

THE ZAPPIA LAW FIRM

A PROFESSIONAL CORPORATION

— Labor & Employment Law —

SPECIAL UPDATE

PRIVATE AND PUBLIC EMPLOYERS

January 22, 2015

NLRB HOLDS THAT EMPLOYEES MAY USE COMPANY EMAIL FOR PROTECTED UNION COMMUNICATIONS

Summary

The NLRB ruled that employees who have authorized access to their employer's email system in the course of their work have a right to use the email system to engage in protected communications on nonworking time. (In so doing, the NLRB invalidated its own 2007 decision (*Register Guard*, 351 NLRB 1110 (2007)), when it overruled the portion of that holding which prohibited employees from using their employer's email systems for non-work activities, including union organizing activities, during non-work hours.) The NLRB weighed employees' rights to communicate over employer property rights, and concluded that employee use of email for protected communications during non-working time, outweighs the employer's property right. There are, however, two limitations: (1) Companies are not required to provide email access to employees and the right only attaches once/if the employer has granted that access; and (2) An employer may justify a total ban of non-work-related emails by demonstrating that special circumstances make the ban necessary to maintain production or discipline.

Not only does this ruling force employers to stomach criticism voiced through their own email systems, but it also helps their employee's efforts to organize.

Background

Purple Communications provides sign-language interpretation services. Since June 2012, the company maintained an employee handbook that contains its electronic communications policy. That policy states:

INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY

Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [sic] Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.

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Prohibited activities

Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:

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2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.

....

5. Sending uninvited email of a personal nature

At Purple Communications, interpreters are assigned individual email accounts on the company's email system, and they use those accounts every day that they are at work. They are able to access their company email accounts on the computers at their workstations, as well as on computers in the call centers' break areas and on their personal computers and smartphones. The interpreters have access to the internet on the break-area computers but very limited access at their workstations. In the fall of 2012, the union filed petitions to represent the interpreters that resulted in Board elections at seven of the company's call centers. The union filed objections to the results at two of the company's facilities, including an objection asserting that the electronic communications policy interfered with the interpreters' freedom of choice in the election. The union also filed an unfair labor practice charge regarding the policy, leading to the issuance of the complaint allegation now before us.

HOLDING

The NLRB will now presume that employees who have authorized access to their employer's email system in the course of their work have a right to use the email system to engage in protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights. Because limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, the NLRB anticipates that it will be the rare case where special circumstances justify a total ban on non-work email use by employees. In more typical cases, where special circumstances do not justify a total ban, employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline. However, an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction. The mere assertion of an interest that could theoretically support a restriction will not suffice. And, ordinarily, an employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer has authorized.

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Purple Communications, Inc. and Communications Workers of America, AFL-CIO, NLRB
Cases: 21-CA-095151, 21-RC-091531, and 21-RC-091584.