted most recently in her blistering *Register-Guard* dissent. There, then-Member Liebman took the position that employer rules banning all non-job-related solicitations are overly broad in the absence of a legitimate business justification that outweighs the interference with section 7 rights. It is conceivable that a new Board, particularly one that is likely to have two new, more pro-labor members, will be more sympathetic to section 7 rights, and may rule that employer bans on such communications, absent a legitimate business justification, presumptively violate the Act. As the dissent in *Register-Guard* noted, as technology changes, the Board needs to keep up with those changes.\textsuperscript{82} The Obama Board may decide to reconsider CSPs entirely and produce a new statement as to how it construes e-mail systems and messages, in terms of their classification in the labor law context. The previous Board classified computer and telephone systems as personal property, essentially grouping employer equipment and systems with employer property cases. The problem with this analysis is that it ignores whether an e-mail communication could also be classified as solicitation, or distribution, or both and, thus, be entitled to statutory pro-
tection during non-working time and, in the case of distribution, in non-working time and in non-working places. The Obama Board may choose to expand upon the traditional paradigm for solicitation and distribution in light of the attributes of e-mail that transcend oral and printed communication methods.

While e-mail systems are personal property, and employers do have quality control and security and liability responsibilities for these systems, as well as cost concerns over bandwidth, e-mail systems are not quite in the same category as other personal property cases. E-mail is essentially incorporeal and sent through cyberspace, which is not the employer's property. In terms of business justifications, it should be noted that many companies have surplus bandwidth, and could better protect their bandwidth by instituting rules that restrict sending and saving items that take up large amounts of space, such as video files or photographs, many of which are personal in nature. Simple methods for preserving bandwidth could prevent the need for additional cost to the employer by allowing the use of its e-mail systems for concerted activities. Perhaps the larger issue is the cost of time spent in sending and reading these e-mails or, in other words, lost work-time. Theoretically, the Obama Board could decide that employees have a right to use employer e-mail addresses to send and read section 7 protected e-mails during non-working time, especially where other non-business uses of the workplace e-mail system are allowed.

VII. What the Future Looks Like- Beyond Register-Guard

Currently, employers' CSPs and network management practices are the real restrictions on employee communications in-house, because an employer may choose to block sites, restrict bandwidth, restrict access to its wireless network, etc., and discipline employees for violating CSPs. However, e-mail and CSPs will not matter as much in the future because new technologies will supplant the current ones. Even today, Facebook, Twitter and smartphones make it less likely that employees will need to use their employers' computer equipment and e-mail systems, or even workers' e-mail addresses, in order to communicate. In this networked and wireless environment, it may be easier than ever for employees to organize and communicate about wages, hours and working conditions, as well as about matters related to mutual aid or protection in the workplace—all of which are protected by section 7 of the Act. Many of these tools are available to all and are free to use at public libraries. In the future, employees will have less need for the employer systems, bulletin boards, break rooms or parking lots, because they will have the Internet allowing for instantaneous and mass communication. A union drive, in theory, could be more successful without the employer interfaces, such as the employer’s worksite, bulletin boards and e-mail system, because the union could get the jump on the employer before it even has knowledge of the unionizing activities.

In the future, employee communication will ultimately become bounded by the question of time rather than equipment, that is, how much work-time can employees devote to non-work activities? Surely the answer is at least a negligible amount of time; that incidental calls and e-mails on section 7 matters are allowable, particularly if personal ones are allowed. It may also become a matter of the message or content, and employers will have to look to analogous cases to decide whether it is lawful for employers to insist that an employee change a screensaver, or wallpaper from a union message, not wear clothes with the union’s URL in certain public or patient settings, or limit speaking about the union during working time, or prohibit posting the union website on the bulletin board. In many instances, the timing of the institution of restrictions may indicate an anti-union motive, for example, when new restrictions reflect an employer’s instant reaction to the onset of union activity at a site. In addition, it will be important to compare how the employer treats other messages that are not about a union, but are also not about business.
VIII. Conclusion

The Board’s Register-Guard decision was not properly decided, starting with the threshold question regarding the legality of the employer’s CSP. The Board should not have found the CSP to be a valid rule simply because it appeared to be facially non-discriminatory. The Register-Guard’s policy unduly interfered with section 7 rights and it should not have survived the Board’s scrutiny absent a legitimate business reason related to production or maintenance of discipline or the like. The larger question of the rule itself was not considered on appeal but will be more important in future cases where a new Board is more likely to look beyond the test of facial neutrality to determine the impact of a policy and require that an employer policy that interferes with section 7 rights must be justified by a legitimate business reason.

The Board in Register-Guard did not use the appropriate standard for discriminatory enforcement of an otherwise valid rule. Upon appeal of this issue, the D.C. circuit court found that there was not substantial evidence to support the Board’s finding of no discrimination and sent the matter back to the Board. The Register-Guard’s CSP was not applied or enforced as it was written, and while it appeared neutral on its face in that it did not prohibit only section 7 protected activities, the employer’s enforcement of the policy was selective and focused solely upon union-related activities. A reconstituted Board is likely to depart from the Board’s analysis on discriminatory enforcement, and apply a standard that is more sensitive to protection of employees’ section 7 concerted activities, a standard that is appropriate for employees engaged in protected communication while rightfully on company property—a standard that is consonant with prior Board law.

A new Board might even engage in rulemaking to outline what are appropriate CSPs. The Board could outline the parameters of statutorily protected conduct on e-mail, aligning these employee actions with precedent on employee solicitation and distribution such that e-mails and other communications could be sent and read on non-working time and, in the case of distribution, in non-working areas.

ENDNOTES

2 Id.
5 Id.
7 Guard Publ’g Co., Inc. (Register-Guard), 351 N.L.R.B. 1110 (2007), aff’d in part, rev’d in part, and remanded, 571 F.3d 53 (2009). See also Christine Neylon O’Brien, Employees on Guard: Employer Policies Restrict NLRA-Protected Activities on E-Mail, 88 OR. L. REV. 195 (2009) (analyzing Board’s Register-Guard decision and subsequent Register-Guard-related cases handled by the Board’s Division of Advice).
8 Register-Guard, 571 F.3d at 55.
9 Id. at 59 (citing WEBSTER’S II NEW COLLEGE DICTIONARY 1050, 888 (1999)).
10 Register-Guard, 571 F.3d at 55.
11 Id.
12 Id.
13 Id.
14 Id. at 57 (citing 29 U.S.C. §§158(a)(1) & (3) (2006)).
15 Register-Guard, 571 F.3d at 57.
16 Register-Guard, 351 N.L.R.B. 1110 (Members Wilma Liebman and Dennis Walsh dissenting in part).
17 Register-Guard, 571 F.3d at 57.
18 Id.
19 Id.
21 Register-Guard, 351 N.L.R.B. at 1118.
22 Id. at n.17.
23 Register-Guard, 571 F.3d at 58.
24 Id. at 59-60.
25 Id. at 58.
26 Caryn F. Horner, Recent Case: Guard Publishing Co.: Work E-mail and the Battle over Where Employees Can Draw the Line on E-mail Use, 29 BERKELEY J. EMP. & LAB. L. 487, 490 (2008).
27 Wilma B. Liebman, Symposium on James Aten’s Values and Assumptions in American Labor Law, a Twenty-Fifth Anniversary Retrospective: Values and Assumptions of the Bush NLRB: Trumpling Workers’ Rights, 57 BUFF. L. REV. 643, 647 (2009) (noting that Register-Guard decision could be so subtitled because Board majority “could not find a way to discriminate employees’ rights to communicate with each other at the workplace through this new technology” of e-mail and instead decided “that employer’s e-mail system is a piece of property, just like a telephone or a bulletin board, and thus employers may completely prohibit their employees from using the e-mail system to communicate with each other about working conditions, even if they use the e-mail system for communicating with each other about business matters.”)
28 Register-Guard, 351 N.L.R.B. at 1121. The current Board is composed of just two members, now Member Schaumber and Chairman Liebman. See National Labor Relations Board, Member Biographies, available at http://www.nlrb.gov/About_Us/Overview/Board/ (last visited Oct. 21, 2009). President Barack Obama designated Wilma Liebman Chairman of the Board. See Susan J. McGolrick, NLRB, Obama Designates Liebman as Chairman, Rewarding Her 11 Years of Service on Board, Daily Lab. Rep. (BNIA) No. 13, at A-B (Jan. 23, 2009) (discussing announcement regarding Chairman Liebman, current composition of Board and likelihood of Democratic majority as three vacancies are filled). The White House announced its nomination of Craig Becker, Mark Gaston Pearce, and Brian...
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See McGolrick, supra note 55 at AA-1.

See David J. Murphy & Robert Bonsall, The “New” Obama National Labor Relations Board: Attack, Retreat or Both?, 38th Annual Institute on Employment Law, Practicing Law Institute (2009) n. 49 (citing St. Anthony’s Hosp. 292 N.L.R.B. 1304, 1307 (1989), aff’d, 902 F.2d 1572 (8th Cir. 1990); Catherine L. Fisk & Deborah C. Malamud, Thirty-Ninth Annual Administrative Law Issue: Administrative Law under the George W. Bush Administration: Looking Back and Looking Forward: Article: The NLRB in Administrative Law Exile: Problems with its Structure and Function and Suggestions for Reform, 58 DUKE L. J. 2013, 2069-70 (2009) (discussing how NLRB in Register-Guard offered no reasoning for its conclusion that e-mail had not changed pattern of industrial life sufficiently to mandate employee use of e-mail for section 7 purposes and that decision was a significant departure from prior reading that section 7 gives employees rights to communicate at work both orally and in writing on non-working time).

Register-Guard, 351 N.L.R.B. at 1127.

Register-Guard, 351 N.L.R.B. at 1125, 1123.

Register-Guard, 351 N.L.R.B. at 1121, 1123.

Register-Guard, 351 N.L.R.B. at 1125.

Register-Guard, 351 N.L.R.B. at 1129.

Register-Guard, 351 N.L.R.B. at 1124 (citing Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)).

Register-Guard, 351 N.L.R.B. at 1124.

Register-Guard, 351 N.L.R.B. at 1131.

Register-Guard, 571 F.3d at 60-61.

Register-Guard, 351 N.L.R.B. at 1122, 1127.

Id. at 1126.

Id. at 1128.

Id. at 1127.

Id. at 1128.

Id. at 1130.

Id. & n. 26.

Id. at 1129.

Id.

Id.

See id. at 1125-26, 1128-1130 (discussing importance of e-mail and Fleming Cos. v. NLRB, 349 F.3d 968 (7th Cir. 2003) & Guardian Indus. Corp. v. NLRB, 49 F.3d 317 (7th Cir. 1995)).

Register-Guard, 351 N.L.R.B. at 1127.

Fleming Cos. v. NLRB, 349 F.3d 968 (7th Cir. 2003).

519 F.3d 373 (7th Cir. 2008).

Id. at 374.

Id. at 375.

Id. at 375-76.

Id. at 376.

Id. at 374.

Guard Publ’g Co. v. NLRB (Register-Guard), 571 F.3d 53, 62 (D.C. Cir. 2009). See also Susan J. McGolrick, Unfair Labor Practice, D.C. Circuit Rules Guard Publishing Illegally Disciplined Copy Editor for E-mails, 128 Daily Lab. Rep. (BNA), No. 128, at AA-1 (July 8, 2009) (discussing case as ‘partial’ victory for the union because union chose not to appeal the Board’s ruling that the policy itself was lawful).

571 F. 3d at 62.