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Employees on Guard: Employer Policies Restrict NLRA-Protected Concerted Activities on E-mail

E-mail has changed the landscape of communication at work and beyond. Employees frequently use their workplace e-mail for personal messages. In most instances, employers look the other way at this diversion of resources unless either productivity is compromised or the employees circulate subject matter, such as offensive jokes, that could subject the employer to liability for maintaining a hostile work environment. Employers often have a different reaction, however, when they detect activity that they think might undercut their authority or indicate outside intervention by a union. In those situations, employers might clamp down on the use of company property or work time for communicating what management perceives as unsettling or disloyal messages. This reaction by management might occur whether the message is orally communicated, posted on a bulletin board, made by telephone, sent by the U.S. Postal Service or a private carrier service, or transmitted by e-mail.

The *Guard Publishing Co.* decision (hereinafter referred to as *Register-Guard I*) raised the questions of whether an employer's prohibition on the use of its e-mail for all "nonjob-related [sic] solicitations" may include union-related e-mails and whether such a

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policy violates federal labor law.¹ A related issue is whether an employer is free to enforce such a policy against union-related e-mails while simultaneously permitting employees to send non-business-related personal e-mails. In *Register-Guard I*, a divided National Labor Relations Board (NLRB or the Board) upheld just such an e-mail policy, as well as the disciplinary enforcement of that policy, against allegations that the policy violated the National Labor Relations Act² (NLRA or the Act).³

Register-Guard I represented an important decision for the NLRB because of the issues presented with respect to the medium of workplace e-mail, and the case afforded the agency an opportunity to illustrate its continuing relevance in the twenty-first century. At the Board level, the *Register-Guard I* decision was heralded as a “blow to organized labor” that “could have a broad impact, because unions often use company e-mail to update workers about contract negotiations or plans for work stoppages, and also [e-mail] is widely used in organizing campaigns.”⁴ Former Board Member John Raudabaugh argued in an amicus brief that “federal labor law doesn’t

¹ *Guard Publ’g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1110 (2007), *aff’d in part, rev’d in part*, 571 F.3d 53 (D.C. Cir. 2009).

² *Id.* Then-Chairman of the NLRB Robert Battista was joined by Members Schaumber and Kirsanow in the majority opinion. Members Liebman and Walsh dissented to the Board majority’s holding that the employer’s ban on using e-mail for non-job-related solicitations was lawful and to the majority’s “overruling of bedrock Board precedent about the meaning of discrimination as applied to Section 8(a)(1).” *Id.* at 1121; *see also* Susan J. McGolrick, *Unfair Labor Practices: NLRB 3-2 Allows Publisher’s E-mail Policy Prohibiting ‘Non-Job-Related Solicitations,’* Daily Lab. Rep. (BNA), No. 246, at A-1 (Dec. 24, 2007) [hereinafter McGolrick, *NLRB 3-2*] (discussing the Board’s decision). The current Board is composed of just two members, Chairman Liebman and now-Member Schaumber. National Labor Relations Board, Board Member Biographies, http://www.nlr.gov/About_Us/Overview/Board/ (last visited Oct. 12, 2009). President Barack Obama recently 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. (BNA), No. 13, at A-8 (Jan. 23, 2009) (discussing the announcement regarding Chairman Liebman, the current composition of the Board, and the likelihood of a Democratic majority as three vacancies are filled). The *Register-Guard I* case was recently deemed to be one of six significant Board rulings awaiting court review by the two current Board members. *See* Susan J. McGolrick, *Obama Has Opportunity to Quickly Create Democratic Majority on Board*, Daily Lab. Rep. (BNA), No. 15, at S-9 (Jan. 27, 2009).

³ National Labor Relations Act, 29 U.S.C. §§ 150–169 (2006).

⁴ Kris Maher, *Union Use of Company Email Is Limited*, WALL ST. J., Dec. 22, 2007, at A7. The Board member opinions divided along political party lines: members of the majority voting to limit union use of company e-mail were Republican appointees, and the dissenters, who argued that employers should not be able to ban non-job-related e-mail activity, including union communications, were Democratic appointees.

guarantee employees or unions access to company email” and highlighted the importance of the decision since “[t]his case applies to every employer in the United States.”⁵ In fact, the importance of the subject matter led the NLRB to schedule a rare oral argument and solicit comments on a list of published questions surrounding the issues in the case.⁶

Register-Guard I is likely to result in increased employer monitoring of employee e-mail as the majority opinion made clear that employers have property rights in their e-mail systems and, thus, have the right to limit employees’ use of workplace e-mail regarding unions and organizational topics.⁷ Employers may legally prohibit union activity on e-mail if they similarly ban solicitations by other outside organizations, even though they may still permit “office chitchat and personal messages.”⁸

Register-Guard I was appealed to the U.S. Court of Appeals for the D.C. Circuit, and some critics of the Board’s decision speculated that the appellate court would ask the Board to modify its ruling because it is inconsistent with Supreme Court precedent.⁹ The outcome of the appeal, discussed in the Addendum at the end of this Article, as well as changes in the NLRB’s membership could well result in the adoption of a different standard for workplace communication policies and their enforcement in the near future.¹⁰ A memorandum from the NLRB General Counsel reported on five cases since *Register-Guard I* that provide guidance on the Board’s *Register-*

⁵ *Id.* The decision applies to all private-sector employers who are covered by the jurisdiction of the National Labor Relations Act regardless of whether the employees are unionized or not.

⁶ See *infra* notes 45–67 and accompanying text (discussing notice of oral argument, questions for consideration, and positions reflected in briefs of amici).

⁷ Morey Stettner, *More Firms Will Eye Blogs, E-mail in '08; Employers Expanding Programs to Monitor What Workers Do Online*, INVESTOR’S BUS. DAILY, Dec. 31, 2007, at AO7 (noting that the NLRB’s decision signals that employers own computers and employees lack legal right to use them for certain communications).

⁸ Tim Fought, *Board: Companies Can Bar Union E-Mail*, ASSOCIATED PRESS, Dec. 22, 2007, available at http://www.newsvine.com/_news/2007/12/22/1181742-board-companies-can-bar-union-email.

⁹ Lawrence E. Dube, *NLRA: Law Professors Speaking at ABA Conference Criticize NLRB’s Register-Guard Decision*, Daily Lab. Rep. (BNA), No. 87, at C-1 (May 6, 2008) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). In fact, the D.C. Circuit Court of Appeals did reverse the Board’s decision and remand in relevant part. *Guard Publ’g Co. v. NLRB (Register-Guard II)*, 571 F.3d 53 (D.C. Cir. 2009); see *infra* notes 349–63 and accompanying text (discussing appellate court decision).

¹⁰ See *infra* notes 349–63 and accompanying text.

Guard I decision and its practical implications.¹¹ Due to the importance of the issues involved in these cases, the General Counsel directed all regional offices to submit discrimination cases that implicate the Board's decision in *Register-Guard I* to the Division of Advice,¹² which provides legal advice to the NLRB regional offices.¹³ The procedure of deferral to the Division of Advice ensures that the regional offices treat significant and recently litigated issues appropriately and consistently.¹⁴

This Article explores the issues relating to policies that cover use of company equipment and systems, especially restrictions on e-mail, and how these policies may be legally problematic if they interfere with the National Labor Relations Act, which governs the right, among others, to engage in union activities. This Article focuses upon the significance of the NLRB's *Register-Guard I* decision, the legal basis and sources cited by the majority in support of its decision, the arguments of the dissenting members, and the General Counsel's recent applications of the majority's discrimination standard in *Register-Guard I*. Why the Board's decision in *Register-Guard I* was appealed and restricted is discussed, taking into account precedent under the NLRA and the current status and uses of e-mail.¹⁵ This

¹¹ Memorandum from Ronald Meisburg, NLRB General Counsel, to NLRB Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers (May 15, 2008) [hereinafter GC Memorandum], available at http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-07%20Report%20on%20Case%20Development.pdf; see also *NLRB: General Counsel Meisburg Issues Report Discussing Recent E-mail, Solicitation Cases*, Daily Lab. Rep. (BNA), No. 97, at A-1 (May 20, 2008) (discussing the GC Memorandum).

¹² GC Memorandum, *supra* note 11, at 3.

¹³ See 2 THE DEVELOPING LABOR LAW 2660 (John E. Higgins, Jr., ed., 5th ed. 2006).

¹⁴ GC Memorandum, *supra* note 11, at 3, 12 (directing regional offices to send these cases to the NLRB Division of Advice in order to maintain a consistent approach to the interpretation of the decision and case-handling). In fact, the General Counsel had previously listed "[c]ases involving claims that rules that prohibit or limit non-business use of employer supplied e-mail, access to the Internet, cell phones, digital assistants, or other employer-owned means of electronic communication unlawfully interfere with the Section 7 protected [sic] activities" as actions that must be submitted to the Division of Advice. Memorandum from Ronald Meisburg, NLRB General Counsel, to NLRB Regional Directors, Officers-in-Charge, and Resident Officers 3 (Sept. 25, 2007), available at http://www.nlr.gov/shared_files/GC%20Memo/2007/GC%2007-11%20Mandatory%20Submission%20to%20Advice.pdf.

¹⁵ See Dube, *supra* note 9, at C-3. Subsequently, the Guard Publishing Company itself asked the D.C. Circuit Court of Appeals to review the Board's decision, and the union thereafter petitioned for review. See *id.* at C-1; see also Christine Neylon O'Brien, *The Impact of Employer E-mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act*, 106 DICK. L. REV. 573, 588-89 (2002).

Article questions the legality of workplace communication systems policies that permit nonbusiness uses of communications systems yet also prohibit concerted activity and union-related communications among employees. The distinctions appear to be based upon disfavored content, involving protected concerted activity, rather than legally relevant distinctions that pertain to legitimate business reasons. The Article concludes that the NLRB needs to modernize its rules to embrace the realities of electronic communication and suggests a standard for balancing employees' NLRA rights with employers' legitimate business reasons relating to production, discipline, or other modern-day equivalents.

I

THE RELEVANT FACTS, ISSUES, AND PROCEDURAL HISTORY IN *REGISTER-GUARD I*

The Guard Publishing Company publishes the *Register-Guard*, a daily newspaper, in Eugene, Oregon.¹⁶ The company implemented a Communications Systems Policy (CSP) in 1996, shortly after the installation of a new computer system.¹⁷ The CSP explicitly noted that the computer equipment and system were owned and provided by the company to assist in conducting business.¹⁸ The CSP contained the following prohibition: "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."¹⁹

A local union represented about 150 *Register-Guard* employees as part of its bargaining unit.²⁰ Suzi Prozanski was the president of the local union and also worked as a copy editor.²¹ She sent three union-related e-mails on the company's e-mail system.²² Her first e-mail involved an attempt to clarify inaccurate statements made by another

(discussing the interaction between employer e-mail policies and section 7 of the National Labor Relations Act).

¹⁶ Guard Publ'g Co. (*Register-Guard I*), 351 N.L.R.B. 1110, 1133 (2007).

¹⁷ *Id.* at 1111.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 1133.

²¹ *Id.* at 1133–34.

²² Steven Greenhouse, *Ruling Lets Firms Bar Union E-mail*, N.Y. TIMES, Dec. 23, 2007, at A28, available at <http://www.nytimes.com/2007/12/23/business/22cnd-labor.html>.

employee, Bill Bishop, regarding a union rally.²³ Ms. Prozanski first told her managing editor that she intended to send the e-mail, and he asked her to wait until he checked with Human Resources. Two days later, when Ms. Prozanski had not heard back from her editor, she told him that she was going to send the e-mail, and he simply replied, “I understand.”²⁴ Ms. Prozanski wrote the e-mail, with the subject line “setting it straight,” while she was on break from her workstation.²⁵ The next day, she received a written warning for violating company policy by using company e-mail to conduct union business.²⁶

Three months after the first e-mail, Ms. Prozanski sent two e-mails to multiple *Register-Guard* e-mail addresses from the union’s office—not from company premises.²⁷ These e-mails sought support for the union’s negotiating position by asking employees to wear green and to participate in the union’s float in the town parade. Ms. Prozanski testified that she thought sending the e-mails from the union office obviated any problems with the company’s computer policy because she was not using company equipment.²⁸ Nonetheless, Ms. Prozanski received another written warning for using the company’s communication system for union activities, in violation of the prohibition on “non-job-related solicitations.”²⁹

The union filed several unfair labor practice charges with the NLRB alleging the *Register-Guard* discriminatorily enforced its CSP with respect to union material.³⁰ Under NLRA section 7,

[e]mployees shall have 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 activities for the purpose of collective bargaining or other

²³ *Register-Guard I*, 351 N.L.R.B. at 1111. Mr. Bishop also received a written warning for his violation of the CSP, but the unfair labor practice complaint did not allege that Bishop’s discipline was unlawful. *Id.* at 1111 n.5.

²⁴ *Id.* at 1111.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* Another unfair labor practice issue arose regarding the company’s collective bargaining proposal that the electronic communications systems were not to be used for union business, but ultimately this was disposed of by the Board. *Id.* at 1110, 1112.

mutual aid or protection, and shall also have the right to refrain from any or all such activities.³¹

This language, including the “concerted activities” terminology, has been interpreted to provide protection for employees who band together to discuss wages, hours, and working conditions and employees who engage in discussions regarding “mutual aid or protection,” even in the absence of a union agent.³² Some e-mail discussions have been included within the protection of section 7 even in the absence of a union.³³

Where employers interfere with section 7 rights, numerous unfair labor practices may be asserted under section 8 of the Act.³⁴ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” under section 7.³⁵ Section 8(a)(3) prohibits employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”³⁶

In this case, the union alleged both that the *Register-Guard* violated NLRA sections 8(a)(1) and 8(a)(3) in its maintenance and enforcement of an overbroad no-solicitation policy and that the *Register-Guard* discriminatorily enforced its policy against Ms. Prozanski because her e-mail regarded union matters.³⁷ The CSP explicitly prohibited employees from using e-mail to solicit, and the union argued that Ms. Prozanski’s e-mail was not a solicitation.³⁸

Whether employee conduct amounts to solicitation or not is important in determining whether a workplace communications policy that prohibits solicitation has been violated. Whether a solicitation is job-related is equally critical under policies similar to those at the *Register-Guard*. Solicitation in general is defined as “[t]he act or an instance of requesting or seeking to obtain something;

³¹ 29 U.S.C. § 157 (2006).

³² See DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW 136 (12th ed. 2003) (noting union designation is not required and individuals may act in concert when furthering goals of a group of employees).

³³ See *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997).

³⁴ 29 U.S.C. § 158 (2006).

³⁵ 29 U.S.C. § 158(a)(1) (2006).

³⁶ 29 U.S.C. § 158(a)(3) (2006).

³⁷ *Guard Publ’g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1110 (2007).

³⁸ *Id.* at 1133.

a request or petition.”³⁹ Further, it is important under section 7 to categorize employee communications as either a solicitation or a distribution. While a solicitation seeks a response, a distribution seeks to convey material to another without soliciting a reply. In the context of union organization or employee engagement in concerted activities, employers have the right to establish rules to maintain discipline in their establishments and, through that right, employers may prohibit union solicitation during working time.⁴⁰ If printed materials are distributed, employers may limit such distribution to nonwork time and nonwork areas.⁴¹ These statutory sections and Board and judicial precedents provide a preliminary context for analyzing the Board’s and the appellate court’s decisions in this case.

A. *The Administrative Law Judge’s Decision*

In 2002, Administrative Law Judge (ALJ) John J. McCarrick held, *inter alia*, that the *Register-Guard* violated sections 8(a)(1) and (3) of the Act through its discriminatory enforcement of its CSP.⁴² While the ALJ found that the employer could maintain the CSP, the company violated the Act by “enforcing the CSP to prohibit union-related e-mails while allowing a variety of other nonwork-related [sic] e-mails.”⁴³ Thereafter, the employer, union, and the Board’s General Counsel filed various exceptions, cross-exceptions, and supporting, reply, and answering briefs.⁴⁴

B. *The National Labor Relations Board: Call for Comment from Parties and Amici and Notice of Oral Argument*

In January 2007, the Board issued a notice of oral argument along with an invitation for amicus curiae briefs.⁴⁵ The Board spelled out questions for the parties and prospective amici to address, including “whether employees have a Section 7 right to use their employer’s e-mail system to communicate with one another, what standard should govern that determination, and whether an employer violates the Act

³⁹ BLACK’S LAW DICTIONARY 1427 (8th ed. 2004).

⁴⁰ Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945) (regarding solicitation).

⁴¹ Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962) (regarding distribution of union literature).

⁴² *Register-Guard I*, 351 N.L.R.B. at 1112.

⁴³ *Id.*

⁴⁴ *Id.* at 1110 n.1.

⁴⁵ *Id.* at 1110.

if it permits other nonwork-related [sic] e-mails but prohibits e-mails on Section 7 matters.”⁴⁶

The Board’s General Counsel argued that rules limiting employee communication at work should be judged by balancing section 7 rights against the employer’s interest in maintaining discipline.⁴⁷ While an employer has legitimate business interests in preventing liability for inappropriate content in e-mails, protecting its system against overloads and viruses, and preserving confidentiality and productivity, the General Counsel nonetheless proposed that “broad rules prohibiting nonbusiness use of e-mail should be presumptively

⁴⁶ *Id.* The full list of questions published by the Board follows:

1. Do employees have a right to use their employer’s e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters? If so, what restrictions, if any, may an employer place on those communications? If not, does an employer nevertheless violate the Act if it permits non-job-related e-mails but not those related to union or other concerted, protected matters?
2. Should the Board apply traditional rules regarding solicitation and/or distribution to employees’ use of their employer’s e-mail system? If so, how should those rules be applied? If not, what standard should be applied?
3. If employees have a right to use their employer’s e-mail system, may an employer nevertheless prohibit e-mail access to its employees by non-employees? If employees have a right to use their employer’s e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?
4. In answering the foregoing questions, of what relevance is the location of the employee’s workplace? For example, should the Board take account of whether the employee works at home or at some location other than a facility maintained by the employer?
5. Is employees’ use of their employer’s e-mail system a mandatory subject of bargaining? Assuming that employees have a Section 7 right to use their employer’s e-mail system, to what extent is that right waivable [sic] by their bargaining representative?
6. How common are employer policies regulating the use of employer e-mail systems? What are the most common provisions of such policies? Have any such policies been agreed to in collective bargaining? If so, what are their most significant provisions and what, if any, problems have arisen under them?
7. Are there any technological issues concerning e-mail or other computer-based communication systems that the Board should consider in answering the foregoing questions?

Press Release, NLRB, NLRB to Hold Oral Argument on Employee Use of Employer’s E-mail System (Jan. 10, 2007), *available at* http://www.nlr.gov/shared_files/Press%20Releases/2006/R-2613.pdf.

⁴⁷ *Register-Guard I*, 351 N.L.R.B. at 1112 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

unlawful, absent a particularized showing of special circumstances.”⁴⁸ Less-broad prohibitions would be evaluated on a case-by-case basis.

The General Counsel reasoned that e-mail cannot be “neatly characterized as either ‘solicitation’ or ‘distribution.’”⁴⁹ The General Counsel argued that e-mail is interactive; electronic communications permit thousands of transmissions at one time, unlike the telephone.⁵⁰ This basis was used for distinguishing Board decisions relating to employee use of telephones, bulletin boards, and other equipment from decisions relating to e-mail.⁵¹ Finally, the General Counsel asserted that allowing personal e-mails while prohibiting union-related e-mails on the basis that these communications are “on behalf of an ‘outside organization’” violates section 8(a)(1) in that the employer’s policy interferes with, restrains, or coerces employees with respect to their section 7 rights.⁵²

The union argued both that the employees were allowed to use the employer’s e-mail system to communicate nonbusiness matters generally and that the employees were rightfully on the employer’s property while at work, and, thus, they were not trespassing.⁵³ The union asserted that the employer’s management interests should be balanced against section 7 rights and that nondiscriminatory restrictions on e-mail may be imposed during working time, but additional restrictions should be imposed only where “necessary to further substantial management interests.”⁵⁴

The *Register-Guard* argued that employees have no section 7 right to use its e-mail system.⁵⁵ The equipment and system are owned by the company for business purposes, and the company insisted that Board precedent allows employers to restrict nonbusiness use, including restrictions on union-related communications.⁵⁶ The employer further argued that cases involving oral solicitation were “inapposite” because the company’s equipment is used for e-mail and noted that the employees and the union had other means of

⁴⁸ *Id.* at 1113.

⁴⁹ *Id.* at 1112.

⁵⁰ *Id.* at 1112–13.

⁵¹ *Id.*

⁵² *Id.* at 1113.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

communicating besides e-mail.⁵⁷ Basically, there is more of a burden on, or cost to, the company when employees use company equipment to communicate by e-mail as opposed to oral communication where no company equipment is utilized. Finally, the company argued that the correct analysis regarding discrimination would be a comparison of their treatment of union solicitations and their treatment of other organizational material that promotes meetings or group action, “persuader literature,” or the sale of outside products through the use of the company’s communications system.⁵⁸

Amici in support of the General Counsel and the union included the National Employment Lawyers Association (NELA) and the National Workrights Institute.⁵⁹ The NELA argued both that e-mail communication is no different than communication in lunchrooms and break rooms and that proscribing e-mail during nonworking time would not be consonant with the U.S. Supreme Court’s decision in *Republic Aviation*.⁶⁰ Further, the NELA maintained that union-related e-mails should be categorized as job-related rather than non-job-related.⁶¹ The National Workrights Institute noted that e-mail is a “predominant” method of communication and that most employers permit some personal use. The Institute expressed concern over the vagueness of employer e-mail policies and their application on an ad hoc basis because “uncertainty chills employee use of e-mail for Section 7 purposes.”⁶² Basically, a ban on union-related e-mail should be a violation of section 8(a)(1) because it interferes with protected activity under section 7.⁶³

Amici in support of the company included the HR Policy Association, the Minnesota Management Attorneys Association, the U.S. Chamber of Commerce, and the Employers Group.⁶⁴ They focused on the primacy of the employer’s property interest, arguing that an employer should be able “to impose nondiscriminatory restrictions on e-mail use.”⁶⁵ The Employers Group and the U.S. Chamber of Commerce argued even when an employer allows

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

personal e-mail, it must impose reasonable, nondiscriminatory limits on size, attachments, and number of recipients.⁶⁶ The amici supporting the company maintained that allowing some personal e-mails while prohibiting solicitations on behalf of unions and other organizations does not violate the NLRA.⁶⁷

C. The Board Adopts New Distinctions Regarding Discriminatory Enforcement While Upholding the Legality of Employer E-mail Policy that Prohibits Non-Job-Related and Outside Solicitations

1. The Majority Opinion

a. Employer Property Rights in its Communication Systems Prevail Over Employee Section 7 Rights

The Board held that employees have no statutory right under section 7 of the Act to use the employer's system for non-job-related solicitations.⁶⁸ After an examination of Board precedent, the Board explicitly decided to modify its approach in cases of discriminatory enforcement of e-mail policies, holding that "discrimination under the Act means drawing a distinction along Section 7 lines,"⁶⁹ which ordinarily means that similar types of activities are treated disparately based upon the presence of union content or conduct. Thus, some outside organizations would be allowed to communicate, but similar union-related communications would be subjected to discipline.⁷⁰ The Board ruled that the newspaper publisher's enforcement of its Communications Systems Policy against Ms. Prozanski for sending two e-mails urging other employees to support the union was lawful,

⁶⁶ *Id.* at 1114.

⁶⁷ *Id.* While the amici in support of the company thought that e-mail did not "fit neatly" into the Board's analytical framework for solicitation and distribution, the Employers Group and the HR Policy Association argued that, if the Board sought to analyze e-mail by either of these frameworks, it should be the framework of distribution. *Id.* at 1113–14. No doubt these employer-friendly amici sought to analogize e-mail to distribution rather than solicitation because the Board's rule for distribution is more restrictive—generally allowing employers to prohibit distribution during working time and in working areas—while the general rule for solicitation is that employers may prohibit such communication only during working time. See 1 THE DEVELOPING LABOR LAW 107 (John E. Higgins, Jr., ed., 5th ed. 2006) (discussing the Board's no-solicitation and no-distribution rules since *Republic Aviation*).

⁶⁸ *Register-Guard I*, 351 N.L.R.B. at 1110.

⁶⁹ *Id.*

⁷⁰ See *id.* at 1115 (comparing categories of permitted e-mails to those that resulted in discipline).

thus overturning the administrative law judge's decision.⁷¹ The first e-mail that Ms. Prozanski sent, in which she sought to clarify the specifics of a union rally, was not deemed to be a "solicitation" by the majority because it did not solicit a reply or response, and, thus, the employer's enforcement of its policy against her for sending that e-mail, including the written warning, violated sections 8(a)(3) and (1) of the NLRA.⁷²

The Board majority in *Register-Guard I* held that the employer's Communications Systems Policy, which prohibits use of the employer's e-mail system for any non-job-related solicitations, did not conflict with any statutory rights under section 7 of the NLRA.⁷³ It noted that, while the issue of employees' rights to use an employer e-mail system for section 7 purposes was one of first impression, related precedent existed on employee use of bulletin boards, telephones, and televisions for these purposes.⁷⁴ The majority relied upon the employer's right to regulate employee use of company property, noting that the Board found no statutory right for employees to use an employer's equipment or media as long as the restrictions on that use are not discriminatory.⁷⁵ As will be discussed later, the categorization of the employee activity and the analysis applied for determining whether a restriction on e-mail is discriminatory with respect to section 7 rights are both critical in setting the parameters for lawful employer e-mail policies.

The NLRB majority found the dissenters' reliance upon the analytical framework of *Republic Aviation v. NLRB* inapposite.⁷⁶ In *Republic Aviation*, an employer maintained a broad no-solicitation rule on its premises and discharged an employee for soliciting union membership on his lunch break.⁷⁷ In *Republic Aviation*, the Board "found that the rule and its enforcement violated Section 8(a)(1)."⁷⁸

⁷¹ *Id.* at 1110, 1113–14 (discussing the legality of the employer's Communications Systems Policy in each instance); see also McGolrick, *NLRB 3-2*, *supra* note 2, at A-1.

⁷² *Register-Guard I*, 351 N.L.R.B. at 1114; McGolrick, *NLRB 3-2*, *supra* note 2, at A-1. Because the first e-mail sent by Ms. Prozanski did not fit within the prohibited category of "nonjob-related [sic] solicitations" in the company's CSP, it was discriminatory for the *Register-Guard* to enforce the CSP and discipline her with a written warning for sending that e-mail.

⁷³ *Register-Guard I*, 351 N.L.R.B. at 1114.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1115 (referencing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

⁷⁷ *Id.*

⁷⁸ *Id.*

The U.S. Supreme Court affirmed the Board's decision in *Republic Aviation*, finding that employer property rights must give way in some instances to safeguard section 7 rights where an employer rule would otherwise deprive employees of their right to communicate in the workplace on their own time.⁷⁹ Absent "special circumstances mak[ing] the rule necessary in order to maintain production or discipline," a no-solicitation rule during nonwork time is "an unreasonable impediment to self-organization."⁸⁰ The *Register-Guard I* majority distinguished the instant case from *Republic Aviation* on the basis that the *Register-Guard*'s CSP, unlike the employer policy in *Republic Aviation*, did not regulate "face-to-face solicitation."⁸¹ The majority in *Register-Guard I* focused on the employer's property interest and did not characterize e-mail as either solicitation or distribution, and so the majority decision avoided the issue of whether e-mail was "more analogous to distribution than to solicitation."⁸² The Board majority noted that section 7 does not require that employees have access to any "particular means" to communicate, nor are they "entitled to use a medium of communications simply because the Employer is using it."⁸³ Nor does section 7 require an employer to provide the "most convenient or most effective means of conducting those communications."⁸⁴

The *Register-Guard I* majority explicitly avoided reliance upon the Board's decision in *Adtranz ABB Daimler-Benz Transportation, Inc.*, a precedent cited by the administrative law judge.⁸⁵ *Adtranz* involved a failure to establish nondiscriminatory enforcement of a business-use-only rule regarding employee e-mail use.⁸⁶ Rather than distinguish the limited Board cases and guidance available on employer e-mail policies, the *Register-Guard I* majority preferred to focus on the employer's property rights in its communications systems, emphasizing that the "Board has never found that employees have a general right to use their employer's telephone system for

⁷⁹ *Id.* (quoting *Republic Aviation Corp.*, 324 U.S. at 801–02).

⁸⁰ *Id.* (quoting *Republic Aviation Corp.*, 324 U.S. at 803 n.10).

⁸¹ *Id.*

⁸² *Id.* at 1115 n.9.

⁸³ *Id.* at 1115 (quoting *NLRB v. United Steelworkers (Nutone)*, 357 U.S. 357, 363–64 (1958)).

⁸⁴ *Id.*

⁸⁵ *Id.* at 1114 n.8 (citing *Adtranz ABB Daimler-Benz Transportation, Inc.*, 331 N.L.R.B. 291 (2000), *vacated in part*, 253 F.3d 19 (D.C. Cir. 2001)).

⁸⁶ *Id.*; see also O'Brien, *supra* note 15, at 583–84 (discussing *Adtranz*).

Section 7 communications.”⁸⁷ The work environment at the *Register-Guard* did not eliminate face-to-face communication by any means, and, thus, the majority saw no reason, in the absence of discrimination, to mandate employee use of the employer’s e-mail system for section 7 purposes.⁸⁸ The majority found that the CSP “on its face does not discriminate;” therefore, the policy did not violate section 8(a)(1).⁸⁹

b. The Majority’s Test for Discriminatory Enforcement

The *Register-Guard I* majority modified the Board’s previous analysis regarding whether employer actions amount to discrimination against section 7 activity.⁹⁰ Citing two Board decisions that were not enforced by the U.S. Court of Appeals for the Seventh Circuit, the *Register-Guard I* majority adopted that appellate court’s analysis of discrimination, namely that “discrimination means the unequal treatment of equals.”⁹¹ Pursuant to the Seventh Circuit’s analysis in *Fleming Co.* and *Guardian Industries Corp.*, the distinction between organizational notices and personal postings on bulletin boards was significant.⁹² The Seventh Circuit did not treat these notices as “equals” because they are not similar in character; therefore, the employer’s disparate treatment of each communication medium was not deemed to be discrimination along section 7 lines by the *Register-Guard I* majority.⁹³ It would be a violation of the Act, in the majority’s view, if an employer allowed solicitation either by one union but not another or by anti-union employees but not pro-union employees because, in both situations, the two parties are similar in

⁸⁷ *Register-Guard I*, 351 N.L.R.B. at 1116. Significantly, the majority cited no precedent in support of this broad statement.

⁸⁸ *Id.*

⁸⁹ *Id.* The Board majority’s use of the language that “the CSP *on its face* does not discriminate” when affirming the legality of the employer’s maintenance of the CSP seems to indicate that the *impact* of maintaining the policy was not considered relevant to the inquiry of whether the CSP discriminated against section 7 activity. *See id.* (emphasis added); *see also infra* notes 360–63 and accompanying text (discussing that the issue of the legality of the CSP itself was not appealed; therefore, the D.C. Circuit Court of Appeals did not consider this).

⁹⁰ *Register-Guard I*, 351 N.L.R.B. at 1116.

⁹¹ *Id.* at 1117 (citing *Fleming Co.*, 336 N.L.R.B. 192 (2001), *aff’d in part, vacated in part*, 349 F.3d 968 (7th Cir. 2003); *Guardian Indus. Corp.*, 313 N.L.R.B. 1275 (1994), *enforcement granted in part, enforcement denied in part*, 49 F.3d 317 (7th Cir. 1995)).

⁹² *Id.* (citing *Fleming Co. v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003)).

⁹³ *See id.* at 1117–18.

character, and thus, to have such a prohibition would be discrimination.⁹⁴ An employer is not prohibited from “drawing lines on a non-Section 7 basis.”⁹⁵ Thus, distinctions made between solicitations that are charitable and noncharitable, personal and commercial, business and nonbusiness, and organizational or not, would all survive scrutiny because the distinctions do not discriminate along section 7 lines, according to the Board majority.⁹⁶

The dissent argued that discrimination is not the essential analysis for a section 8(a)(1) violation; rather, this analysis merely speaks to the employer’s purported legitimate business reason for its conduct.⁹⁷ The *Register-Guard I* majority found that there was no evidence that the employer had an anti-union motive.⁹⁸ Nonetheless, Member Peter Kirsanow, while joining the majority opinion, noted separately that where a “facially Section 7-neutral line” is drawn, in terms of determining whether there is an anti-union motive, an employer’s reasonable interest is relevant.⁹⁹ Thus, if both the “effect” of the line drawn is that all section 7 communications are prohibited and the line “is not based on any reasonable employer interest[, then] an antiunion motive [is] a permissible inference.”¹⁰⁰

The majority dismissed the dissent’s argument that an employer’s disparate treatment of unlike groups amounts to discrimination. The majority looked to the Supreme Court’s refusal to require like treatment of supervisors and employees in terms of each group’s ability to communicate organizational messages.¹⁰¹ In the majority’s view, it would be a different matter if the employer “truly diminished

⁹⁴ *Id.* at 1118 n.17 (citing *NLRB v. United Steelworkers (Nutone)*, 357 U.S. 357, 363–64 (1958), for the proposition that employers may use their own equipment to send anti-union messages while denying employees the use of equipment to send pro-union missives). It would violate section 8(a)(2)’s prohibition on domination or assistance if an employer favored one union’s messages over another. 29 U.S.C. § 158(a)(2) (2006).

⁹⁵ *Register-Guard I*, 351 N.L.R.B. at 1118.

⁹⁶ *Id.*; see *infra* notes 352–59 and accompanying text (discussing the refusal of the D.C. Circuit Court of Appeals to accept the company’s post hoc justification for its discipline of Ms. Prozanski).

⁹⁷ *Register-Guard I*, 351 N.L.R.B. at 1118; see also *infra* notes 113–78 and accompanying text (discussing *Register-Guard I* dissent).

⁹⁸ *Register-Guard I*, 351 N.L.R.B. at 1118 n.18.

⁹⁹ *Id.*

¹⁰⁰ *Id.* Member Kirsanow clearly alluded to the relevance of the impact of a facially neutral line when deciding whether the line was drawn with an anti-union motive.

¹⁰¹ *Id.* at 1118 (citing *NLRB v. United Steelworkers (Nutone)*, 357 U.S. 357 (1958)).

the ability of the labor organization . . . to carry its message to the employees.”¹⁰²

The *Register-Guard I* majority inferred that there must be actual discrimination on the basis of the rule or prohibition, indicating that the dissent “fail[ed] to acknowledge that many decisions require *actual* discrimination.”¹⁰³ The majority, in adopting the rule from the Seventh Circuit, stated that “unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.”¹⁰⁴ Two phrases are of particular significance: “disparate treatment” and “similar character.” The language “disparate treatment” is critical because it contrasts with disparate impact.¹⁰⁵ The employer’s conduct, practice, or rule itself must be overtly discriminatory in order to constitute a violation under the disparate treatment standard; a disparate impact, however, can be found to be a violation if the conduct, practice, or rule is facially neutral yet has a disproportionate impact upon a protected group or activity. The disparate treatment standard sets a low standard for scrutiny of employer rules that may limit or prevent employees from engaging in protected concerted activity. There is simply no reason or precedent for setting the bar this low. The test adopted by the *Register-Guard I* majority permits employers to engage in conduct that is discriminatory in impact with respect to section 7 activities, as long as the discrimination is not overt, intentional, or motivated by anti-union animus.

The second phrase of interest in the majority’s language relates to what activities or communications are of a “similar character.” The key issue with this language is that delineating the appropriateness of categories is in the eye of the beholder, and the initial subjective determinations of appropriate categories in communications policies

¹⁰² *Id.*

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ *Id.* at 1119.

¹⁰⁵ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding employer discriminated on basis of race as to transfers and hiring by using tests and educational requirements that both were not job-related and acted as barriers to hiring and advancement of minorities due to their disparate impact). The *Register-Guard I* dissent referenced an article that took issue with the *Guardian Industries* court’s mistaken importation of Title VII’s disparate treatment approach into section 8(a)(1) of the NLRA. *Register-Guard I*, 351 N.L.R.B. at 1129 (Liebman and Walsh, Members, dissenting) (citing Rebecca Hanner White, *Modern Discrimination Theory and the National Labor Relations Act*, 39 WM. & MARY L. REV. 99, 115 (1997)).

are likely to be made by employers, who are not bound by legally relevant categories. What activities or communications are of a “similar character” is far from clear even after taking into account decisions of courts faced with enforcing or denying enforcement of Board orders regarding analogous matters. A preferable standard would require legal categories outlined by the Board that relate to statutory parameters and legislative intent. The test of the legality of any workplace communications systems policy should require a balancing of an employer’s legitimate business reasons—for its announced categories of permitted and prohibited activities—against employees’ legitimate exercise of section 7 rights.

The *Register-Guard I* Board found that the *Register-Guard* did not tolerate use of its e-mail by employees to solicit other employees in support of nonunion groups or organizations, except for an employer-sponsored United Way campaign.¹⁰⁶ Thus, the employer’s enforcement of its CSP regarding both union president Prozanski’s e-mail urging employees to wear green to support the union and her e-mail asking employees to participate in the union’s entry in the local parade “did not discriminate along Section 7 lines.”¹⁰⁷ The absence of evidence that the *Register-Guard* had allowed other groups or organizations to use the e-mail to solicit meant that there was no disparate treatment in the majority’s view.¹⁰⁸ Ms. Prozanski’s e-mail seeking to clear up the facts surrounding a union rally that occurred the day before was not a solicitation.¹⁰⁹ The *Register-Guard I* majority found, consequently, the employer violated sections 8(a)(1) and (3) when it enforced its CSP with respect to that missive by issuing Ms. Prozanski a warning for sending a union-related e-mail.¹¹⁰ This conclusion stemmed from the fact that the CSP merely prohibited “nonjob-related [sic] solicitations’ [and] not all non-job-related communications.”¹¹¹ Ms. Prozanski’s later e-mails that called for employees to act in support of the union were not protected

¹⁰⁶ *Register-Guard I*, 351 N.L.R.B. at 1119, 1119 n.23.

¹⁰⁷ *Id.* at 1119.

¹⁰⁸ *Id.* at 1119 n.24.

¹⁰⁹ *Id.* at 1119.

¹¹⁰ *Id.*

¹¹¹ *Id.*; see also *infra* note 353 and accompanying text (discussing the affirmation of the Board’s finding on this issue by the D.C. Circuit Court of Appeals).

activities under section 7, the majority wrote; therefore, the employer's discipline regarding these two was lawful.¹¹²

2. *The Dissent*

Members Wilma Liebman and Dennis Walsh dissented in part in the *Register-Guard I* decision.¹¹³ They took exception to the majority's treatment of e-mail as just a piece of communications equipment like bulletin boards, telephones, or scraps of paper, a concept they felt failed to consider how e-mail has "revolutionized communication . . . within and outside the workplace."¹¹⁴ The dissent would find that, when an employer gives "employees access to e-mail for regular, routine use in their work," a ban on using e-mail for non-job-related solicitations should be "presumptively unlawful absent special circumstances."¹¹⁵ The strongly worded dissent also took exception to the majority's "overruling of bedrock Board precedent about the meaning of discrimination as applied to Section 8(a)(1)."¹¹⁶ The majority's test would permit a rule that would allow employee use "for a broad range of nonwork-related [sic] communications but not for Section 7 communications."¹¹⁷ The dissent noted that the *Register-Guard's* CSP was enforced only against union solicitations and union-related communication.¹¹⁸ Personal, non-work-related communications of all kinds were permitted, including organizing a poker group and party invitations.¹¹⁹ The dissent noted that "[e]xcept

¹¹² *Register-Guard I*, 351 N.L.R.B. at 1119. The *Register-Guard I* majority both overturned the ALJ on this point and also overturned the ALJ's finding of violations of section 8(a)(1) and (5) that were based upon the employer's insistence on an unlawful bargaining proposal, specifically one that prohibited use of the employer's e-mail for union business. *Id.* at 1120. The majority found there was insufficient evidence of insistence that the proposal was a condition of entering into an agreement, and, thus, there was no reason to evaluate the proposal's lawfulness. *Id.* They also found there was insufficient evidence that the proposal impeded negotiations on lawful subjects, again noting that, under the circumstances, it was not necessary to rule on the lawfulness of that proposal itself. *Id.* at 1120, 1120 n.28; see also *infra* notes 350–58 and accompanying text (discussing that the D.C. Circuit Court of Appeals reversed the Board's conclusion that the company's discipline of Ms. Prozanski for sending the latter two e-mails was lawful).

¹¹³ *Register-Guard I*, 351 N.L.R.B. at 1121 (Liebman and Walsh, Members, dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1122.

¹¹⁹ *Id.*

with respect to union activity . . . the CSP was honored (and enforced) in the breach.”¹²⁰

The dissent analyzed the facts in the case from the perspective of the status of Suzi Prozanski as a bargaining unit employee and as a union president—as well as evaluating the conduct that was disciplined.¹²¹ The employer issued Ms. Prozanski her first written warning for her use of company equipment and its e-mail system, even though the message was composed and sent on her break time.¹²² The *Register-Guard* wrote that Ms. Prozanski violated the CSP by using the e-mail for union business and further noted that this would lead employees to think that it was permissible to use the e-mail for “purposes other than company business.”¹²³ “And, of course, that’s not true.”¹²⁴ Ms. Prozanski’s two other e-mails were composed and sent from the union office but utilized the company’s e-mail addresses and its system.¹²⁵ The employer’s written warning with respect to these e-mails stated that she had violated the CSP and demanded that she “stop using the system for dissemination of union information.”¹²⁶ It is noteworthy both that the employer characterized sending the e-mails as “dissemination” when the employer’s policy specifically sought to prohibit “solicitation” and that the employer singled out “union information” as the material to be prohibited.¹²⁷ Dissemination seems to be more akin to distribution than to solicitation.

a. The Appropriate Balancing Test—Employee Solicitation not Nonemployee Access and Distribution

The Board’s General Counsel contended that the *Register-Guard*’s CSP violated section 8(a)(1) because it was “unlawfully

¹²⁰ *Id.*; see also *infra* notes 357–58 and accompanying text (The D.C. Circuit Court of Appeals noted that singling out union activity for discipline was discrimination.).

¹²¹ *Register-Guard I*, 351 N.L.R.B. at 1122.

¹²² *Id.* This was the May 4th e-mail.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*; see also *supra* notes 18–19 and accompanying text (discussing the language of the CSP); *infra* notes 352–59 and accompanying text (discussing D.C. Circuit Court of Appeals’s dissatisfaction with the company’s “post hoc” rationale for its discipline stemming from Ms. Prozanski’s two latter e-mails).

overbroad.”¹²⁸ The administrative law judge dismissed this allegation, and the *Register-Guard I* majority affirmed.¹²⁹ The dissenters noted that the key to a section 8(a)(1) case is the interference with section 7 rights.¹³⁰ Employees have a right to communicate about matters protected under section 7, and, where an employer’s conduct or practice interferes with section 7 rights, “the employer must demonstrate a legitimate business reason that outweighs the interference.”¹³¹ The dissent urged both that it is the Board’s job to balance employees’ section 7 rights to communicate against the employer’s business interests and that “[l]imitations on communications should not be ‘more restrictive than necessary’ to protect the employer’s interests.”¹³²

The dissenters advocated using the test for oral solicitation in the workplace from *Republic Aviation Corp. v. NLRB*.¹³³ The oral solicitation test presumes that a restriction “on nonworking time [is] unlawful, absent special circumstances.”¹³⁴ In *Republic Aviation*, even though the employee solicitation occurred on employer property, the Supreme Court deemed this justification to be inadequate for an employer prohibition.¹³⁵ The Court upheld the Board’s decision, noting that an employer may make “reasonable rules” regarding actions during working time, but, outside working hours, an employee may use any time as desired “without unreasonable restraint, although the employee is on company property.”¹³⁶ The *Register-Guard I* dissent noted that the “special circumstances” from the *Republic Aviation* decision that might necessitate a rule banning solicitation during nonwork time would be “in order to maintain production or discipline.”¹³⁷ While *Republic Aviation* involved a total ban on solicitation, the dissent reflected that lesser employer restrictions on employee solicitation at work may survive scrutiny, for

¹²⁸ *Register-Guard I*, 351 N.L.R.B. at 1123.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* (citing *Caesar’s Palace*, 336 N.L.R.B. 271, 272 n.6 (2001); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976)).

¹³² *Id.* (citing *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 502–03 (1978)).

¹³³ *Id.* at 1123–24 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

¹³⁴ *Id.* at 1124.

¹³⁵ *Id.*

¹³⁶ *Id.* (quoting *Republic Aviation*, 324 U.S. at 803 n.10) (emphasis added in the *Register-Guard I* dissent).

¹³⁷ *Id.* (quoting *Republic Aviation*, 324 U.S. at 803 n.10).

example restricting solicitation to nonpatient areas of a hospital or noncustomer, or nonpublic, areas of a restaurant or business.¹³⁸

The dissent cited *NLRB v. Babcock & Wilcox Co.*, noting that the treatment of nonemployee organizers on company property requires a different balancing test than that afforded to communication among employees.¹³⁹ Employers may restrict “nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer’s notice or order does not discriminate against the union by allowing other distribution.”¹⁴⁰ The *Register-Guard I* dissent emphasized the distinction the Supreme Court made between employees and nonemployees, establishing that the test for restricting employee communication must be “necessary to maintain production or discipline.”¹⁴¹ Since employees are rightfully on the employer’s property, the employer’s management interests are at stake, rather than the employer’s property interests.¹⁴²

The dissent took issue with the *Register-Guard I* majority’s use of the nonemployee test rather than the employee test—with the majority satisfying itself that “the employees had other means of communication available.”¹⁴³ Such is not the appropriate inquiry, and, as the Board’s General Counsel urged, the employer’s broad ban on employee e-mail use should be presumptively unlawful under the *Republic Aviation* evaluation.¹⁴⁴ The dissent outlined three problems with the majority’s analysis, beginning with its failure to accept the importance of e-mail communication both inside and outside of the modern workplace. The dissent argued that e-mail is not just workplace equipment but rather it is a different tool, and, thus, the test used in cases evaluating other workplace equipment does not apply.¹⁴⁵ In addition, the dissent noted that the employer’s property interest in the equipment is not sufficient to exclude section 7 e-mails, nor is the “reasonable alternative means” test appropriate in this

¹³⁸ *Id.*

¹³⁹ *Id.* (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

¹⁴⁰ *Id.* (quoting *Babcock & Wilcox Co.*, 351 U.S. at 112 (emphasis added in the *Register-Guard I* dissent)).

¹⁴¹ *Id.* (quoting *Babcock & Wilcox Co.*, 351 U.S. at 113).

¹⁴² *Id.* (citing *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976)).

¹⁴³ *Id.* at 1125.

¹⁴⁴ *Id.* at 1124.

¹⁴⁵ *Id.* at 1125.

context.¹⁴⁶ E-mail is how people communicate at work today, and the section 7 rights of employees should not be interfered with unless a legitimate business reason outweighs them.¹⁴⁷ The dissent found the *Register-Guard* failed to establish that employee use of the e-mail for section 7 matters would interfere with its property rights or cause it economic or other harm.¹⁴⁸ According to the dissent, the majority's use of equipment cases seemed backward looking and unrealistic rather than keeping up with "changing patterns of industrial life," which is the Board's responsibility.¹⁴⁹ Reliance on the employer's property rights in its e-mail system should not provide an "absolute right to exclude Section 7 e-mails," particularly where the employees have computers and routinely use e-mail for communication at work.¹⁵⁰ The dissent further distinguished e-mail from other on-site equipment by pointing out that e-mail travels through cyberspace, which the employer does not own, and the system accommodates simultaneous users, unlike telephones.¹⁵¹

There is a significant difference between the communication rights of employees and nonemployees; the majority was incorrect to apply the alternative means of communication test from nonemployee cases to the rights of employees to communicate via e-mail.¹⁵² The dissent would presume that a broad ban on "all nonwork-related [sic] 'solicitations' is presumptively unlawful absent special circumstances."¹⁵³ The presumption could be rebutted with evidence of an employer's legitimate business interest.¹⁵⁴ But there was no unreasonable burden shown to establish an employer's legitimate business interest in excluding section 7 matters from the employer's e-mail in the *Register-Guard I* case.¹⁵⁵ The dissent pointed out that employers could institute rules that would prohibit large attachments

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1125 n.6 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 494 (1978); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir.1976)).

¹⁴⁸ *Id.* at 1126–27.

¹⁴⁹ *See id.* at 1125 (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

¹⁵⁰ *Id.* at 1126.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1126–27.

¹⁵³ *Id.* at 1127.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* The dissenters pointed out that they would "require specific evidence to support . . . an [employer's] assertion" that a server's capacity was so limited that text e-mails would interfere with its functioning or the like. *Id.* at 1127, 1127 n.16.

or other items that might interfere with the efficiency of the system.¹⁵⁶ As with oral solicitations, a rule that would limit non-work-related e-mails to nonwork time would be presumed lawful. The *Register-Guard* CSP, however, limited *all* non-job-related solicitations, so this limitation would appear to prohibit even those e-mails sent on nonwork time. The dissent noted that Board precedent on oral solicitations permits employees to solicit on company property on nonworking time but, with regard to distribution of flyers and printed material, restrictions can limit distribution to nonworking time and nonworking areas.¹⁵⁷ The dissent would reverse the administrative law judge's ruling and find that the employer's maintenance of the Communications Systems Policy regarding use of e-mail for non-job-related solicitations itself violated section 8(a)(1).¹⁵⁸

b. The Test for Discriminatory Enforcement of a Workplace Rule

The employer's enforcement of the CSP was also discriminatory, the dissent asserted.¹⁵⁹ The dissenters disagreed with the majority's adoption of the Seventh Circuit's limited analysis of discrimination as well as how the majority applied that court's test.¹⁶⁰ The dissent would follow Board precedent that an employer violates section 7 if it allows employees to use employer equipment for nonwork purposes while prohibiting section 7 use.¹⁶¹ The majority would allow an employer to draw a line between various types of solicitations as the employer sees fit, thus permitting the *Register-Guard* CSP because the company purported to ban all organizational solicitations, not just union ones. At the same time, all kinds of non-work-related personal

¹⁵⁶ *Id.* at 1127.

¹⁵⁷ *Id.* at 1127 n.15 (citing Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 621 (1962)).

¹⁵⁸ *Id.* at 1127; *see also infra* notes 360–63 and accompanying text (discussing that the legality of the CSP was not appealed to the D.C. Circuit Court of Appeals; however, now-Chairman Liebman's posture on the CSP, as evidenced in the *Register-Guard I* dissent, may prove more influential in future cases).

¹⁵⁹ *Register-Guard I*, 351 N.L.R.B. at 1127; *see also infra* notes 350–59 and accompanying text (discussing the D.C. Circuit Court of Appeals's opinion, which aligned with the *Register-Guard I* dissent on the discriminatory enforcement issue).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1127–28 (citing, e.g., Richmond Times-Dispatch, 346 N.L.R.B. 74, 76 (2005), *enforced*, 225 F. App'x 144 (4th Cir. 2007) (unpublished opinion) (found an employer violation of section 8(a)(1) where non-work-related e-mail messages were permitted but union-related messages were prohibited)).

messages were permitted.¹⁶² In analyzing the two Seventh Circuit cases that the majority relied upon, the dissent noted that both cases involved a failure of the appellate court to enforce Board orders.¹⁶³ In both *Guardian Industries Corp.* and *Fleming Co.*, the employer policies regarding bulletin boards excluded organizational notices.¹⁶⁴ In *Fleming*, the employer permitted personal postings in practice despite a “company business purposes only” policy, yet the court found this was not discriminatory because union notices fell within the broader category of prohibited organizational notices.¹⁶⁵

The *Register-Guard I* dissent pointed out that the National Labor Relations Act creates “affirmative right[s] to engage in concerted group action for mutual benefit and protection.”¹⁶⁶ Where an employer’s conduct “reasonably tended to interfere with those affirmative Section 7 rights . . . the burden is on the employer to demonstrate a legitimate and substantial business justification for its conduct.”¹⁶⁷ No improper motive must be established under section 8(a)(1), rather motive is relevant in section 8(a)(3) cases, according to the dissent.¹⁶⁸ It is not important to categorize activities as “equal,” because the mere interference with section 7 rights is the “essence” of a violation of section 8(a)(1) absent a showing of a “business justification that outweighs the infringement.”¹⁶⁹ As the dissent noted, discrimination is a relevant factor when weighing whether the employer’s business justification is a pretext rather than the key issue.¹⁷⁰

The dissent emphasized that where employees are involved, rather than nonemployees, the employer’s managerial interests in production and discipline are implicated rather than simply the company’s property interests.¹⁷¹ If the employer draws lines regarding permitted and prohibited categories of e-mails and section 7 e-mails are within the category of prohibited e-mails, then there should be a legitimate

¹⁶² *Id.* at 1128.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1128–29.

¹⁶⁶ *Id.* at 1129.

¹⁶⁷ *Id.* (citing *Caesar’s Palace*, 336 N.L.R.B. 271, 272 n.6 (2001); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976)).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1129 n.22, 1130 n.24.

business reason for those lines.¹⁷² Without this reason, “the employer’s rule is . . . antithetical to Section 7’s protection of concerted activity,” even in the absence of anti-union motive, according to the dissent.¹⁷³ The employer’s enforcement of its CSP violated section 8(a)(1) with respect to all three of Ms. Prozanski’s e-mails.¹⁷⁴ Because the *Register-Guard* allowed personal solicitations that violated the CSP, singled out union solicitations for censure, and never “enforced the CSP against *anything other than* union-related messages,” this discipline was unlawful discrimination even under the Seventh Circuit’s analysis.¹⁷⁵

In addition to violating section 8(a)(1), the employer’s discipline of Ms. Prozanski violated section 8(a)(3). The dissent deemed the disciplinary warnings unlawful because the CSP itself was unlawful on its face, enforcement of the policy was discriminatory, and discipline pursuant to the CSP violated sections 8(a)(1) and 8(a)(3).¹⁷⁶ In conclusion, the dissent faulted the majority’s failure to “adapt the Act to changing patterns of industrial life”¹⁷⁷ by both ignoring the fact that e-mail is a “primary means of workplace communication” and allowing employers “virtually unlimited discretion to exclude Section 7 communications, so long as the employer couches its rule in facially neutral terms.”¹⁷⁸

3. Comparing the Majority and Dissenting Opinions

The difference between the majority and dissenting views in the *Register-Guard I* decision is significant. The *Register-Guard I* majority gives employers broad latitude to control and regulate their property interests in their communications systems. The majority would allow categories of permissible and prohibited activities in an employer policy to withstand legal scrutiny as long as the categories are not facially discriminatory. Just one member of the majority

¹⁷² *Id.* at 1130.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1131.

¹⁷⁵ *Id.* (emphasis in original). Because the issue of the CSP’s legality was not appealed, the D.C. Circuit Court of Appeals did not address the issue, but the court did agree with the *Register-Guard I* dissent’s view that, even under the Seventh Circuit’s analysis, the singling out of union activity for enforcement of the policy was discriminatory. See *infra* notes 358–59 and accompanying text.

¹⁷⁶ *Register-Guard I*, 351 N.L.R.B. at 1131.

¹⁷⁷ *Id.* at 1132 (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

¹⁷⁸ *Id.* at 1132.

reflected on the relevance of the effect that allowing such categories would have on section 7 activities. Further, the majority applied tests appropriate to nonemployee, as opposed to employee, communication and refused to distinguish between solicitation and distribution precedents. In contrast, the dissent would apply the balancing test for employees engaging in solicitation, thus requiring a legitimate business reason for a communications systems policy that excludes section 7 communications while simultaneously allowing other personal, nonbusiness e-mails on the employer's e-mail system.

The dissent in *Register-Guard I* saw e-mail as a totally different medium than a bulletin board, the medium involved in the cases from the Seventh Circuit upon which the majority relied for its test of discriminatory enforcement. E-mail is the predominant mode of communication in many workplaces, the new "water cooler" around which employees gather to communicate, so the dissent advocated that the Board should keep pace with and adapt both the Act and its interpretation of rules to encompass the importance of such new technologies.¹⁷⁹

II

ANALYSIS OF RELEVANT CASES FROM THE U.S. COURTS OF APPEALS FOR THE SEVENTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

The Board's *Register-Guard I* decision was appealed to the Court of Appeals for the District of Columbia.¹⁸⁰ From the outset of the appeal, there was reason to believe that the Board's decision would not withstand the appellate court's scrutiny. Labor law professors at an American Bar Association meeting criticized the Board's decision in *Register-Guard I* and predicted that it would not survive judicial review.¹⁸¹ One theoretical weakness in the *Register-Guard I* majority's opinion is that the Seventh Circuit decisions relied upon by the Board majority, namely *Guardian Industries Corp.* and *Fleming*

¹⁷⁹ *Id.* at 1125 (citing Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 18 (2000) (discussing e-mail as new water cooler, which has largely displaced face-to-face discussion)).

¹⁸⁰ *Guard Publ'g Co. v. NLRB (Register-Guard II)*, 571 F.3d 53 (D.C. Cir. 2009).

¹⁸¹ *See Dube, supra* note 9, at C-1. This view proved prescient at least as far as the discriminatory enforcement aspect of the case was concerned. *See infra* notes 349–63 (discussing the D.C. Circuit Court of Appeals decision in *Register-Guard II*).

Co., dealt with bulletin boards, not e-mail.¹⁸² As the dissent noted, e-mail is a very different medium of communication than a workplace bulletin board—or even a work telephone.¹⁸³ Because of the prevalence and popularity of e-mail as a mode of communication in the modern-day workplace, it seems that the impact of restricting the use of e-mail for section 7 purposes would be far greater than similar restrictions on bulletin board use.

Another weakness regarding the decisions from the Seventh Circuit that the *Register-Guard I* majority relied upon is that the discriminatory enforcement test enunciated there was later eroded by a recent decision from the same circuit, *St. Margaret Mercy Healthcare Centers v. NLRB*,¹⁸⁴ discussed below. Further, the *Register-Guard I* majority's failure to address Board precedent on employer restrictions regarding solicitation and distribution by employees at work presents yet another ideological weakness, one that narrows the practical and precedential value of the majority's opinion. Finally, the majority's overemphasis on the employer's property interests at the expense of the employees' section 7 rights undermines the credibility of the majority opinion. No balancing of interests is allowed because of the majority's presumption that when the employer owns the system the employer is entitled to control it, and there is no violation of the Act unless there is substantial evidence of overt discrimination.

*A. Precedents from the Court of Appeals for the Seventh Circuit:
From Bulletin Boards to Solicitation and Distribution in Health Care
Institutions*

In *Guardian Industries*, Judge Easterbrook's decision considered whether an employer should have to acquiesce to use of its bulletin board for union organizational purposes simply because it has extended to employees limited, indirect access to the bulletin board.¹⁸⁵ His opinion discussed the employer's ability to control activities in the workplace because of its property rights in the business and building, as well as the employer's contractual rights to

¹⁸² *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995); *Fleming Co. v. NLRB*, 349 F.3d 968, 970 (7th Cir. 2003).

¹⁸³ See *Register-Guard I*, 351 N.L.R.B. at 1125 (Liebman and Walsh, Members, dissenting) (noting the absurdity of equating e-mail to telephone, bulletin boards, etc.).

¹⁸⁴ 519 F.3d 373 (7th Cir. 2008).

¹⁸⁵ *Guardian Indus. Corp.*, 49 F.3d at 318–19.

maintain rules for its employees.¹⁸⁶ Section 7 rights protect organizational rights, as well as the right to oppose a union campaign, but section 7 rights do not entitle labor organizations to use a medium of communication in the workplace just because the employer uses it.¹⁸⁷ Judge Easterbrook analogized that just as the government need not subsidize political parties, employers need not provide access to promote a union.¹⁸⁸

The key issue then for Judge Easterbrook's analysis is whether the employer is discriminating against speech and organizational efforts. If access to the employer's bulletin board is given to others, the Board ruled that the employer must also allow notices relating to labor organization.¹⁸⁹ The Seventh Circuit in *Guardian Industries* found fault with the NLRB's definition of "discrimination," labeling it idiosyncratic and different from the use of the term in other legal settings.¹⁹⁰ The *Guardian Industries* opinion noted both that the Court of Appeals for the Sixth Circuit accepted the Board's view that, where employees had access to bulletin boards for other purposes, section 7 secures the employees' right to post union materials and that the Court of Appeals for the Eighth Circuit also followed the Board's view on this issue.¹⁹¹ The Court of Appeals for the Eleventh Circuit questioned the "sweep" of the Board's policy but still enforced a similar Board order.¹⁹² Up until the *Guardian Industries* case, the Seventh Circuit had reserved judgment on the issue.¹⁹³ Judge Easterbrook noted that the Board used the language of disparate treatment rather than disparate impact in the *Guardian Industries* case.¹⁹⁴ The NLRB, in its decision, did not indicate that Guardian's policy had a disparate impact on unions, unlike the across-the-board non-solicitation policy that the Supreme Court ruled effectively prevented unions from communicating in the *Republic Aviation* case.¹⁹⁵ The Board would find that once an employer accepts other

¹⁸⁶ *Id.* at 318.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 319.

¹⁹⁰ *Id.* at 320.

¹⁹¹ *Id.* at 321 (citing *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 660 (6th Cir. 1983); *NLRB v. Honeywell, Inc.*, 722 F.2d 405, 406 (8th Cir. 1983)).

¹⁹² *Id.* (citing *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 320.

¹⁹⁵ *Id.* (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

notices for the bulletin board, then it must accept union meeting announcements or else the employer is engaging in discrimination.¹⁹⁶

In *Guardian Industries*, the Seventh Circuit referred to the U.S. Supreme Court's decision in a public-sector employment case where a public employer that opened its internal e-mail system to communications about civic and church meetings was not required to keep it open to communications on behalf of unions.¹⁹⁷ The fact that the permitted postings in *Guardian Industries* were swap-and-shop notices rather than organizational notices was significant in the Seventh Circuit's view because the permitted and prohibited postings were not of a similar character.¹⁹⁸ The *Guardian Industries* court found that "the Board has taken its own definition [of discrimination] to the logical limit. It has gone too far. Distinguishing between for-sale notices and announcements of all meetings, of all organizations, does not discriminate against the employees' right of self-organization."¹⁹⁹ The court said that "the Board could create a rule that does not depend on the idea of 'discrimination,'" mentioned the Board's "latitude to adopt rules adjusting the balance between labor and management," and noted that even "nondiscriminatory regulation of solicitation in the workplace may diminish to an unacceptable degree employees' ability to communicate with each other about organization."²⁰⁰ The *Guardian Industries* court concluded that the antidiscrimination principle, the sole principle advanced for the Board's order, was simply not adequate to support the order.²⁰¹

The Seventh Circuit's second decision referenced by the *Register-Guard I* majority, *Fleming Co. v. NLRB*,²⁰² was also a bulletin board case rather than an e-mail case. The *Fleming Co.* decision noted that the *Guardian Industries* court "explicitly rejected the position" that when an employer allows employees any access, then it must permit

¹⁹⁶ *Id.* at 321.

¹⁹⁷ *Id.* at 320 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

¹⁹⁸ *Id.* at 321.

¹⁹⁹ *Id.* at 321–22.

²⁰⁰ *Id.* at 322. This is particularly interesting language from the *Guardian Industries* decision because it implies that an overbroad no-solicitation policy, even when "nondiscriminatory," may be legally problematic if it decreases employees' ability to engage in organizing activities. Thus, the effect of the policy, rather than the motive for it, is emphasized by the Seventh Circuit.

²⁰¹ *See id.*

²⁰² 349 F.3d 968 (7th Cir. 2003).

union postings.²⁰³ In *Guardian Industries*, the court recognized that a company allowing postings of “a similar character to union materials” would then not be able to discriminate against union postings.²⁰⁴ Since the permitted notices in *Guardian Industries* involved “for-sale” notices, rather than organizational notices, there was no discrimination.²⁰⁵

In *Fleming Co.*, Judge Rovner wrote that any category of notices that is distinct from organizational notices could be allowed by an employer without discriminating against the posting of union materials.²⁰⁶ The court found that “a rule banning all organizational notices . . . is impossible to understand as disparate treatment of unions.”²⁰⁷ In *Fleming Co.*, the employer had a written policy that prohibited the posting of any noncompany material on the bulletin boards, but, in actual practice, personal notices were posted without enforcement of the written policy.²⁰⁸ Nonetheless, no organizational or club notices were permitted, and the court found that the exclusion of organizational notices did not amount to disparate treatment of unions in light of its decision in *Guardian Industries*.²⁰⁹ The appellate court so ruled despite the Board’s finding that removing the union literature from the company bulletin boards violated section 8(a)(1).²¹⁰

Three months after the Board’s decision in *Register-Guard I*, Judge Posner authored an opinion for the Seventh Circuit that retreated from the discriminatory enforcement standard applied in both the *Guardian Industries* and *Fleming Co.* decisions—the very standard that the majority relied upon in *Register-Guard I*.²¹¹ In *St. Margaret Mercy*

²⁰³ *Id.* at 975.

²⁰⁴ *Id.* (citing *Guardian Indus. Corp.*, 49 F.3d at 320).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (quoting *Guardian Indus. Corp.*, 49 F.3d at 320).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 975–76. The administrative law judge’s opinion in *Register-Guard I* cited the Board’s position in *Fleming Co.*, 336 N.L.R.B. at 193–94, that if an employer permits employees to use its communications equipment for nonbusiness use, then it may not prohibit use for section 7 purposes. *Guard Publ’g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1128 (2007).

²¹¹ *St. Margaret Mercy Healthcare Ctrs. v. NLRB*, 519 F.3d 373, 374 (7th Cir. 2008). The panel included Judge Easterbrook who authored the Seventh Circuit’s opinion in *Guardian Industries*. The *St. Margaret’s* decision proved influential in the *Register-Guard I* appeal. See *infra* notes 349–59 and accompanying text (discussing *Guard Publ’g Co. v. NLRB (Register-Guard II)*, 571 F.3d 53 (D.C. Cir. 2009)).

Healthcare Centers v. NLRB, the Seventh Circuit expressed a different view for discriminatory enforcement of a no-solicitation rule against pro-union soliciting than the standard of discrimination the court outlined in *Guardian Industries* and *Fleming Co.*²¹² In the *St. Margaret* decision, Judge Posner described how the Board found the hospital interfered with the right of nurses to organize and discriminated against a nurse who was a union activist.²¹³ The interference and discrimination violated sections 8(a)(1) and 8(a)(3) respectively, according to the Board.²¹⁴ The court further noted that “[d]etermining when an employer is unlawfully interfering with organizing activities requires weighing the employees’ interest in organizing against the interest of the employers and others (such as, in this case, the hospital’s patients) in being free from disruptive interference by union organizers in the operation of the employer’s business.”²¹⁵ The employer in *St. Margaret* had a lawful no-solicitation/distribution rule that prohibited these activities in patient care areas, including halls and corridors adjacent to patient and treatment rooms.²¹⁶ Employees on break were permitted to solicit in nonwork areas that included “employee break areas.”²¹⁷ The Board found that the hospital forbid employees from engaging in union activities in the employee break rooms or multipurpose rooms.²¹⁸ Because the break rooms were adjacent to patient rooms (across the corridor), the hospital defended its prohibition based upon its concern that the activity in the break rooms could be heard in “patient care areas.”²¹⁹ The court, however, noted that a closed door could redress that concern.²²⁰

Further, with respect to the instance of discrimination against a nurse who solicited for the union at the nurses’ station, it was shown that other charitable and commercial solicitations had been allowed in

²¹² See *St. Margaret Mercy Healthcare Ctrs.*, 519 F.3d at 373; see also Susan J. McGolrick, *Seventh Circuit Affirms that Hospital Illegally Applied Solicitation/Distribution Rule*, Daily Lab. Rep. (BNA), No. 48, at AA-1 (Mar. 12, 2008) (discussing the *St. Margaret* case).

²¹³ *St. Margaret Mercy Healthcare Ctrs.*, 519 F.3d at 374.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 374–75.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 375.

²²⁰ *Id.*

the same area.²²¹ The permitted solicitations at the nurses' station included Girl Scout cookies, March of Dimes, United Way, Secretary's and Boss's Days, going away parties, birthday parties, and other social occasion solicitations.²²² In addition, a beach balm product, created by a nurse to "control bikini line irritation," was sold at the station.²²³ Management was aware of all these solicitations and, as Judge Posner noted, participated in some of them.²²⁴ Judge Posner questioned why charitable or social, as well as commercial, solicitations should be treated differently from union solicitations.²²⁵

Union solicitations were the only ones that were subjected to rebuke even though the rule prohibited all solicitations in patient care areas.²²⁶ Judge Posner noted that

it is far from obvious that a patient in intensive care will be less disturbed by a nurse hawking bikini lotion or organizing a birthday party than by a union organizer. Patients, especially those in intensive care, and their family members and friends, would like to think that nurses when on duty give their exclusive attention to their professional duties and are not distracted by engaging in charitable, social, or commercial activities.²²⁷

The *St. Margaret* decision focused on the discriminatory enforcement aspect of the no-solicitation policy rather than on the legality of the policy itself, much the same focus as in Case 2: Community Medical Centers, from the General Counsel's memorandum that is discussed in Part III of this Article, and in the *Register-Guard I* case as presented on appeal.²²⁸ In *St. Margaret*,

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* Judge Posner noted, rather tongue-in-cheek, in the text of the decision that:

We are particularly struck by the hawking of "beach balm," a product "created by a registered nurse to control bikini line irritation" and optimized for "anyone who shaves or waxes bikini lines." (Consumers will doubtless be reassured to learn that beach balm is "natural, safe, and tested by nurses, not on animals!").

Id.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 375–76.

²²⁸ See *infra* notes 275–80 and accompanying text (discussing Case 2 in the GC Memorandum). The same presentation of issues occurred in the *Register-Guard I* appeal, and the D.C. Circuit Court of Appeals dealt with the discriminatory enforcement issue in like manner, citing to the Seventh Circuit's *St. Margaret* decision. See *infra* notes 349–63 and accompanying text (discussing the appellate decision).

Case 2, and *Register-Guard I*, it was clear that the only activity that resulted in a warning or discipline was section 7 activity. Conduct that was prohibited by the employer policy was permitted to occur except for cases where there was union solicitation or union-related e-mails. To paraphrase an administrative law judge in another recent case, *Stephens Media, LLC*, even the Seventh Circuit could see that where the union activity was the only activity prohibited, or the only activity for which an employee was disciplined, this was discrimination.²²⁹ The application of the no-solicitation rule to employee break rooms (nonpatient areas) in *St. Margaret* during nonwork time was held to be unlawful.²³⁰ Because the activity in *St. Margaret* was classified as solicitation, it was treated as such, whereas in *Register-Guard I*, the Board majority avoided such classification and the consequent Board precedent that provides protection for these important section 7 employee rights.²³¹ The tone of the *St. Margaret* decision reflected the court's exasperation with the employer's poorly supported rationale for its selective enforcement of its rule. The court poked holes in the hospital's purported reasoning and openly questioned why some activities were permitted while union activities were not. One weakness of the *St. Margaret* decision is that it is too brief. Perhaps because the case seemed to be such a straightforward instance of discrimination against union activity, the Seventh Circuit never referred to the discriminatory enforcement standard it previously applied in the *Guardian Industries* or *Fleming Co.* decisions—the standard that the Board adopted in *Register-Guard I*.

B. The Court of Appeals for the District of Columbia: A Hospital's Ban on Nonemployee Solicitation Discriminates Against Unions

In *Lucile Salter Packard Children's Hospital v. NLRB*, the employer sought to set aside an NLRB decision and order that the employer had violated the Act by its discriminatory enforcement of a

²²⁹ See *infra* notes 336–41 and accompanying text (discussing *Stephens Media, LLC*, 2008 WL 649133, at *17 (NLRB Div. of Judges Mar. 6, 2008)).

²³⁰ *St. Margaret Mercy Healthcare Ctrs.*, 519 F.3d at 374–75; see also McGolrick, *supra* note 212, at AA-1 to AA-2 (discussing the illegal application of a no-solicitation/distribution rule to break rooms).

²³¹ See *Guard Publ'g Co. (Register Guard I)*, 351 N.L.R.B. 1110, 1121–22 (2007) (Liebman and Walsh, Members, dissenting). The dissent objected that the majority's use of equipment cases, rather than classifying the activity as oral solicitation, distribution, or both, resulted in sanctioning employer prohibition of protected activities.

ban on nonemployee solicitation and distribution on hospital property at any time.²³² Despite the written policy, the hospital permitted other outsiders that were not labor unions, such as credit unions, insurers, family care resources, and textbook publishers, to solicit and set up displays.²³³ It also allowed vendors to sell wares across from the hospital cafeteria as part of an employer-sponsored, employee activity committee fund-raising opportunity.²³⁴ When the hospital refused an American Federation of State, County and Municipal Employees union access for solicitation or distribution, the union filed an unfair labor practice charge alleging discriminatory application of the no-solicitation rule.²³⁵

In *Lucille Salter*, the D.C. Circuit Court of Appeals (D.C. Circuit) outlined the general rules that apply to nonemployee solicitation and distribution, noting that employers may not be required to permit such unless: (1) “the union has no other reasonable means of communicating its message” or (2) the employer discriminates against a union by denying it access while allowing access by other nonemployee entities.²³⁶ The D.C. Circuit focused upon the second discrimination exception and noted a narrow exclusion to an otherwise absolute policy may not be in violation of the Act if it permits “a few isolated instances of charitable solicitation.”²³⁷ The D.C. Circuit also noted that there may be permissible solicitations that relate to the employer’s business function and purpose, including pharmaceutical and textbook displays, blood drives, and fund-raising sales.²³⁸ The ALJ and the Board found that neither of these exceptions immunized the hospital from a section 8(a)(1) violation, and the circuit court held that there was substantial evidence to support this finding.²³⁹ The permissible solicitations that related to employee fringe benefits were not violations because they were integral to the hospital’s business functions and purposes.²⁴⁰ Other outside solicitations by credit union, insurance, and employee activity committee-sponsored vendors were permitted by the employer despite

²³² 97 F.3d 583, 586 (D.C. Cir. 1996).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 587.

²³⁷ *Id.* (quoting *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995)).

²³⁸ *Id.* at 588.

²³⁹ *Id.*

²⁴⁰ *Id.*

the absolute no-solicitation rule, while the union was simultaneously excluded.²⁴¹ This amounted to unlawful discrimination under the NLRA.²⁴²

The court refused to allow “a wide variety of nonbeneficent, commercial solicitations bearing no arguable connection to its business” as the employer requested, while, at the same time, union solicitation was prohibited.²⁴³ The “small number of isolated ‘beneficent acts’” exception is a narrow one, the D.C. Circuit ruled.²⁴⁴ The court in *Lucile Salter* found that the Board

drew a reasonable distinction between solicitations regarding benefits paid for in whole or in part by the Hospital, which the ALJ found to be “intimately related” to the Hospital’s regular benefit package, and the solicitations at issue here, which involve products and services purchased out of the employees’ own pockets.²⁴⁵

The D.C. Circuit refused to allow “a subjective criterion to govern access [to] eviscerate section 8(a)(1)’s purpose of preventing discriminatory treatment of unions by employers who permit other nonemployee entities to solicit on the employer’s property.”²⁴⁶ The court agreed with the Board’s assessment that the hospital had a “subjective preference” rather than a “meaningful basis for distinguishing between the solicitations.”²⁴⁷ Nor was the court persuaded that the solicitations supported by the employee activities committee were related to hospital business purposes “because they enhance morale by keeping employees happy and productive.”²⁴⁸

The D.C. Circuit found the “for sale” notice precedent of *Guardian Industries Corp.* inapposite to the situation in *Lucile Salter* because, in *Guardian Industries*, all outside entities were treated similarly with

²⁴¹ *Id.* at 590–91.

²⁴² *Id.* The Court of Appeals for the District of Columbia noted that neither of the two exceptions to the NLRA’s nondiscrimination rule applied because there was not a small number of charitable or beneficent solicitations, rather the frequency was regular and the nature of most of the solicitations was commercial. *Id.* Secondly, the solicitation activities were not related to legitimate business functions and purposes of the employer. *Id.*

²⁴³ *Id.* at 589 n.7.

²⁴⁴ *Id.* at 589.

²⁴⁵ *Id.* at 590.

²⁴⁶ *Id.* at 591.

²⁴⁷ *Id.* at 590 n.10.

²⁴⁸ *Id.* at 591. The court noted the Board’s convincing response to this improving morale argument was that the same could be said for a union. *Id.*

respect to the posting ban, and, thus, there was no discrimination.²⁴⁹ This was different from the *Lucile Salter* case because other nonemployee solicitations “indistinguishable in nature from Union solicitations” were permitted and union solicitations were not.²⁵⁰ Similarly, the court in *Lucile Salter* dismissed the relevance of the Supreme Court’s decision in *Perry Education Ass’n* to the hospital’s case because, in *Perry*, the groups permitted to use the employer’s e-mail system “were integrally related to the school’s primary educational purpose.”²⁵¹ The Lucille Salter Packard Children’s Hospital’s argument that a health care institution has a special need for a “peaceful, nondisruptive environment” also did not wash as far as the D.C. Circuit was concerned because, as the Board noted, it was not shown that the union solicitation would have been any more disruptive than those solicitations that were permitted.²⁵² The court both found the hospital’s argument that union materials are “inherently disturbing and disruptive” to be “a value judgment pure and simple” and concluded that the hospital discriminated against the union “in its application of a purportedly absolute no-solicitation rule.”²⁵³

In *Lucile Salter*, the court dealt with the discriminatory enforcement of what seemed to be a facially neutral rule that banned access to outsiders for solicitations and distributions. Nonemployee access is often stricter than employee access and is permitted to be stricter by law, and yet the hospital allowed many kinds of nonemployee access in clear violation of its own no-solicitation rule—without what the D.C. Circuit deemed to be a “meaningful basis” for the distinction. In *Lucile Salter*, the court upheld the Board’s determination that the hospital was discriminating with respect to its application of its rule. This precedent regarding discriminatory enforcement was relevant to the *Register-Guard*’s appeal to the same circuit in *Register-Guard II*. Just as in *Lucile Salter*, the *Register-Guard* policy was discriminatorily enforced against union use of the communications system, albeit in regards to

²⁴⁹ *Id.* at 591–92.

²⁵⁰ *Id.* at 592.

²⁵¹ *Id.* (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983) (involving public employer’s refusal to allow a union to use its e-mail system, which was deemed lawful)). *Perry* was also cited by the Seventh Circuit in the *Guardian Industries Corp.* case.

²⁵² *Id.*

²⁵³ *Id.*

use of the system rather than access to the employer's facilities. While the *Register-Guard I* case involved *employee* use rather than use by nonemployees, it also involved a classification that excluded union solicitations while other non-job-related solicitations were allowed on the e-mail system. Thus, there was a similar paradigm for discriminatory exclusion of union solicitations in both cases.

The *Register-Guard I* majority focused on the employer's property rights and its right to regulate and restrict employee use of company property. The court in *Lucile Salter* looked for a "meaningful basis" for exclusions that barred unions from company property when other outside organizations were permitted on the property—a logical standard that the *Register-Guard I* majority did not require. The *Register-Guard I* majority was content to allow employer restrictions as long as they were nondiscriminatory, applying a standard for discrimination that aligned with disparate treatment.²⁵⁴ The *Register-Guard I* majority also reflected that employers need not allow access to a particular communication means simply because the employer uses it.²⁵⁵ Discrimination exists only if there is unequal treatment of equals, in the majority's view, but the critical issue remains: Who determines what the "equals" are?²⁵⁶

The *Register-Guard I* majority cited *Lucile Salter* for the proposition that there must be a demonstration that "the employer treated nonunion solicitations differently than union solicitations,"²⁵⁷ but the *Lucile Salter* decision, in fact, both set clear parameters for what is similar activity by other nonemployee entities within the facts of that case and noted that the two narrow exceptions to the NLRA's nondiscrimination rule were not met by the hospital's meaningless distinctions.²⁵⁸ In *Lucile Salter*, the D.C. Circuit Court of Appeals

²⁵⁴ *Guard Publ'g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1113, 1116 (2007).

²⁵⁵ *Id.* at 1113.

²⁵⁶ *See id.* at 1116.

²⁵⁷ *Id.* at 1118 (quoting *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996)).

²⁵⁸ *Lucile Salter Packard Children's Hosp.*, 97 F.3d at 592. Another relevant case from the D.C. Circuit Court of Appeals mentioned by the Eugene Newspaper Guild in its brief is that of *Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1987). Brief for Petitioner Eugene Newspaper Guild at 9, *Guard Publ'g Co. v. NLRB (Register-Guard II)*, 571 F.3d 53 (D.C. Cir. 2009) (Nos. 07-1528 & 08-1006). The Guild noted that the "Board majority [in *Register-Guard I*] followed the very approach to applying the judicially developed antidiscrimination principle that this Court *rejected* over twenty years ago in *Restaurant Corp. of America* . . . and that the Seventh Circuit *rejected* recently in *St. Margaret Mercy Healthcare Centers*." *Id.* at 16. This was so because in *Register-Guard I* the CSP prohibited all non-job-related solicitations, yet the company only disciplined

wanted to know why the hospital felt that one type of solicitation was inherently more disturbing than another and the court was not prepared to accept the employer's subjective value judgments.²⁵⁹

Just as the Seventh Circuit opined with respect to discriminatory enforcement of a no-solicitation rule against an employee in the *St. Margaret* decision and as the Court of Appeals for the D.C. Circuit indicated regarding discriminatory enforcement of a no-solicitation rule against nonemployees in *Lucile Salter*, employers need to have a logical or meaningful or, even better, a *legitimate business reason* for excluding union activity when similar nonunion activity is allowed. In the absence of such a reason, where the impact of the rule is to exclude section 7-protected activity but not exclude other nonsection 7 activity, the employer is violating section 8(a)(1) of the Act. Who defines the type of activity is critical to outcomes. The Board is the agency vested with that responsibility, and any court of appeals will uphold the Board's rational interpretation of the Act as applied to given fact patterns where the Board's conclusions are supported by substantial evidence on the given record.

III

MEMORANDUM FROM THE BOARD'S GENERAL COUNSEL—CASES AFTER *REGISTER-GUARD I*

Since the Board issued its decision in *Register-Guard I*, General Counsel Ronald Meisburg has been called upon to advise NLRB regional directors on a number of cases with related issues. The General Counsel's report on these cases provides significant guidance as to how the regional directors should proceed.²⁶⁰ In essence, the watchword on *Register-Guard I* seems to be that the agency is bound by it until either the composition of the Board changes or the Board revises its approach in light of the appellate court's decision and remand in *Register-Guard II*. At present, the General Counsel is applying the standard from *Register-Guard I* narrowly and focusing upon the facts surrounding any changes in policy or discriminatory enforcement—looking in particular for timing that coincides with

union e-mails and not other non-job-related solicitations. *Id.* at 23–24. The Board majority offered no explanation for the after-the-fact distinctions made by the employer; distinctions that had nothing to do with any disruption of the workplace or maintenance of production and discipline. *See id.* at 18–23.

²⁵⁹ *Id.*

²⁶⁰ GC Memorandum, *supra* note 11.

union activity—such that changes or selective discipline might indicate an anti-union motive. Despite this approach, for the short term, the General Counsel remains tethered to the reasoning of *Register-Guard I* that provides employers with broad discretion to categorize and prohibit uses of its property that infringe on section 7 rights, even in the absence of a legitimate business reason. Cases that speak about restrictions on solicitation, as opposed to restrictions on the use of the employer’s e-mail, tend to have a more positive outcome for the protection of section 7 rights.

The five cases submitted to the Division of Advice were done so pursuant to the General Counsel’s direction to the regional offices with the goal being to “assure a consistent approach to the interpretation of [the *Register-Guard I*] decision.”²⁶¹ The five cases were reported with the names redacted, but I have included the actual names of the respondent companies that were obtained by a Freedom of Information Act (FOIA) request from the National Labor Relations Board, as well as information discovered by research on the background and resolution of the actual cases.²⁶²

A. Case 1 – Chevron Phillips Chemical Co.

The General Counsel upheld Chevron Phillips’s rule that prevented union officials from sending e-mails to company managers outside of

²⁶¹ *Id.* at 3.

²⁶² See Memorandum from Ronald Meisburg, NLRB General Counsel, to NLRB Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers 7 (Apr. 17, 2008), available at http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%20%2008-05%20Report%20on%20the%20Midwinter%20Mtg%20of%20the%20ABA%20P&P%20Committee.pdf (discussing the General Counsel’s standards for disclosure of advice memos noting: that memos authorizing dismissal of charge allegations, absent withdrawal, are subject to disclosure under FOIA; that memos authorizing issuance of complaint, absent settlement, are internal agency work product and, as such, typically are not disclosed; and that, after a case is closed, the General Counsel, as a matter of discretion, may disclose a redacted version). The General Counsel noted the high level of practitioner interest in how the *Register-Guard I* decision would be applied by his office and that he thought the subject warranted a report on how cases sent for advice since *Register-Guard I* have been handled. GC Memorandum, *supra* note 11, at 2.

A telephone interview with National Labor Relations Board staff, namely Linda Kahn, resulted in the filing of a Freedom of Information Act request by Margo E.K. Reder, a Research Associate at Boston College, on May 27, 2008, and the actual names of the respondent companies were subsequently provided to the author by letter. Telephone Interview with Linda Kahn, NLRB Staff Member, in Wash., D.C. (June 12, 2008); Letter from Jacqueline A. Young, Freedom of Info. Officer, NLRB, to Christine Neylon O’Brien (June 17, 2008) (All documents obtained are on file with the author.). Thus, beyond the GC Memorandum, this section will discuss further facts and findings in these cases from complaints, decisions of administrative law judges, and current dispositions.

the unionized facility where the union represented a bargaining unit.²⁶³ The union had been allowed to use the e-mail system for union business regarding labor relations matters at the facility, including communicating with the employer.²⁶⁴

The General Counsel found the employer's rule lawful because it "concerned how the union was permitted to use the employer's e-mail system and did not otherwise prohibit the union from engaging in protected communications outside the plant or to broad groups of managers."²⁶⁵ "[T]he rule solely involved company equipment, and did not discriminate against union or Section 7 activity"²⁶⁶ The reference to company equipment reflects the emphasis of the majority in the *Register-Guard I* decision. The General Counsel's memorandum did not elaborate upon *why* the rule did not discriminate against the union or section 7 activities but followed the *Register-Guard I* majority's reasoning that, because the conduct occurred on company equipment, the company was free to establish restrictions with respect to its use. As long as the category of activity in question was clearly delineated by the company policy, and the prohibited conduct was within that category, it would not be discrimination along section 7 lines if there was no comparable e-mail that was treated more favorably within that same category. The standard of the majority in *Register-Guard I* did not require the employer to establish a legitimate business reason for the policy that outweighed the interference with section 7 activities.

The Advice Memorandum in the *Chevron* case, much like the General Counsel's memorandum, concluded that the "Employer's rule was not unlawful because it narrowly concerned only the Union's use of the Employer's e-mail system and did not discriminatorily prohibit the Union from communicating outside the plant or to broad groups of managers."²⁶⁷ The employer had "freely allowed the Union to use the company e-mail system" but then delivered a letter to the union stating that the broad distribution of e-mails constituted

²⁶³ GC Memorandum, *supra* note 11, at 4.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Memorandum from Barry J. Kearney, Assoc. General Counsel, NLRB Div. of Advice, to Martha Kinard, Reg'l Dir., Region 16, at 1 (Feb. 28, 2008) [hereinafter Advice Memorandum], available at http://www.nlr.gov/shared_files/Advice%20Memos/2008/16-CA-25946.pdf.

inappropriate use.²⁶⁸ The employer cited examples of local plant issuance of e-mails to company officials outside the plant—e-mails about one supervisor or manager sent broadly to other managers not directly involved—and the employer noted that continued misuse “may result in the immediate suspension of your company e-mail account.”²⁶⁹

The union initially responded to the employer that they would no longer use the company e-mail system but, in a later meeting, the union offered to use the system but keep local issues in plant and not send single-issue items to more than one manager, if the company would rescind their letter.²⁷⁰ In this context, “local issues” means that the union was offering to keep e-mails regarding issues within the same plant or facility where they occurred, and “single-issue items” were small matters that were only pertinent to one manager or supervisor. The union was offering to keep these e-mails within the appropriate chain of command rather than allowing them to go to other managers as well. The employer refused to rescind the letter and sent a second letter with its concerns.²⁷¹ The Advice Memorandum noted that the Board held in *Register-Guard I* both that an employer’s e-mail system is company property and that “employees have no statutory right to use [it] for Section 7 purposes.”²⁷² Pursuant to *Register-Guard I*, an employer may bar non-work-related use of its system, unless the employer “acts in a manner that discriminates against Section 7 activity.”²⁷³ The Advice Memorandum concluded that Chevron Phillips’s rule was lawful because it only concerned company equipment and did not discriminate against union or section 7 activity.²⁷⁴

B. Case 2 – Community Medical Centers

The General Counsel found that the *Register-Guard I* decision did not prevent issuance of a complaint regarding discriminatory enforcement of a facially valid no-solicitation rule at a health care

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1–2.

²⁷¹ *Id.* at 2.

²⁷² *Id.* (quoting Guard Publ’g Co. (*Register-Guard I*), 351 N.L.R.B. 1110, 1110 (2007)).

²⁷³ *Id.* (quoting *Register-Guard I*, 351 N.L.R.B. at 1116).

²⁷⁴ *Id.*

institution, Community Medical Centers in California.²⁷⁵ The no-solicitation rule prohibited solicitation “during working time and in immediate patient care areas.”²⁷⁶ The employer was inconsistent in enforcing its policy, choosing to warn and discipline employees soliciting for the union while allowing all other types of institutional, organizational, commercial, and personal solicitations.²⁷⁷ The General Counsel noted that, unlike the *Register-Guard I* case where the employer had not allowed solicitations for other groups or organizations, Community Medical Centers had allowed solicitations for a variety of groups and organizations but prohibited union-related solicitations. There were also other allegations of section 8(a)(1) and 8(a)(3) violations that, if proven, might indicate the employer’s motive in banning the union solicitations was anti-union.²⁷⁸ The charge filed by the Service Employees International Union United Healthcare Workers-West alleged a violation of section 8(a)(1) for “enforcing a discriminatory and unlawful no-solicitation, no-distribution policy.”²⁷⁹ The General Counsel memorandum focused on the discriminatory enforcement rather than any unlawfulness of the policy itself.²⁸⁰

C. Case 3 – Sutter Regional Medical Foundation

Sutter Regional Medical Foundation’s policy was similar to the policy of Community Medical Centers, and the General Counsel again concluded that a complaint against the employer was not barred by the Board’s decision in *Register-Guard I*.²⁸¹ The facts involved discriminatory repromulgation²⁸² and disparate enforcement of what

²⁷⁵ GC Memorandum, *supra* note 11, at 4.

²⁷⁶ *Id.* at 5.

²⁷⁷ *Id.* Commercial solicitations included “sales of Avon, Mary Kay cosmetics, Tupperware, and Pampered Chef products,” individual commercial solicitations included “sales of homemade foods, jewelry, and holiday crafts,” school fund-raising solicitations included “sales of candy, candles, and wrapping paper items,” and personal solicitations included “collections of money for various families.” *Id.*

²⁷⁸ *Id.*

²⁷⁹ NLRB Charge Against Community Medical Centers, NLRB Case No. 32-CA-23591 (Oct. 22, 2007) (on file with author) (filed by SEIU United Healthcare Workers-West).

²⁸⁰ See GC Memorandum, *supra* note 11, at 4 (noting *Register-Guard I* is not a bar to issuing complaint regarding discriminatory enforcement of “facially valid no-solicitation rule”).

²⁸¹ *Id.* at 5.

²⁸² This was a term used in the unfair labor practices charge filed. It refers to reissuing or reannouncing a previously on-the-books policy against use of e-mail for any nonwork

was “an otherwise valid rule prohibiting non-business e-mail.”²⁸³ An employee who had asked the employer’s I.T. director for advice concerning “what was considered abuse of the employer’s computer system” was answered in a manner that did not caution the employee that his subsequent use of the system to send e-mails to twenty employees about an off-site union organizing meeting would be prohibited.²⁸⁴ That topic was not within the parameters that were discussed, but, after the employee sent the e-mails, he was warned in writing both that e-mail for solicitation purposes violated handbook provisions and that solicitation during working time for any purpose was prohibited.²⁸⁵ The warning also stated “that the employer’s e-mail system is intended for reasonable and responsible business purposes and is not intended for personal use.”²⁸⁶

The GC Memorandum noted that the employer’s decision to discipline was “content based” and there was evidence that it was intended to chill union activity.²⁸⁷ Other nonwork e-mails circulated during work time (including chain letters, jokes, party invitations, and non-business-related solicitations for cosmetics and candies), and the senders were not subjected to discipline.²⁸⁸ The employer eventually agreed to not discipline its employees because of union activity, not enforce a previously unenforced rule in response to union activity, and not prohibit employee e-mails or soliciting about unions during working time, while permitting other e-mails and solicitations about nonwork matters during working time. Despite the settlement, the employer subsequently disciplined the same employee again for an e-mail with union-related content.²⁸⁹ The General Counsel decided that a complaint should issue following the analysis of the Board majority in *Register-Guard I* that the “‘employer’s motive for the line-drawing was antiunion.’”²⁹⁰ The *Salmon Run Shopping Center, LLC*, case, which the Board majority cited with approval in *Register-Guard I*,

purpose, a rule that had been ignored or unenforced for a period of time. As is discussed below, the key to the sudden enforcement of the policy was the curtailing of employee union activity.

²⁸³ See GC Memorandum, *supra* note 11, at 5.

²⁸⁴ *Id.* at 6.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 7.

also applied in Case 3 because the employer's denial of union access "was based 'solely on the union's status as a labor organization and its desire to engage in labor-related speech.'"²⁹¹

The charge against Sutter Regional Medical Foundation alleged that an appointment-registration manager and the director of human resources both discriminated against an employee registration-representative because of her union activities.²⁹² The initial charge filed in August 2006 noted that the specific activities of the management team amounted to unfair labor practices under sections 8(a)(1) and 8(a)(3) of the Act because the activities involved discipline of the employee "by a written warning because of her union activities and [management] made changes in her condition of employment to discourage union activity."²⁹³ An amended charge filed in October 2006 added allegations that broadened the focus to include more discriminatory enforcement of e-mail and no-solicitation rules, specifically:

Within the last six months, the employer unlawfully re-promulgated a pre-viosly [sic] unenforced rule that prohibited the use of email for any non-work [sic] purposes during work time.

Within the last six months, the employer unlawfully enforced a rule barring solicitation during work hours by selectively and disparately enforcing the rule in regard to employee union activity.

Within the last six months, the employer unlawfully enforced a rule prohibiting use of email for nonwork purposes during working time

²⁹¹ *Id.* (citing *Salmon Run Shopping Ctr., LLC*, 348 N.L.R.B. 658 (2006) (ordering a private shopping mall to allow nonemployee union organizers to distribute literature critical of a mall patron to other mall patrons because discriminatory exclusion of the union organizers violated section 8(a)(1) of the Act)). The dissent in *Register-Guard I* distinguished *Salmon Run* from its case on the basis that *Salmon Run* involved nonemployee access and, thus, invoked the employer's property interests rather than managerial interests. *Guard Publ'g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1130 n.24 (2007). The dissent also objected that the majority inferred that anti-union motivation was required in order to find a violation only because there was anti-union motivation present in the *Salmon Run* case. *Id.* The Court of Appeals for the Second Circuit refused to enforce the Board's order subsequent to the *Register-Guard I* decision. *Salmon Run Shopping Ctr., LLC v. NLRB*, 534 F.3d 108 (2d Cir. 2008).

²⁹² NLRB Charge Against Sutter Regional Medical Foundation, NLRB Case No. 20-CA-33085 (Aug. 7, 2006) (on file with author) (filed by the Office & Professional Employees International Union, Local 29, AFL-CIO, CLC).

²⁹³ *Id.*

by selectively and disparately enforcing the rule in regards to employee union activities.²⁹⁴

The Board, through Members Liebman and Schaumber, denied Sutter Regional Medical Foundation's motion for partial summary judgment concerning multiple complaint allegations against the employer on January 4, 2008.²⁹⁵ The September 28, 2007, complaint alleged that, in opposition to a union campaign, the employer: "unlawfully maintained and enforced an e-mail rule in response to [the] Union activity"; interrogated, threatened, and discriminated against employees because of their union activity; and "unlawfully enforced its solicitation and distribution rules in response to . . . Union activity."²⁹⁶

D. Case 4 – Texas Dental Association

The employer, Texas Dental Association, had a Board of Directors as an executive body, an executive director to manage the organization of medical directors, and a House of Delegates (House) for legislative matters.²⁹⁷ The employees expressed concern over working conditions, including disparate discipline, safety issues, and unfair implementation of paid time off.²⁹⁸ Management was nonresponsive to the employees' issues concerning their wages, hours, working conditions, and the absence of a proper reporting procedure.²⁹⁹ An employee learned a House delegate was sympathetic to their concerns and sent e-mails to the entire House to engage support for an employee petition that sought an impartial, outside source to voice their grievances.³⁰⁰

When the resolution for an employee complaint procedure was not adopted by the House, the employee e-mailed the petition to the

²⁹⁴ NLRB Charge Against Sutter Regional Medical Foundation, NLRB Case No. 20-CA-33085 (Oct. 31, 2006) (on file with author) (filed by the Office & Professional Employees International Union, Local 29, AFL-CIO, CLC).

²⁹⁵ *Board Denies Sutter Regional Medical Foundation's Motion for Partial Summary Judgment*, NLRB REGION 20 ROUNDUP, (NLRB, S.F., Cal.), Winter 2008, at 3 [hereinafter *Board Denies Motion*], available at http://www.nlr.gov/nlr/about/regional_newsletters/Region20NewsletterWinter2008.pdf. Chairman Liebman and Member Schaumber remain as the two current members of the Board. National Labor Relations Board, *supra* note 2.

²⁹⁶ *Board Denies Motion*, *supra* note 295, at 3.

²⁹⁷ GC Memorandum, *supra* note 11, at 7.

²⁹⁸ *Id.* at 7–8.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 8.

Board of Directors.³⁰¹ The Executive Director investigated the source of the e-mail and, with the approval of the Board of Directors, discharged the sender as well as a supervisor who had known of the e-mail but failed to report it.³⁰² The basis for the employee discharge was insubordination by “participating in the ‘anonymous e-mail scheme,’ ignoring instructions to come forward,” inappropriately using the employer’s computers in violation of policy, “and acting outside the scope of responsibilities.”³⁰³ The supervisor was discharged for insubordination and failure to disclose the information about the e-mail and the authors.³⁰⁴

The actual charge filed against the Texas Dental Association by former employee Nathan Clark alleged that he and another employee were terminated

for attempting to organize with other staff members to address grievances against management. Employees, in an attempt to address grievances and report unfair labor practices by management, organized and created a petition and attempted to contact the Board of Directors and governing body of the corporation in order to have our grievances heard by an impartial third party. Grievances included requesting employees to perform illegal acts, terminating employees for attempting to report illegal workplace activities, and attempts by management to financially defraud the organization’s membership by misrepresenting financial expenditures on financial reports, among other issues. The Executive Director terminated [Nathan Clark’s] employment on August 17, 2006 [sic] for attempting to organize with other employees to file grievances to the Board of Directors and governing body of the Association.³⁰⁵

In *Texas Dental Ass’n*, the General Counsel reported that the employer unlawfully discharged both the employee for engaging in protected activity and the supervisor for refusing to commit an unfair labor practice.³⁰⁶ The employer’s purported reason for the discharge was not supported by evidence, and it was improper for the employer to discipline an employee for failure to abide by a rule that prohibited section 7-protected activity.³⁰⁷ The employer allowed reasonable,

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ NLRB Charge Against Texas Dental Association, NLRB Case No. 16-CA-25349 (Dec. 12, 2006) (on file with author) (filed by Nathan Clark).

³⁰⁶ GC Memorandum, *supra* note 11, at 8–9.

³⁰⁷ *Id.* at 9.

personal use of its computers, the Internet, and e-mail but then disparately enforced its e-mail policy against the protected concerted activity.³⁰⁸ Analyzing the facts in light of the *Register-Guard I* decision, with its adoption of the Seventh Circuit's discrimination analysis, the General Counsel found the evidence indicated that "the employer had not drawn a meaningful distinction between employee e-mails that it permits (jokes, baby announcements, offers of sports tickets) and those that it prohibits (Section 7 content)."³⁰⁹ The discharged employee's e-mails were not solicitations but "direct communications to management seeking improvement in working conditions."³¹⁰ Thus, the General Counsel found "that these e-mails were more job-related than the personal e-mails that the employer permitted," making the discharge unlawful because it was based upon discriminatory enforcement of its electronic communications policy.³¹¹

What is interesting in this analysis is that the General Counsel is purportedly using the Seventh Circuit's analysis for discrimination from *Register-Guard I* but, at the same time, noting no "meaningful distinction" to justify the various types of e-mails that the employer permitted or prohibited.³¹² The employer's e-mail policy was not broken into the same types of categories as the policy at issue in *Register-Guard I*, namely non-job-related communications and outside solicitation. Those categories allowed the *Register-Guard* to withstand the majority's scrutiny in *Register-Guard I*. The General Counsel looked at the employer's disciplinary responses to various employee e-mails and refused to immunize the employer's after-the-fact justifications for its disparate enforcement of its policy. Case 4 of the memorandum provides hope that *Register-Guard I* will not routinely get the employer off the hook, at least not unless the employer has set up "meaningful" distinctions for the categories of permitted and prohibited e-mail use. The General Counsel's assessment that the e-mails to management were more job-related than the personal e-mails that the employer permitted indicates that the General Counsel, like the dissent in *Register-Guard I*, is prepared to sift through pretentious categories that make no business sense—

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 10.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² See *id.* The majority in *Register-Guard I* did not require "meaningful distinctions" for categories of communications or activities.

categories that are a pretext for prohibiting employees from engaging in statutorily protected activity or disciplining them for the same.

The administrative law judge's subsequent decision, pursuant to a consolidated and amended complaint in *Texas Dental Ass'n*, found that the discharges were unlawful under the Act.³¹³ The "official use only requirement" of the employer's communications policy was not adhered to, and no discipline occurred prior to the discharge of Mr. Clark.³¹⁴ Mr. Clark's discharge resulted from his protected concerted activity, including his failure to report any involvement in the anonymous e-mails.³¹⁵ Subsequent to the Board's decision in *Register-Guard I*, the complaint in *Texas Dental Ass'n* was amended to delete a section 8(a)(1) allegation regarding the employer's electronic communications policy but the complaint still alleged disparate enforcement of the policy.³¹⁶ The administrative law judge found that the company's discharge of Mr. Clark was disparate enforcement of that policy.³¹⁷ The judge also found that supervisor Barbara Lockerman was discharged for "her failure to come forward with her knowledge [of] the petition, [a] protected concerted activity of the employees."³¹⁸ Ms. Lockerman was entitled to withhold the information she obtained by attending the employee meeting.³¹⁹ Her discharge for refusing to engage in an unfair labor practice was itself an unfair labor practice under the Act.³²⁰ The administrative law judge ordered that both Mr. Clark and Ms. Lockerman be offered reinstatement plus back pay.³²¹

E. Case 5 – Starbucks

The final case in the General Counsel's memorandum involved a change in company bulletin board policy as a direct reaction to union

³¹³ Texas Dental Assoc., Case No. S 16-CA-25349, 2008 WL 1732928, at *1 (NLRB Div. of Judges Apr. 10, 2008). Nathan Clark and Patricia St. Germain were the employees, and Barbara J. Lockerman was the supervisor.

³¹⁴ *Id.* at *6.

³¹⁵ *Id.* at *8.

³¹⁶ *Id.* at *10.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at *11.

³²⁰ *Id.* at *12.

³²¹ *Id.* at *14.

activity at a Starbucks Corporation store in New York.³²² The memorandum noted that the facts were “clearly distinguishable from those in *Register Guard [I]*.”³²³ The employer had two bulletin boards that were used, one for company announcements and one for employees, prior to the onset of organizational activity at the facility.³²⁴ The employee bulletin board was used for all types of personal and non-work-related matters, including an anti-war protest march and party announcements.³²⁵ There was no written policy regarding the use of the boards.³²⁶

The day after a union organizer gave a list of demands on behalf of the union to the company, the employer removed union documents from the employee bulletin board and, then, removed all employee materials and posted employer materials thereon.³²⁷ The union organizer asked the employer about this and was told that employees were no longer allowed to post anything.³²⁸ Unlike in the *Register-Guard I* case, the General Counsel noted that in Case 5 of the memorandum there was no disparate enforcement of what was a facially neutral, written company-wide policy.³²⁹ Rather, at Starbucks, an unwritten policy was changed in reaction to union activity, evidencing an anti-union motive, and the previously issued complaint would, even after the *Register-Guard I* decision, continue to allege discriminatory prohibition of employee use of the bulletin board.³³⁰ The resolution of the unfair labor practice complaint in

³²² GC Memorandum, *supra* note 11, at 10; *see* NLRB Charge Against Starbucks Corporation, NLRB Case No. 2-CA-37548 (Mar. 14, 2006) (on file with author) (filed by Industrial Union 660) (identifying respondent employer).

³²³ GC Memorandum, *supra* note 11, at 10.

³²⁴ *Id.* at 11.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 10–11. An administrative law judge has since issued a decision on the consolidated Starbucks unfair labor practice charges represented in Case 5 of the GC Memorandum (2-CA-37548). The ALJ found that the timing of the employer changes—such as restricting posting of union material on the bulletin board, wearing of union buttons, and talking about unions and working conditions, as well as the discipline and discharge of employees for engaging in protected activity—were in reaction to union organization and, thus, violated the Act. Of particular note was the selection of actions that were limited or prohibited, which indicated inconsistent enforcement of rules to limit union-related conduct. *See* Lawrence E. Dube, *Unfair Labor Practices: ALJ Finds Starbucks Violated NLRA Rights, Citing Interference, Discipline at NYC Stores*, Daily Lab. Rep. (BNA) No. 249, at A-1 (Dec. 30, 2008); *see also* Starbucks Corp., Case No. 2-

Starbucks Corp. reflects that the *Register-Guard I* decision, as interpreted by the General Counsel who advises the Board's regional offices, will not provide a carte blanche for employers to prohibit section 7-protected activity, even where use of company equipment such as bulletin boards is at issue, if the timing of changes in rules or the selective enforcement of rules indicates anti-union motivation.

F. Summary

In conclusion, the report of post-*Register-Guard I* cases handled by the Division of Advice indicated that, where an employer permits employees to use the employer's e-mail system, employers may place reasonable limits on that use.³³¹ The General Counsel noted that employer distinctions should be meaningful, stopping short of saying that there should be a legitimate business reason for the distinctions. But the General Counsel nonetheless analyzed the categories and the rationale for the categories more closely than the majority of the Board did in *Register-Guard I*.³³² One can read between the lines of the General Counsel's memorandum that categories that make no sense or are unrelated to a business reason will be scrutinized closely and may be an indicia of illegal motivation—especially where there appears to be no advantage for the employer other than screening out union or concerted activity. Where otherwise valid rules are promulgated for anti-union reasons, these remain unlawful after the *Register-Guard I* decision.³³³ The timing of employer changes in its communications policy, e.g., in reaction to the onset of union or other concerted activity, would certainly raise a red flag regarding motive in light of the General Counsel's memorandum. Direct communication with management about working conditions remains a protected activity even when an employee uses the employer's e-mail.³³⁴ Also, the General Counsel's memorandum noted that the

CA-37548, 2008 WL 5351366, at *17–19 (NLRB Div. of Judges Dec. 19, 2008) (discussing the timing of restrictions as evidence of anti-union motivation and the application of the discriminatory enforcement standard from *Register-Guard I*).

³³¹ GC Memorandum, *supra* note 11, at 12.

³³² See *supra* notes 309–11 and accompanying text (discussing the language of the General Counsel in the GC Memorandum regarding Case 4).

³³³ GC Memorandum, *supra* note 11, at 12.

³³⁴ See *id.*; see also *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249–50 (1997) (holding that employee e-mail communication with management regarding the employer's changing vacation day plan was a protected concerted activity).

General Counsel will continue to require cases involving *Register-Guard I*-type issues to be brought to the Division of Advice.³³⁵

The impact of the Board's decision in *Register-Guard I* will continue to be more restrictive upon employees and unions, unless either the Board changes its tack on workplace communications policies in the future or the appellate courts refuse to enforce the Board's current framework for deciding both what is a discriminatory communications policy and what is discriminatory enforcement. Because the legality of the *Register-Guard*'s CSP is not before the Board upon remand, that issue will await further clarification in a future case. Meanwhile, the General Counsel seems to be narrowly following the majority's rule in *Register-Guard I*, while still striving to maintain the protection afforded by the Act. Regional directors will follow the example and advice provided by the General Counsel.

Administrative law judges will also be grappling with the new *Register-Guard I* framework. In one recent decision, *Stephens Media, LLC*,³³⁶ an administrative law judge noted that the *Register-Guard I* decision "reversed a long line of Board cases dealing with discriminatory enforcement of work rules."³³⁷ After *Register-Guard I*, he said "it would no longer be sufficient to show that an employer merely disparately enforced its rules but it must be shown that, ' . . . unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.'"³³⁸ Even under this more demanding and restrictive analysis, however, the judge concluded that the respondent in the case discriminatorily enforced its security policy against the union.³³⁹ This was discrimination because there was no security policy requiring prior management approval for access of outside organizations, and, thus, the employer's enforcement of this alleged policy only against the union was discrimination.³⁴⁰ The administrative law judge stated that "[e]ven the Seventh Circuit . . .

³³⁵ GC Memorandum, *supra* note 11, at 12. This is to "assure a consistent approach to our casehandling." *Id.* The General Counsel clearly wishes to maintain a close watch on cases governed by the Board's *Register-Guard I* decision.

³³⁶ Case No. S 37-CA-7043, 2008 WL 649133 (NLRB Div. of Judges Mar. 6, 2008).

³³⁷ *Id.* at *16.

³³⁸ *Id.* (quoting *Guard Publ'g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1119 (2007)).

³³⁹ *Id.* at *17.

³⁴⁰ *Id.*

[would recognize that allowing] notices for anything except unions . . . ‘is anti-union discrimination by anyone’s definition.’”³⁴¹

RECOMMENDATIONS AND CONCLUSION

After the National Labor Relations Board’s decision in *Register-Guard I*, employers have greater rights to restrict nonwork use of e-mail than in the past. However, whether the *Register-Guard I* rationale will withstand the test of time, appeal, and Board member turnover is another matter. The Board majority in *Register-Guard I* excused employer restriction of e-mail because there were “alternate means” of communication among employees. The Board majority maintained that employers may restrict employees from use of e-mail even where this would restrict section 7-protected communications, essentially applying a nonemployee standard for real property access. This is not a satisfactory balancing of interests in the context of the modern-day workplace and current labor law precedent, which permits employee solicitation and distribution on nonwork time and in nonwork areas. Whether cyberspace is a “work area” is another question, and, in a sense, it is the wrong question because the traditional notion of work area is no longer relevant in most modern-day workplaces.³⁴²

Similarly, the traditional labor law distinctions regarding solicitation and distribution are not readily applicable to Internet communications, and this outmoded analysis should be abandoned when the Board fashions new rules for workplace e-mail communications.³⁴³ The dissent in *Register-Guard I* criticized the majority’s decision, noting it “confirms that the NLRB has become

³⁴¹ *Id.* (quoting *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995)). This was the same rationale that the D.C. Circuit referenced in the *Register-Guard I* appeal. See *infra* notes 358–59 and accompanying text (discussing that singling out of union activity for discipline is discrimination) (citing *St. Margaret Mercy Healthcare Ctrs. v. NLRB*, 519 F.3d 373, 375–76 (7th Cir. 2008)).

³⁴² See Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 286–87 (2008) (arguing that the manufacturing model of separate work area and break area is no longer the dominant model and the Board’s attempt to follow the same rules, in modern workplaces, is not meaningful or workable and will impede employee exercise of statutory rights).

³⁴³ See *id.* at 289–92 (assessing the solicitation and distribution dichotomy and recommending the Board use a new method of analysis for Internet communications).

the ‘Rip Van Winkle of administrative agencies.’”³⁴⁴ It is at least partly true that “United States labor and employment law sleepwalked into cyberspace.”³⁴⁵ Most of its critics would agree that it is time for the Board to wake up to the reality of modern workplace communications.

While employers certainly may be considered to “own” the e-mail addresses for the workplace accounts of their employees, the ownership or property questions are not always clear-cut, or even clearly relevant to labor law concerns. An employer’s communications system may either store the information sent and received on its bandwidth or have an external company provide space on a server. In either event, the employer incurs expense to run the system and has legal reasons to monitor its use, e.g., to ensure that employees are productive, not engaging in illegal harassment, etc. Some employees may be able to retrieve work e-mail messages only at work. Other employees may be able to access their workplace e-mail from their own hardware, whether at home or via mobile devices. Employees may have personal e-mail accounts from their residential internet service providers or from free websites, e.g., Comcast, Verizon, RCN, Yahoo, America Online, Hotmail, and Gmail. Employees with multiple e-mail accounts are often able to channel the messages from one account into another, thus enabling them to merge their work and personal communications into their personal e-mail account.

Should it make a difference in terms of labor law outcomes that an e-mail message is read on or sent from an employer- or employee-owned computer?³⁴⁶ Should it make a difference in labor law outcomes that e-mail messages are stored on the company’s server or other outside servers? Is the burden of transfer and storage of messages on the employer’s system a key “property” issue, or is it merely a managerial issue? As the Eugene Newspaper Guild noted in its Brief on Appeal to the Court of Appeals for the D.C. Circuit, a computer programmer who worked at the *Register-Guard* testified

³⁴⁴ *Guard Publ’g Co. (Register-Guard I)*, 351 N.L.R.B. 1110, 1121 (2007) (Liebman and Walsh, Members, dissenting) (quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)).

³⁴⁵ William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMP. RTS. & EMP. POL’Y J. 49, 55 (2008).

³⁴⁶ It should be noted that it did not get union president Suzy Prozanski off the disciplinary hook in *Register-Guard I* when she sent a message from the union computer because she sent her message to employees at their workplace e-mail addresses.

that simple text messages sent on the newspaper's e-mail system "place virtually no burden on the e-mail system," especially when compared to the consumption of computer memory from nonbusiness photographs that the company allows on the system.³⁴⁷ The NLRB needs to come to grips with the impact of new technology that has, to a large extent, replaced face-to-face communication in most workplaces. The Board must adapt the aging Act to the cyber environment and create rules that will address how new forms of communication in the virtual workplace fit with precedent based upon face-to-face communication.

A disparate impact analysis should apply when an employer sets up categories that look facially neutral but the effect of which is to eliminate or discriminate against conduct protected by section 7 of the Act. Communications systems policies that are overbroad in terms of restricting and interfering with section 7 rights should not withstand scrutiny on the basis that they are not intended to discriminate. The interference with affirmative statutory rights in this context must be justified by a legitimate business reason.

The Board should provide employers and unions more guidance in this area by outlining the appropriate characterizations of similar activities in a forward-looking advice memorandum. The General Counsel's memorandum on cases since *Register-Guard I* is a good beginning but falls short of prospective advice on creating appropriate categories that are legally relevant, which would allow employers to fashion lawful workplace communications policies. Employees should be legally entitled to make use of employer e-mail systems for section 7 purposes on a nondiscriminatory basis subject to a balancing test that takes into account the employer's legitimate business reasons for any restrictions. Any company communications systems policy that outlines permissible and prohibited employee uses of the systems should not include broad prohibitions that exclude section 7 activities while allowing other non-business-related uses, unless the employer can support the exclusion of section 7 activities with a legitimate business reason. Without this standard, employers will be free to sweep away employees' section 7 rights with wholesale exclusions of categories of communications without a bona fide justification.

³⁴⁷ Brief for Petitioner Eugene Newspaper Guild, *supra* note 258, at 5–6. The programmer noted that the newspaper's e-mail system handled three to four thousand pieces of e-mail with no difficulty. *Id.* at 5.

Finally, as the General Counsel inferred in his memorandum with respect to *Texas Dental Ass'n*,³⁴⁸ it seems that the issue of union representation and working conditions is job-related—whether employees are considering choosing unionization, are in the process of bargaining for a collective bargaining agreement, or are deciding whether to engage in a lawful strike. The union at the *Register-Guard* was comprised of employees, not outsiders, and e-mail communications about wages, hours and working conditions, and other matters of mutual aid or protection clearly relate to section 7 rights, which are protected under the Act. Even in the absence of a union, employees have protection to voice their opinions about such matters.

The National Labor Relations Board's decision in *Register-Guard I* should not remain the rule on employee use of employer e-mail systems. Section 7 activities are entitled to affirmative protection under the National Labor Relations Act, and concerted activities, as well as other union organizational activities, should not be banned while employers allow other organizational and non-work-related use of the e-mail systems without legitimate business reasons for such distinctions. Whether e-mail is characterized as solicitation, distribution, or both, the standard for employee use of workplace e-mail should allow employees to engage in section 7 activity on e-mail during nonwork time unless the employer both asserts a legitimate business reason for excluding the use and also does not discriminate against section 7 activity via the use of e-mail for other non-work-related uses of a similar character.

ADDENDUM

The Court of Appeals for the D.C. Circuit recently issued its decision in *Guard Publishing Co. v. NLRB (Register-Guard II)*.³⁴⁹ In what was a victory for the union, the appellate court upheld as “certainly reasonable” the Board's conclusion that the employer's discipline of Ms. Prozanski for her first, May 4th, e-mail was discrimination along section 7 lines and, thus, a violation of section 8(a)(1) of the Act.³⁵⁰ The warning was discriminatory because that

³⁴⁸ GC Memorandum, *supra* note 11, at 10 (noting e-mails regarding working conditions to management were more job-related than personal e-mails that the employer permitted).

³⁴⁹ 571 F.3d 53 (D.C. Cir. 2009).

³⁵⁰ *Id.* at 59.

specific e-mail involved mere factual correction about the rally and was not a solicitation that was prohibited by the *Register-Guard's* Communications Systems Policy.

The court found that there was not substantial evidence to support the Board's conclusion that the *Register-Guard* lawfully disciplined Ms. Prozanski for her other two August e-mails.³⁵¹ While the latter e-mails were solicitations, the court noted that the employer's line barring access based upon organization status was merely a "post hoc invention," one that the company did not invoke until after the NLRB's General Counsel filed a complaint.³⁵² The company policy made no distinction based upon solicitation by groups or individuals, rather it forbid all non-job-related solicitations.³⁵³ Additionally, the company's disciplinary warning about Ms. Prozanski's August e-mails did not raise "the organization-versus-individual line."³⁵⁴ Rather, the warning asked her to refrain from using the company's systems for "union/personal business."³⁵⁵ Similarly, the disciplinary notice regarding her May e-mail did not draw a line based upon the organizational issue; instead, it said that it was not permissible to use the company e-mail for purposes other than company business.³⁵⁶ The court noted that "neither the company's written policy nor its express enforcement rationales relied on an organizational justification."³⁵⁷ The Court of Appeals for the D.C. Circuit found it telling that the *only* e-mails that resulted in discipline at the *Register-Guard* were union-related ones.³⁵⁸ They referenced the Seventh Circuit's recent decision in *St. Margaret Mercy Healthcare Centers v. NLRB* for the proposition that singling out both union activity and a union supporter for rebuke amounts to discrimination against union activity.³⁵⁹

³⁵¹ *Id.*

³⁵² *Id.* at 60.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* (emphasis in original).

³⁵⁶ *Id.* at 59.

³⁵⁷ *Id.* at 60.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 60–61 (citing *St. Margaret Mercy Healthcare Ctrs. v. NLRB*, 519 F.3d 373, 375–76 (7th Cir. 2008)); see *supra* notes 212–31 and accompanying text (discussing the importance of the Seventh Circuit's decision in *St. Margaret Mercy Healthcare Centers v. NLRB* to both the Board majority's rationale in *Register Guard I* and the likely outcome of the *Register-Guard I* appeal).

Although the union believed that the company's no-solicitation policy was overly broad, it did not seek review of the Board's finding that the *Register-Guard's* no-solicitation policy was lawful, and, thus, the appellate court did not consider this larger issue, instead limiting its consideration to the discriminatory enforcement of the company's policy.³⁶⁰ AFL-CIO Associate General Counsel James B. Coppess discussed the reason the union did not appeal the Board's ruling on the policy itself.³⁶¹ In the union's view, while the Board's decision on the validity of the company's policy was wrong, the union deemed that decision to be a policy choice within the Board's discretion that the appellate court was unlikely to overturn.³⁶² Mr. Coppess speculated that the Board may reach a different decision on the validity of such policies in a future case.³⁶³ In the interim, challenges to company policies that restrict section 7 activity will likely focus on discriminatory enforcement rather than the overbreadth of the policies.

As the Board considers the *Register-Guard II* case upon remand, its review will be limited to consideration of evidence related to the unfair labor practice charges concerning the *Register-Guard's* discriminatory enforcement of the Communications Systems Policy against the union president for her two later e-mails. These e-mails constituted solicitations and, thus, fell within the prohibitions of the company's CSP. However, the appellate court found that there was not substantial evidence on the record to support the Board's finding that the employer's discipline of Ms. Prozanski was lawful because the employer's drawing of the line barring access to the e-mail system, based upon organizational status, was a line not enforced until after the fact. In reality, the employer warned her against use of the communications system for union or personal use and for purposes other than company business rather than warning her based upon any organizational status. Even more telling, the only e-mails that the employee was disciplined for were union-related, which the appellate court viewed as evidence of discrimination.

Upon remand, the Board should restate its standard for discriminatory enforcement of a valid employer rule, specifically

³⁶⁰ *Id.* at 58.

³⁶¹ See Susan J. McGolrick, *Unfair Labor Practices: D.C. Circuit Rules Guard Publishing Illegally Disciplined Copy Editor for E-mails*, Daily Lab. Rep. (BNA), No. 128, at AA-1 (July 8, 2009).

³⁶² *Id.*

³⁶³ *Id.*

avoiding the “discrimination along section 7 lines” analysis that has proven inadequate to protect section 7 rights. The Board should preface the discriminatory enforcement standard with a statement that, where an employer rule interferes with section 7 rights, the rule should be able to withstand a balancing test showing that the interference is necessary because of the employer’s legitimate business reasons. The Board should clarify that an employer’s pretextual reasons will not carry the day when important statutory rights are unduly restricted. Finally, where valid employer rules relate to solicitation and distribution, the Board should reaffirm its traditional rule that employees are free to solicit and distribute on nonwork time and distribute in nonwork areas. The Board could declare that they will characterize workplace e-mails as solicitation, distribution, or both based upon the content of the messages. This is both a traditional analysis for protection of section 7 rights and certainly preferable to the property-based analysis used by the *Register-Guard I* majority, which unduly elevated an employer’s ownership of equipment over these important statutory rights.

The D.C. Circuit Court of Appeals did not address the larger question in *Register-Guard I*, namely whether the employer’s Communications Systems Policy itself was a violation of section 8(a)(1). That question must now await the Board’s consideration in a future case.

