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Perhaps Mimeographs and IBM Selectrics® Weren't So Bad: Employee Entitlement to Use Employer Email Systems to Engage in Protected Concerted Activity

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Overview

Most employers of any size or sophistication are generally familiar with the governmental agencies that regulate them, such as the U.S. Department of Labor ("USDOL"), the Equal Employment Opportunity Commission ("EEOC"), the Internal Revenue Service ("IRS") and, in North Carolina, the North Carolina Department of Labor and the Division of Employment Security of the North Carolina Department of Commerce.

Almost all North Carolina employers, however, can be forgiven for forgetting about the federal National Labor Relations Board ("NLRB"). Most people think of the NLRB—if they think of it at all—only in the context of labor unions, and employers in North Carolina usually give little thought to unions. Employees in North Carolina are represented by labor unions at the lowest rate in the country. According to the USDOL Bureau of Labor Statistics, as of January 2014, only 3 percent of North Carolina employees were so represented by unions. Labor unions, in other words, have little to do with the workplace in North Carolina.

The Broad Reach of the NLRB

However, the days in which "non-unionized" employers may ignore the NLRB and its power over them are over. It is pretty well-known that the NLRB has waded into employers' "social media policies" and how such policies may be enforced.[1] But the NLRB has now gone well beyond that and issued a decision with enormous implications for employers whose businesses use email systems. Late in 2014, the NLRB, in a radical development, ruled that use of an employer's email system by employees "for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." Purple Communications, Inc., 361 NLRB No. 126, *1 (Dec. 11, 2014).

To what employers does this decision apply? Just about all of them. According to the NLRB, its "jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, . . . non-union businesses, and businesses in states with 'Right to Work' laws," including North Carolina. The NLRB's jurisdiction extends to all "labor disputes" that "affect" interstate commerce without regard to how many employees an employer has which is a limitation on the reach of many labor laws. The NLRB, however, has chosen not to assert jurisdiction over certain employers whose businesses do not engage in interstate commerce in excess of certain amounts. Those amounts, which one can find on the NLRB's website, are not substantial (such as an "annual inflow or outflow"

of $50,000 for "non-retailers," a gross annual volume of business of $500,000 for "retailers," and a gross annual volume of at least $250,000 for "special categories" such as hospitals and medical and dental offices). An employer should therefore assume that it should comply with Purple Communications unless it is prepared to argue that its annual volume of business is smaller than the NLRB's self-imposed jurisdiction limits.

Almost any employer that has implemented an email system and provided employees with access to it—which presumably includes virtually all employers in today's technological workplace—must consider the NLRB's Purple Communications decision and what it means in terms of how the employer's system may be used and how the employer must deal with employees who have used (or merely wish to use) the system to confer with, or complain to, one another about the terms and conditions of their employment.

How Did this Issue Come Up?

How did this issue come up? Innocently enough. The employer in Purple Communications had maintained in its employee handbook an "electronic communications policy" of the kind that many employers have in place. The policy provided in part as follows:

> INTERNET, INTRANET, VOICEMAIL, AND ELECTRONIC COMMUNICATION POLICY
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> Computers, laptops, internet access, voicemail, electronic mail (email) . . . and/or other Company equipment is provided and maintained by the [sic] 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.
>
> **Prohibited activities**
>
> Employees are strictly prohibited from using the . . . email systems . . . in connection with any of the following activities:
>
> . . . .
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> . . . .
>
> 5. Sending uninvited email of a personal nature.

The issue before the NLRB was whether the policy violated Section 7 of the National Labor Relations Act ("NLRA") which essentially provides employees of covered employers with the right "to effectively communicate with one another at work regarding . . . terms and conditions of employment."

The Majority Holding in Purple Communications, Inc.

The NLRB held that the policy violated Section 7. The majority decision by three members of the five-member NLRB is about 17 single-spaced pages long and includes 82 detailed footnotes, so any summary of the decision (much less of the two dissenting opinions which comprise about 42 pages and vast footnotes of their own) risks being more simplistic than simple. But, with that caveat, the following analysis is offered.

The majority began with Section 1 of the NLRA, which provides in part that the policy of the United States is to "protect the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment **or other mutual aid or protection.**" Section 7 of the NLRA therefore

provides employees (whether or not a union is in the picture) with the "right to . . . engage in concerted activities for the purpose of . . . mutual aid or protection." As the majority noted, such "collective action cannot come about without communication," especially at the workplace, because, in the majority's view, the workplace is "'a particularly appropriate place for employees to exercise their Section 7 rights, because it is the one place where employees clearly share common interests and . . . traditionally seek to persuade fellow workers in . . . matters related to their status as employees.'"

The majority observed, based on a 2004 survey, that "over 81 percent of employees spent an hour or more on email during a typical workday, with about 10 percent spending at least 4 hours. . . . The same survey found that about 86 percent of employees sent and received nonbusiness-related email at work" and, according to a 2008 survey, that "96 percent of employees used the internet, email, or mobile telephones to keep them connected to their jobs, even outside of their normal work hours." The majority also noted the fact that "[s]ome personal use of employer email systems is common and, most often, is accepted by employers," and that "many employers expect or at least tolerate personal use of electronic communications equipment by employees because it often increases worker efficiency." Email, in other words, has become ubiquitous in the modern American workplace.

Any thought that the NLRB might be moved by an argument that employers' email systems belong to employers and that they should therefore have the right to say how such systems are used was quickly dashed: "Since 1945, the Supreme Court has held that, when employees seek to engage in Section 7 activity on their employer's land, even against the owner's wishes, the owner's property rights may have to yield to some extent to accommodate the employees' Section 7 rights. Logically, the same must be true of the owner's property rights with regard to its equipment."

The majority of the NLRB members found that the time had come for the NLRB to "formulate a new analytical framework for evaluating employees' use of their employers' email systems." That "framework" is as follows (all emphases added):

- "[The NLRB] 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." The NLRB's decision, in other words, "applies only to employees who already have access to their employer's email system for work purposes." Its decision "does not require employers to provide such access" to employees in the first place.
- "[A]n employer may justify **a total ban on nonwork use of email** , including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. . . . Because limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, [the NLRB] anticipate[s] that it will be **the rare case** where special circumstances justify a total ban on nonwork email use by employees."
- "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**." Any employer contending that "special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction," and the "**mere assertion of an interest that could theoretically support a restriction will not suffice.**" And, in most cases, "an employer's interests will establish **special circumstances** only to the extent that those interests are not similarly affected by employee email use that the employer has authorized."

Despite the obvious complexities of its "new analytical framework," the majority took pains to indicate that its decision is "limited." The decision pertains only to email systems, not to "any other electronic

communications systems." It also pertains only to "use by employees."

Finally, with a flair for understatement, the majority acknowledged that many employers:

> [W]ho choose to impose a working-time limitation [on employees' use of the employers' email system] will have concerns about the extent to which they may monitor employees' email use to enforce that limitation. Our decision does not prevent employers from continuing . . . to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability.

The NLRB has long observed "that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary.'" "An employer's monitoring of electronic communications on its email system will similarly be lawful **so long as the employer does nothing out of the ordinary,** such as . . . focusing its monitoring efforts on protected conduct. . . . Nor is an employer ordinarily prevented from notifying its employees . . . that it monitors (or reserves the right to monitor) computer and email use for legitimate management reasons, and that employees may have no expectation of privacy in their use of the employer's email system."

Employers who monitor employees' use of their email systems, even when employees are engaged in protected Section 7 activity, will be fine, so long as they can mount a "nothing out of the ordinary" defense. That will require employers to present credible evidence of how they usually monitor employee use of their email systems as compared, for example, to how they monitored such use by an employee who claims to have been unlawfully demoted or fired because of what he said to one or more other employees on the email system. That, of course, may be more easily said than done.

Conclusion

What is an employer to do? Besides the always sage advice of "consult your legal counsel," affected employers should review and consider revising their personnel policies to ensure that they don't discourage (or invite an argument that they ***seem*** to discourage) employees from using the employer's email system to engage in Section 7-protected communications on "non-working time" and, if an employer wishes to apply "controls" over the system to "maintain production and discipline," should spell out those "controls," why they are being adopted, and ensure that they will be "uniform and consistently enforced."

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[1] *See* "Acting General Counsel Releases Report on Employer Social Media Policies" (May 30, 2012), http://www.nlrb.gov/news-outreach/news story/acting-general-counsel-releases-report-employer-social-media-policies, and "'#YOUSHOULDSUE' The Danger of Firing an Employee who has Called-Out the Company in Social Media" (October 11, 2013), available at http://www.wardandsmith.com/blog/you-should-sue-the-danger-of-firing-an-employee-who-has-called-out-the-company-in-social-media.

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