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# Compelled Commercial Speech

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## WORKER COLLECTIVE ACTION IN THE DIGITAL AGE

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### I. INTRODUCTION

The United States, like other wealthy countries, has fully embraced electronic communications. Most individuals and businesses regularly use some form of electronic communications, and they often use multiple types.<sup>1</sup>

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<sup>1</sup> See *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 5 (2014) (citing statistics on workplace electronic communications usage).

Given the prevalence of email; social media, such as Twitter and Facebook; mobile phone messaging; and other similar modes of communication, American society is clearly in an age of digital communications.

The workplace has not been immune to this digital revolution. Employees and employers frequently use electronic communications for work-related matters. The same is true for attempts by employees to improve their wages and other work conditions. It is now the norm for unions or other groups of workers to use electronic communications as part of an effort to organize or change employers' policies.

Although workers have used many types of electronic communications, Facebook and other forms of social media have caught the public's eye more than any other.<sup>2</sup> This is probably not surprising given the public's widespread familiarity with and use of social media. One benefit of social media's public attention is that cases involving this form of communication help to illustrate labor law's ability to protect nonunion employees.<sup>3</sup> This not only provides more appreciation for labor law, but also shows workers that they already know how to use one tool that might help improve their work conditions.

In contrast to unions—which have great expertise in organizing collective action—social media and forms of digital communications can be crucial for unorganized workers. Because they typically lack any experience with unions or other similar organizations, most workers do not have the organizational expertise that is generally needed to instigate and maintain collective action. Electronic communications can help fill that gap.

Most obviously, electronic media provides a low-cost and relatively effective means of communication and organization.<sup>4</sup> Although face-to-face contact among workers is usually the most effective way to communicate and solicit collective action,<sup>5</sup> it is also quite limiting. For instance, when workers lack organizational structure it is quite difficult to contact all employees—particularly outside of the watchful eye of often retaliatory employers.<sup>6</sup> Electronic media, when accessible, can allow workers to discuss workplace

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<sup>2</sup> Although this Article focuses on the use of social media for collective action, the high-profile nature of this medium is illustrated by the attention given to the recent election of a union to represent bus drivers, employed by a contractor, who drive Facebook employees to and from work. See Stephen Greenhouse, *Facebook Shuttle Bus Drivers Vote to Unionize*, N.Y. TIMES (Nov. 19, 2014), [http://bits.blogs.nytimes.com/2014/11/19/facebooks-bus-drivers-vote-to-unionize/?\\_r=0](http://bits.blogs.nytimes.com/2014/11/19/facebooks-bus-drivers-vote-to-unionize/?_r=0).

<sup>3</sup> See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1108–11 (2011).

<sup>6</sup> See *infra* note 204.

issues and organize collective actions away from their employer's watchful eye.<sup>7</sup>

This Article explores some of the ways in which employees have used electronic communications to seek better working conditions and argues that this medium will continue to grow in importance. However, several factors currently exist that limit the effectiveness of electronic collective action. In addition to natural limitations on workers' ability to use electronic media and the effectiveness of those communications, this Article discusses the legal protections that might help to reduce employer resistance to digital collective action. This issue illustrates the Catch-22 of electronic communications: as digital collective action strategies become more accessible and useful, they also become more of a target for employers seeking to thwart employee attempts to improve their working conditions. As described below, the legal protections for workplace electronic communications have been in a state of flux. There have been some recent legal gains for employees' ability to use electronic communications, but those protections still fall short in some areas. As workers' use of electronic communications becomes more widespread and more effective, the need for legal protection will grow. Yet, pressure from employers to resist an increasingly effective tool for employees will grow as well. How this tension ultimately develops will depend on the ability of legislators, regulators, and judges to balance these competing interests.

## II. COLLECTIVE ACTION PROBLEMS MEET THE INTERNET

Despite the widespread use of electronic communications, in many ways digital collective action is still in its infancy. Unions and other worker organizations, although certainly not eschewing electronic communications, still rely heavily on traditional organizational strategies. These groups can and should do more to take advantage of digital technology, but their continued use of traditional strategies is understandable. For all the advantages that electronic communications promise for collective action, there are still significant hurdles to their effectiveness.

One limitation of electronic communications is the reality that they generally are a less effective means of convincing workers to engage in collective action than in-person communications.<sup>8</sup> Moreover, even today, many workers who might participate in collective action drives have little to no

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<sup>7</sup> See *infra* Part III. There is no guarantee that employers will not learn about electronic organizational activity, even when workers do not use employers' equipment or servers. For instance, other workers could provide information or access to employers. See, e.g., *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 873, 884 (9th Cir. 2002) (noting that employees gave manager access to other employee's private, worker website).

<sup>8</sup> See *infra* note 24.

regular access to the Internet.<sup>9</sup> This digital divide continues to shrink, but until more low-wage workers regularly use such communications, it is difficult to fault organizers' reliance on traditional collective action strategies.

Although digital collective action strategies are still developing, electronic communications have already played an important role in recent organizing efforts.<sup>10</sup> That importance will almost certainly grow as more employees begin to regularly use such communications and worker-advocacy groups broaden their reliance on digital media.

The usefulness of electronic communications centers on their ability to lower the barriers to collective action. All attempts at collective action must overcome various hurdles, but these problems are particularly acute for workers who attempt to act together to improve their working conditions.<sup>11</sup> Electronic communications can rarely solve these collective action problems on their own, but they can decrease the barriers—possibly enough to allow for more collective action, or more effective action, than might otherwise exist.

The central barrier to collective action is that as groups increase in size, their ability to act together generally decreases.<sup>12</sup> This relationship results from several factors, including the reality that individuals typically will not receive enough personal benefit to justify the costs of engaging in concerted action, even though the group as a whole would be better off.<sup>13</sup> Similarly, because individuals usually do not have to contribute to enjoy the gains from the group's activities, there is a free-rider problem that often makes collective action unattainable or less effective.<sup>14</sup> Other contributors to the inability of

<sup>9</sup> For example, a White House report found that homeowners with college degrees are far more likely to have home broadband availability than those who did not complete high school (88% vs. 35%) and the same is true for households with higher incomes (annual household incomes more than \$100,000 (93%) vs. incomes less than \$25,000 a year (43%), and individuals of color (Asians (81%); Whites (74%); Hispanics (56%); African Americans (55%)). See THE WHITE HOUSE OFFICE OF SCI. & TECH. POLICY & THE NAT'L ECON. COUNCIL, FOUR YEARS OF BROADBAND GROWTH 8 (2013), available at [http://www.whitehouse.gov/sites/default/files/broadband\\_report\\_final.pdf](http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf).

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* notes 17–19 and accompanying text.

<sup>12</sup> MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2, 11–12 (1965).

<sup>13</sup> *Id.* at 34–36; Elinor Ostrum, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 149–52 (2000). However, when the groups are small, collective action may be easier to accomplish. See Herbert Hovenkamp, *The Limits of Preference-Based Legal Policy*, 89 NW. U. L. REV. 4, 60 (1994).

<sup>14</sup> See OLSON, *supra* note 12, at 28–31, 34–36; Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 933 (1994).

larger groups to engage in collective action include high start-up costs<sup>15</sup> and the difficulties in groups', especially heterogeneous ones, ability to agree on courses of action.<sup>16</sup>

These general collective-action problems are especially acute for workers.<sup>17</sup> For instance, changes in the labor market—including increased worker mobility, diversity (which, while generally a good thing, increases heterogeneity), and competition from abroad—make it more difficult for workers to organize and act together.<sup>18</sup> Moreover, employers frequently take aggressive stands against worker collective action through retaliation, policies that limit workplace communications, and other means.<sup>19</sup>

Attempts to organize workers must address these barriers. Two important factors in whether attempts to organize collective action will be successful are the ability of workers to obtain relevant information and to communicate with each other.<sup>20</sup> Electronic communications can, in appropriate circumstances, significantly lower the cost of communication among potential participants in collective action. This lower cost can increase the quantity and quality of workers' communications and coordination, which can increase the chance of collective action occurring and its effectiveness when it does occur.<sup>21</sup>

Electronic communications can also improve workers' access to information. Among the benefits of information is its ability to provide workers with a valuable tool to bargain effectively with their employers, either individually or collectively.<sup>22</sup> Additionally, information can also help mitigate

<sup>15</sup> This early phase is particularly difficult because the promise of benefits is often small and in the future, while basic organizational costs are large and immediate. See OLSON, *supra* note 12, at 22, 30–31.

<sup>16</sup> *Id.*; see also Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250–51 (1992).

<sup>17</sup> See Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 219–26 (2001).

<sup>18</sup> See KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 74–83 (2004); Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 916 (2007); Hirsch, *Communication Breakdown*, *supra* note 5, at 1103–04.

<sup>19</sup> Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9–10, 71 (2000).

<sup>20</sup> OLSON, *supra* note 12, at 46–47; Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 355 (2011); Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 538–39 (2004).

<sup>21</sup> DANIEL BAR-TAL, GROUP BELIEFS: A CONCEPTION FOR ANALYZING GROUP STRUCTURE, PROCESSES, AND BEHAVIOR 72 (1990); Dau-Schmidt, *supra* note 18, at 918.

<sup>22</sup> See, e.g., *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240–43 (1966) (requiring employers to provide unions with employees' contact information before an election); Barenberg, *supra* note 14, at 793–97 (noting that employee free choice depends on ability to deliberate over relevant information, including disparate viewpoints).

some of the general barriers to collective action. Individuals' lack of awareness about matters such as the preferences of other members in their group, the potential rewards of collective action, or the legal protections for group activity, will typically make collective action less attainable.<sup>23</sup> Electronic communications, by providing workers more access to this type of information, can increase the likelihood that collective action will occur.

Digital media and other electronic communications, although not perfect,<sup>24</sup> promise an avenue of communication and information that could surmount the barriers to collective action in some instances. This is true for unionized workforces, where electronic communications allow for faster and more efficient dialogue that, in some circumstances, can avoid employer detection.<sup>25</sup> But it is the nonunion sector where electronic communications provide the most promise. Because this sector typically lacks an organized workforce, electronic communications' ability to lower the barriers to collective action will usually provide more significant benefits.

### III. WORKERS' USE OF ELECTRONIC COMMUNICATIONS

Given that Internet use is prevalent among the general public, it is no surprise that electronic communication is becoming a more regular part of worker collective action.<sup>26</sup> Currently, electronic communications have not reached their full potential and are usually only one among many strategies for worker collective-action efforts. However, they can be particularly important for nonunion workers, who often lack support from a labor organization. Electronic communications can take an even more prominent role when workers from different geographic areas or from different workplaces attempt to work together.<sup>27</sup> These differences can often be fatal to collective action

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<sup>23</sup> See Hirsch, *Communication Breakdown*, *supra* note 5, at 1103–04 (discussing information asymmetries).

<sup>24</sup> Particularly for solicitation purposes, face-to-face communications are generally the most effective, but only if an organizer has the opportunity to communicate with a given individual. See Hirsch, *Communication Breakdown*, *supra* note 5, at 1108–11.

<sup>25</sup> For instance, the union president in *Register-Guard* used email to contact employees, which is more thorough and quicker than personal contact or literature. *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009). Unfortunately, because she used employer-provided email addresses—and possibly because a recipient forwarded the emails—the employer became aware of the messages and punished her. *Id.*

<sup>26</sup> According to a Pew survey, as of 2014, 87% of adults in the United States use the Internet. See *Internet Use Over Time*, PEW RES. CENTER, <http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time/> (last visited Mar. 1, 2015).

<sup>27</sup> See Hirsch, *Communication Breakdown*, *supra* note 5, at 1107.

attempts,<sup>28</sup> but electronic communications promise a means to bridge these gaps.

### A. *Using Electronic Communications To Organize Workers*

Although electronic communications hold the greatest promise for nonunion workers, to date, many of the more high-profile instances of workplace collective action have seen nonunion workers acting in tandem with unions and other worker advocacy organizations.<sup>29</sup> This is not surprising given that unions have long advocated for all workers, even when they are not directly trying to organize them.<sup>30</sup> Moreover, traditional unions have been at the forefront of efforts to use electronic communications to improve workplace conditions.<sup>31</sup>

Unions have been using electronic communications for numerous activities, such as providing information to members and to employees who were targets of organizing drives.<sup>32</sup> They later began using electronic communications more actively to facilitate organizing strategies,<sup>33</sup> as well as to enhance political and communication efforts addressed to the broader public. This experience has given unions the tools to assist nonunion workers in their attempts to improve their working conditions.

As it does so often with workplace issues, Walmart provides a good example of how the alliance between unions and workers uses electronic communications. OUR Walmart (Organization United for Respect at Walmart) is the primary organization pushing Walmart to improve its employment practices.<sup>34</sup> Although membership in OUR Walmart is made up of current and

<sup>28</sup> See sources cited *supra* note 16.

<sup>29</sup> See *infra* note 35 and accompanying text.

<sup>30</sup> For instance, the AFL-CIO actively advocates raising the federal minimum wage. See *Minimum Wage*, AFL-CIO, <http://www.aflcio.org/Issues/Jobs-and-Economy/Wages-and-Income/Minimum-Wage> (last visited Mar. 1, 2015).

<sup>31</sup> Richard B. Freeman, *From the Webbs to the Web: The Contribution of the Internet to Reviving Union Fortunes*, in *TRADE UNIONS: RESURGENCE OR DEMISE?* 162–84 (Sue Fernie & David Metcalf, eds. 2005).

<sup>32</sup> *Id.*

<sup>33</sup> For examples of NLRB cases that saw electronic communications as part of union organizing efforts, see *U-Haul Co. of Cal.*, 347 N.L.R.B. 375, 385 (2006); *Frontier Tel. of Rochester, Inc.*, 344 N.L.R.B. 1270, 1277 (2005), *enforced* 181 F. App'x 85 (2d Cir. 2006); see also Michelle Amber, *Union Loses First Attempts to Organize Pizza Drivers with Votes in Ohio, Nebraska*, *DAILY LAB. REP. (BNA)* No. 227, at A-7 (Nov. 26, 2004) (discussing union that started by using only electronic communications).

<sup>34</sup> See *About Us*, OUR WALMART, <http://forrespect.org/mission-and-vision/> (last visited Mar. 12, 2015). See generally Stephen Greenhouse, *On Black Friday, Walmart Is Pressed for Wage Increases*, *N.Y. TIMES* (Nov. 28, 2014), <http://www.nytimes.com/2014/11/29/business/on-black->



former employees, it has worked with the United Food and Commercial Workers union, which disclaims any interest in organizing Walmart employees to pressure Walmart.<sup>35</sup>

OUR Walmart's strategies against the company include public relations, informing workers, walkouts, and pickets—and it has used electronic communications for all of them. For example, the OUR Walmart website provides not only information about the organization, its goals, and promotional material, but also numerous avenues for workers to participate. Through the website, a worker can become a member of OUR Walmart<sup>36</sup> and obtain information about how to indicate a willingness to strike or engage in other action,<sup>37</sup> report instances of retaliation,<sup>38</sup> inform workers of their rights,<sup>39</sup> and sign a petition.<sup>40</sup> The website also acts as a resource for interested parties to contact a member.<sup>41</sup> OUR Walmart and other groups seeking better conditions for employees have also used sites such as YouTube to spread information about their efforts.<sup>42</sup> Moreover, OUR Walmart has a specific Facebook site devoted to the so-called Black Friday strikes against Walmart; the site not only

friday-protesters-demand-wage-increases-and-schedule-changes-from-walmart.html (describing 2014 Black Friday strikes).

<sup>35</sup> See, e.g., *Federal Labor Board Judge: Walmart Violated Workers' Rights*, UFCW (Dec. 10, 2014), <http://www.ufcw.org/2014/12/10/federal-labor-board-judge-walmart-violated-workers-rights/> (A disclaimer at the bottom of the page states: "UFCW and OUR Walmart have the purpose of helping Wal-Mart employees as individuals or groups in their dealings with Wal-Mart over labor rights and standards and their efforts to have Wal-Mart publically commit to adhering to labor rights and standards. UFCW and OUR Walmart have no intent to have Walmart recognize or bargain with UFCW or OUR Walmart as the representative of Walmart employees.").

<sup>36</sup> See *Employee Rights*, OUR WALMART, <http://forrespect.org/your-rights/> (last visited Mar. 9, 2015).

<sup>37</sup> See *Get Involved*, OUR WALMART, <http://forrespect.org/get-involved/> (last visited Mar. 9, 2015).

<sup>38</sup> See *Employee Rights*, OUR WALMART, <http://forrespect.org/your-rights/> (last visited Mar. 12, 2015).

<sup>39</sup> See *id.*

<sup>40</sup> See *The Declaration*, OUR WALMART, <http://forrespect.org/the-declaration/> (last visited Mar. 9, 2015).

<sup>41</sup> See *Talk to an Associate*, OUR WALMART, <http://forrespect.org/talk-to-an-associate-2/> (last visited Mar. 9, 2015).

<sup>42</sup> See, e.g., Eric Preston, *Walmart Workers Flash Mob: Raleigh, North Carolina*, YOUTUBE, (Sept. 5, 2013), <https://www.youtube.com/watch?v=FuCNH7dqZxg> (video of "flashmob" at Raleigh, North Carolina Walmart); bakunin888, *Recent Victories Against Landlords and Bosses: Seattle Solidarity Network*, YOUTUBE, (Sept. 25, 2010), <https://www.youtube.com/watch?v=kE4uRP2PHwA> (video by Seattle Solidarity Network, showing recent victories on behalf of workers and others). As an example of the effect that OUR Walmart can have at times, recently Walmart agreed to raise the wages of approximately 6,000 workers earning the minimum wage. See Michael Rose, *Wal-Mart to Raise Some Workers' Hourly Pay; Advocates Stage Protests in D.C.*, *New York*, DAILY LAB. REP., No. 200, at A-13 (Oct. 16, 2014).

contains information about the effort and calls for work stoppages, but also urges action against individual stores accused of retaliating against workers.<sup>43</sup> The pressure, among other factors, does seem to be having an effect. For instance, in early 2015, Walmart announced that it would increase wages for approximately 500,000 of its employees.<sup>44</sup> Although one cannot directly credit OUR Walmart's efforts with the raises—an improved labor market, among other factors, likely played a role—public pressure on Walmart seemed to have some influence.<sup>45</sup>

OUR Walmart, although one of the most high-profile worker organizations to use electronic media, is by no means alone. Other groups—which typically cater to workers in a certain geographic, industrial, or skill area—use similar tactics. For instance, the Seattle Solidarity Network (“SSN”), part of a larger group of so-called “Solidarity Networks,”<sup>46</sup> is a voluntary organization that seeks to help workers in struggles with their employers, landlords, and others.<sup>47</sup> Much like OUR Walmart, SSN and similar organizations rely heavily on their websites, online videos, and other electronic communications to organize workers and get out their messages.<sup>48</sup>

Uber, whose online ride service has grown dramatically in the last couple of years, provides another illustration of workers' use of technology. Perhaps not surprisingly, Uber has seen its drivers—which it classifies as independent contractors—use electronic media as part of their dispute over work conditions. In one instance, Uber cancelled its agreement with a driver who had tweeted a link to an article that raised safety concerns from Uber drivers.<sup>49</sup> The driver's story ultimately went viral, which forced Uber to reinstate the driver.<sup>50</sup> In addition, because of concerns about payments and other issues, Uber drivers have been engaging in work stoppages in London

<sup>43</sup> See *Wal Mart Black Friday Strike*, FACEBOOK, [https://www.facebook.com/walmartblackfridaystrike?\\_dr](https://www.facebook.com/walmartblackfridaystrike?_dr) (last visited Mar. 9, 2015).

<sup>44</sup> See Kim Gittleson, *Walmart To Raise Wages for 500,000 US Workers*, <http://www.bbc.com/news/business-31540472> (last visited Apr. 3, 2015).

<sup>45</sup> *Id.*

<sup>46</sup> See *Other Similar, Allied, and/or Cool Organizations*, SEATTLE SOLIDARITY NETWORK, [http://seattlesolidarity.net/index.php?option=com\\_content&view=article&id=89&Itemid=33](http://seattlesolidarity.net/index.php?option=com_content&view=article&id=89&Itemid=33) (last visited Mar. 1, 2015).

<sup>47</sup> See *Frequently Asked Questions*, SEATTLE SOLIDARITY NETWORK, [http://seattlesolidarity.net/index.php?option=com\\_content&view=article&id=10&Itemid=26](http://seattlesolidarity.net/index.php?option=com_content&view=article&id=10&Itemid=26) (last visited Mar. 1, 2015).

<sup>48</sup> See SEATTLE SOLIDARITY NETWORK, <http://seattlesolidarity.net> (last visited Mar. 1, 2015).

<sup>49</sup> Marina Fang, *If You're An Uber Driver, Don't Tweet This Article. You Might Be Fired*, IN THESE TIMES (Oct. 17, 2014, 1:35 PM), [http://inthesetimes.com/working/entry/17269/uber\\_driver\\_fired\\_tweet](http://inthesetimes.com/working/entry/17269/uber_driver_fired_tweet).

<sup>50</sup> *Id.*

and major cities in the United States.<sup>51</sup> Drivers, partially assisted by a union, have organized these actions using many techniques, including electronic media.<sup>52</sup>

Another recent example of nonunion employees using electronic communications involved an extremely successful, and somewhat unusual, collective action. After the widely admired CEO of Market Basket grocery stores was ousted in a family business dispute, employees protested the move by engaging in widespread protests and strikes, aided by a website and social media such as Facebook and Twitter.<sup>53</sup> The protest was ultimately successful, as the pressure led to negotiations—assisted by the Massachusetts and New Hampshire governors—that allowed the ousted CEO to purchase the company.<sup>54</sup> The employees' use of social media was by no means the only factor in the positive resolution of the dispute, but it was an important way for activists to inform the public and over 25,000 employees, who were spread across 71 stores in 3 states, about the protests and how to get involved.<sup>55</sup>

More novel forms of electronic collective action are also occurring. For instance, a new French website—Macholand.fr—allows people to join others in using Twitter, Facebook, or email to protest instances of sexism.<sup>56</sup> Although not limited to workplace issues, the site promises a new means to galvanize workers and the public to act together in an attempt to improve working

<sup>51</sup> See Rebecca Burns, *The Sharing Economy's 'First Strike': Uber Drivers Turn Off the App*, IN THESE TIMES (Oct. 22, 2014, 4:54 PM), [http://inthesetimes.com/working/entry/17279/the\\_sharing\\_economy\\_first\\_strike\\_uber\\_drivers\\_turn\\_off\\_the\\_app](http://inthesetimes.com/working/entry/17279/the_sharing_economy_first_strike_uber_drivers_turn_off_the_app).

<sup>52</sup> See *id.* (noting drivers' use of online forum and website); Jessica Plautz, *Uber Drivers To Schedule 'Global Day of Protest'*, MASHABLE (Oct. 23, 2014, 1:00 AM), <http://mashable.com/2014/10/22/uber-protests/> (noting call for strike via Facebook post).

<sup>53</sup> See Julina Guo, *A Backgrounder: The Market Basket Strike*, ONLABOR (Oct. 28, 2014), <http://onlabor.org/2014/10/28/a-backgrounder-the-market-basket-strike/>. However, the aim of this action, affecting the choice of a CEO, would likely be unprotected by the NLRA. See *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990); *infra* Section III.B.

<sup>54</sup> See Guo, *supra* note 53.

<sup>55</sup> Renee Richardson Gosline, *Anatomy of the Market Basket Meltdown*, BOSTON GLOBE (Aug. 20, 2014), <http://www.bostonglobe.com/magazine/2014/08/20/market-basket-meltdown-views-from-laura-sen-robort-reich-and-more/ElckAsHW0L8savR4TOqXXN/story.html> (describing importance of social media to Market Basket and other collective actions that target consumers); Guo, *supra* note 53 (noting 90,211 “likes” on the Facebook page); see also *Market Basket Sale to Former Boss Ends Bitter Dispute*, BBC NEWS (Aug. 28, 2014), <http://www.bbc.co.uk/news/business-28972536> (noting widespread use of #Marketbasket hashtag on Twitter).

<sup>56</sup> See Eleanor Beardsley, *Egalite N'est Pas La Réalité: French Women Wage Online War on Sexism*, NPR (Oct. 17, 2014, 3:39 PM), <http://www.npr.org/blogs/parallels/2014/10/17/356948567/egalite-is-not-a-realite-french-women-wage-online-war-on-sexism>.

conditions for women, particularly with respect to harassment and other types of discrimination.<sup>57</sup>

### B. *Using Electronic Communications To Inform Workers*

Although the use of electronic communications as a tool to organize and publicize collective action often receives the most attention, the promise of greater access to information may ultimately provide the most substantial benefit to workers. Typically, employers possess vastly more information than workers. These information asymmetries can seriously undermine workers' ability to bargain effectively with their employers, to know their legal rights, and to learn how to effectively seek changes in work conditions.<sup>58</sup> Electronic communications can be an important gap filler in this area, as means both to collect information and to distribute it to those who need it. The websites of OUR Walmart, the Freelancers Union,<sup>59</sup> and other groups show how useful information can be made available to workers everywhere—in addition to more directed messages to workers who have relationships with these organizations. Thus, the next area of significant growth for workers' use of electronic communications is likely to be in the information-collection area.

There are many types of information that workers would find valuable in their efforts to seek better employment conditions. Workers can use certain information—such as workplace practices and policies, safety history, and compensation—to determine an employer's or industry's relative quality with regard to their treatment of workers. Similarly, this information, along with knowledge of legal protections,<sup>60</sup> can help workers gauge their employers' compliance with labor and employment laws and, when appropriate, seek enforcement.<sup>61</sup> Electronic communications cannot provide workers with all

<sup>57</sup> For instance, one Macholand issue was directed at the lack of women employed by a given company. See *Des Hommes Assistants ou Secrétaires? Ca n'existe Pas!* [*Male Assistants or Secretaries? That Does Not Exist!*], MACHOLAND, <http://macholand.fr/des-hommes-assistants-ou-secretaires-ca-nexiste-pas/>, available at <http://translate.google.com/translate?hl=en&sl=fr&u=http://macholand.fr/des-hommes-assistants-ou-secretaires-ca-nexiste-pas/>.

<sup>58</sup> Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1142–43 (2007).

<sup>59</sup> The Freelancers Union has over 200,000 independent contractors, part-time workers, and temporary workers as members. See Steven Greenhouse, *Tackling Concerns of Independent Workers*, N.Y. TIMES, (Mar. 23, 2013), [http://www.nytimes.com/2013/03/24/business/freelancers-union-tackles-concerns-of-independent-workers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/24/business/freelancers-union-tackles-concerns-of-independent-workers.html?pagewanted=all&_r=0). Among the many services it provides for its members is a place to rate “clients” or employers. See *Client Scorecard*, FREELANCER'S UNION, <https://www.freelancersunion.org/client-scorecard/> (last visited Mar. 1, 2015).

<sup>60</sup> See *infra* notes 71–72 and accompanying text.

<sup>61</sup> See Hirsch, *Communication Breakdown*, *supra* note 5, at 1140–41.

relevant information, as employers will be able to keep some material confidential, but they can greatly enhance the overall accessibility of such information.

At this time, the most prevalent type of resource for online workplace information is employer rating websites.<sup>62</sup> Opinions about the quality of an employer or supervisor can be valuable for workers, although there are limits to the current websites' usefulness. The quality and quantity of information on these sites seems low, in part because no site has appeared to catch on enough to attract a high number of workers willing to provide information. This means that there is no information at all for many companies or jobs. And where there is information, the number of entries is often so low that it is too difficult to distinguish among legitimate comments, those of disgruntled employees, and those of employers trying to boost their own ratings.

Although general information about management's behavior is helpful, other types of information could prove even more valuable. In particular, certain objective information, such as wages, benefits, work hours, the existence of covenants not to compete, safety records, and other terms and conditions of employment could prove extremely useful for potential and current employees. Knowing employers' wages and other types of compensation can have an especially positive effect, as that type of information allows employees to compare their employer against other similar employers, or compare their compensation to co-workers.<sup>63</sup> Such comparisons can be invaluable to employees attempting to pressure employers to raise wages.<sup>64</sup>

Although unions typically have compensation data in industries they represent and use that information on behalf of their members, comprehensive employee compensation information remains far less available in the nonunion sector. There are some exceptions, as websites such as Glassdoor.com provide information for nonunion employers that include salary, basic business facts, and rankings and reviews from employees.<sup>65</sup> This information can be quite informative, particularly for larger companies that have a significant number of

<sup>62</sup> See, e.g., *supra* note 59; RATEMYBOSS, <http://www.ratemyboss.com> (last visited Mar. 1, 2015) (site created by RateMyProfessor site).

<sup>63</sup> See Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-(5)(e)(3)(A) (2013) (improving plaintiffs' ability to bring pay equity claims under Title VII); Advancing Pay Equality Through Compensation, 79 Fed. Reg. 20751 (Apr. 8, 2014) (ordering Department of Labor to create rules that would require federal contractors and subcontractors to provide data on employee compensation by sex and race).

<sup>64</sup> See, e.g., David Leonhardt, *I Am Lawyer, Hear Me Whine*, N.Y. TIMES (Feb. 6, 2000), <http://www.nytimes.com/2000/02/06/weekinreview/i-am-lawyer-hear-me-whine.html> (describing Greedy Associates and other online sites in which law firm associates shared salary information, which helped to force their firms to pay higher salaries).

<sup>65</sup> See GLASSDOOR, [www.glassdoor.com/index.htm](http://www.glassdoor.com/index.htm) (last visited Mar. 1, 2015); PAYSACLE, [www.payscale.com/?version=header&utm\\_expid=1482968-11.8K-SZJgeTS-L8iShJ4Ara.1](http://www.payscale.com/?version=header&utm_expid=1482968-11.8K-SZJgeTS-L8iShJ4Ara.1) (last visited Mar. 1, 2015).

ratings and written reviews. But even for these larger employers, many specific jobs have little or no information.<sup>66</sup> Moreover, for most smaller employers, the amount of information available is lacking in both quality and quantity. One expects that over time, more information will be available, but it is unclear when, or if, that growth will be enough to provide significant benefits to workers.

Other types of information could also provide insights into employer practices. For example, the AFL-CIO's Working America organization appears to have one of the more-developed employer databases, with data on over 400,000 employers' labor and employment law violations, mass layoffs, and offshoring practices.<sup>67</sup> This type of compliance information is especially useful for enforcement of labor and employment laws, which often suffers from employees' inability to learn about violations or seek redress.<sup>68</sup> If sites like Glassdoor and Working America can both expand the type of information they report and the number of employers they have information for, workers could begin to see significant gains. Moreover, worker-advocacy groups could try to publicize this information to interested consumers which, especially for companies that sell directly to the public, could greatly enhance workers' ability to pressure employers. A related example of how this information exchange could occur is the various apps that provide information to consumers who care about various aspects of food production.<sup>69</sup> It is not hard to imagine

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<sup>66</sup> For instance, Glassdoor, as of March 1, 2015, has 234 written reviews for my employer, the University of North Carolina-Chapel Hill, including 25 ratings of the Chancellor. See *University of North Carolina Reviews*, GLASSDOOR (Feb. 9, 2015), <http://www.glassdoor.com/Reviews/University-of-North-Carolina-Reviews-E15010.htm>. However, the campus has approximately 12,000 employees, so 234 reviews (209 not including the Chancellor) is a very small sample. See *Information Sheet*, UNC RESEARCH, [http://research.unc.edu/offices/sponsored-research/resources/data\\_res\\_osr\\_infosheet/](http://research.unc.edu/offices/sponsored-research/resources/data_res_osr_infosheet/) (last updated Jan. 9, 2014) (noting 11,983 full- and part-time employees as of 2013).

<sup>67</sup> However, the site seems to have been offline recently without explanation. See *Job Tracker*, WORKING AM., <http://www.workingamerica.org/jobtracker> (last visited Apr. 13, 2015) (noting listings for over 400,000 companies); see also Amy Joyce, *Labor Web Site Keeps Tabs on Business: Workers Can Check Executive Salaries, Company Violations*, WASH. POST, Nov. 18, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111701623.html>; cf. Hirsch & Hirsch, *supra* note 58, at 1142–43 (describing effects of information asymmetries).

<sup>68</sup> See, e.g., Hirsch, *Communication Breakdown*, *supra* note 5.

<sup>69</sup> See, e.g., Press Release, Ctr. for Food Safety, *Announcing the True Food Shoppers Guide Mobile App* (July 15, 2010), available at <http://www.centerforfoodsafety.org/press-releases/792/announcing-the-true-food-shoppers-guide-mobile-app>; *Seafood Recommendations*, SEAFOOD WATCH, <http://www.seafoodwatch.org/seafood-recommendations/our-app> (last visited Mar. 1, 2015).

that in a similar app market for labor statistics, consumers would avoid making purchases from companies that do not treat their workers well.<sup>70</sup>

Finally, electronic communications can help to inform workers of their legal rights. Studies have shown that workers (and their managers) are typically ignorant of their basic rights and liabilities.<sup>71</sup> There is no easy way to reduce this information gap,<sup>72</sup> especially given the complexity of many labor and employment laws, but electronic communications could help. For instance, as more workers use work-related digital media, interested groups or government regulators could use these channels to inform workers of their rights.

#### IV. LEGAL PROTECTIONS FOR ELECTRONIC COMMUNICATIONS

Workers' use of digital media holds great promise, but as that promise becomes more of a reality, employers will become increasingly aggressive in trying to limit workers' ability to use electronic communications. Thus, the effectiveness of workers' use of technology will be highly dependent on the extent to which the law can protect against employer retaliation and other attempts to interfere with electronic communications.

Workers' digital collective activity may enjoy protection under several different legal regimes, including state statutory and common law, as well as federal and state constitutions.<sup>73</sup> However, reflecting its inclusion in a labor law symposium, this Article will focus primarily on the National Labor Relations Act (NLRA).<sup>74</sup>

As the public's use of the Internet has become more widespread,<sup>75</sup> the National Labor Relations Board (NLRB or Board) has seen an increased

<sup>70</sup> See, e.g., Matthew Yglesias, *Who's Boycotting Wal-Mart This Holiday Season?*, SLATE (Nov. 23, 2012), [http://www.slate.com/blogs/moneybox/2012/11/23/wal\\_mart\\_boycott\\_strike\\_prompts\\_liberal\\_boycott\\_but\\_do\\_boycotters\\_shop\\_at.html](http://www.slate.com/blogs/moneybox/2012/11/23/wal_mart_boycott_strike_prompts_liberal_boycott_but_do_boycotters_shop_at.html) (last visited Mar. 1, 2015).

<sup>71</sup> There is a surprisingly large gap between employees' (and managers') knowledge of legal rights and the actual rights that exist. See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 119 (1999) (finding that 83% of employees incorrectly thought that employers needed a justification to fire an employee); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 134 (1997) (finding that approximately 80% to 90% of unemployed workers had incorrect beliefs about employers' ability to fire workers for various reasons).

<sup>72</sup> Indeed, there is strong employer resistance to even the most basic of notice postings. See *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (striking down NLRB's notice-posting rule); *Nat'l Assn. of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (same).

<sup>73</sup> See, e.g., *infra* note 207.

<sup>74</sup> For a thorough examination of similar protections for public-sector employees, see William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427 (2013).

<sup>75</sup> See survey cited *supra* note 26.

number of filings related to digital media.<sup>76</sup> Some of these disputes involve novel issues for the Board, but in many respects these cases present a common allegation that an employer has unlawfully interfered with employees' NLRA rights. As described below, employer interference typically involves punishment that retaliates against employee action, communication policies that restrict employees' use of electronic equipment, and surveillance of employees' electronic communications.

The lawfulness of an employer's interference turns on Section 8(a)(1), which prohibits employers from retaliating against activity that is protected by Section 7 of the NLRA or from chilling employees' willingness to engage in such activity.<sup>77</sup> The following subsections address the starting point for the Section 8(a)(1) analysis: whether employees' actions were "concerted" and "protected" under Section 7.<sup>78</sup> Traditional examples of such activity include discussing work problems or acting together to pressure an employer for better work conditions.<sup>79</sup>

#### A. Concerted Electronic Activity

When employees discuss issues among themselves on Facebook or through other electronic media, they are acting in "concert" just as much as if they were talking with each other at a meeting or in a cafeteria at work. Thus, electronic communications cases are often no different than any other independent Section 8(a)(1) action.<sup>80</sup> However, what constitutes concerted activity can be more novel in the digital age. For instance, should hitting "Like" on Facebook be considered concerted? In its recent *Triple Play Sports Bar &*

<sup>76</sup> See Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957 (2012) [hereinafter *Facebook*] (analyzing 18-month period, from June 2009 to April 2011, in which the NLRB received around 100 charges from employees alleging that they were disciplined or fired for their work-related online communications—finding that the majority of charges involved non-concerted griping).

<sup>77</sup> Section 7 of the NLRA protects employees' 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 mutual aid or protection . . ." 29 U.S.C. § 157 (2013). Those rights are enforced through Section 8(a)(1), which provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. *Id.* § 158(a)(1).

<sup>78</sup> *Id.*; see also Sprague, *supra* note 76.

<sup>79</sup> See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 18 (1962) (holding that employer violated Section 8(a)(1) by firing employees who walked out of work because of excessive cold).

<sup>80</sup> An "independent" Section 8(a)(1) refers to employer action that violates only Section 8(a)(1), which is different from a "dependent" Section 8(a)(1) unfair labor practice that the NLRB automatically finds when an employer has violated other provisions under Section 8(a).



*Grille* decision,<sup>81</sup> the Board found that employees' "Liking" another employee's Facebook posting, which complained about their employer's tax withholding practices, was concerted activity.<sup>82</sup> Key to that finding was that the understanding that "Liking" something on Facebook was a means to express support for the original post; under the facts of the case, this meant that the employees were discussing problems with their work conditions, which is classic concerted activity.<sup>83</sup>

Although "Liking" and other forms of electronic communications may fit well under the traditional concerted activity analysis, other types of digital media present more complications. In particular, electronic communications seem more likely to raise the difficult question of whether to treat an *individual* employee's action as concerted under Section 7. Unlike in-person discussions, in which one employee's complaints will usually result in a near-instant response from another employee, electronic media cases often involve one employee raising a work issue online and receiving responses to that comment, if at all, after a delay of hours, days, or even longer.

The NLRB will classify an individual employee's action as concerted if the employee engaged in the activity "with or on the authority of other employees,"<sup>84</sup> or the action had the "object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees."<sup>85</sup> For example, an employee's online post or email could seek support from other employees to engage in a work protest or other collective action. This type of concerted action occurred in *Hispanics United of Buffalo, Inc.*,<sup>86</sup> where several nonunion employees were fired because of an individual employee's initial Facebook post, and other employees' subsequent comments, that objected to another employee's complaints to a manager about their work. In its decision, the NLRB found that the employees were acting in concert because several of them had made comments to the initial post.<sup>87</sup> The

<sup>81</sup> 361 N.L.R.B. No. 31, 2014 WL 4182705 (2014).

<sup>82</sup> *Id.* at \*3 (describing ALJ's finding, unchallenged by employer, that hitting the "Like" button expressed his support for the others who were sharing their concerns and "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of protected, concerted activity").

<sup>83</sup> *Id.* Presumably, "favoriting" or "retweeting" a message on Twitter would enjoy the same classification.

<sup>84</sup> *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493, 497 (1983), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941, 946-47 (D.C. Cir. 1985) (noting elements of this type of Section 8(a)(1) violation: (1) an employee's activity was "concerted" under Section 7; (2) the employer knew the activity was concerted; (3) the concerted activity was protected by the Act; and (4) the adverse employment action was motivated by the concerted, protected activity).

<sup>85</sup> *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

<sup>86</sup> 359 N.L.R.B. No. 37, 2012 WL 6800769, at \*1-2 (Dec. 14, 2012).

<sup>87</sup> *Id.* at \*4 (finding also that termination was unlawful); see also Robert Sprague, *Employee Electronic Communications in a Boundaryless World*, 53 U. LOUISVILLE L. REV. (forthcoming

Board also stressed that the surrounding circumstances made clear that the employees were acting together to defend themselves against criticism of their work.<sup>88</sup>

Things get more complicated when, rather than trying to instigate group action, an individual employee acts alone in an attempt to benefit fellow employees. The NLRB will find concerted action in these cases only if the individual employee's action occurred in conjunction with, or with the authority of, other employees.<sup>89</sup> In *Knauz BMW*, the NLRB addressed this classification's intersection with social media.<sup>90</sup> The case involved a salesman for a BMW dealership who criticized his employer in two sets of photos and comments on his personal Facebook page. One set of comments complained that the quality of food at a customer appreciation event was too poor for a luxury car brand. An ALJ found that these comments were concerted because the salesman had previously talked to other employees about the low-quality food; thus, the comments fell under the "in conjunction with" classification.<sup>91</sup> However, had the co-workers not had those earlier conversations, the employee's Facebook comments likely would not have been concerted under current Board law.

Notably, these cases and others illustrate that the NLRB has not changed its basic approach to concerted activity, nor does it need to. Although electronic communications may be more prone to implicate questions of concertedness, the NLRB's current analysis remains well-equipped to handle these questions. Employees and their advocates, however, should remain aware that electronic media often pose more pitfalls to garnering protection under the NLRA.

### B. Protected Electronic Activity

If employees' actions are concerted they are still vulnerable to employer retaliation or interference unless they are also "protected" by Section 7. That provision, by its own terms, covers only conduct "for the purpose of collective bargaining or other mutual aid or protection."<sup>92</sup> This coverage is

2015) (manuscript at 14–15) (describing other social media cases), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2510919](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510919).

<sup>88</sup> *Hispanics United of Buffalo*, 359 N.L.R.B. No. 37, 2012 WL 6800769, at \*3.

<sup>89</sup> *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 885 (1986), enforced sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); see also *Parexel International*, 356 N.L.R.B. No. 82 (2011) (finding Section 8(a)(1) violation when employer fired employee it suspected would engage in concerted action in the future).

<sup>90</sup> 358 N.L.R.B. No. 164, 2012 WL 4482841 (Sept. 28, 2012).

<sup>91</sup> *Id.* at \*6, \*10 (citing *Meyers* and noting that the sales employees' compensation was tied to the number of cars sold). The NLRB ultimately decided the case on a different issue. *Id.* at \*21–22.

<sup>92</sup> 29 U.S.C. § 157 (2013).

quite broad and, as a result, it is usually not difficult for employees to fit their actions under Section 7. However, there are exceptions.

Most employee complaints, protests, or other concerted activity—whether through electronic or more traditional means—are typically directed to compensation, work hours, benefits, and other terms and conditions of employment.<sup>93</sup> These goals fit squarely under Section 7’s “mutual aid or protection” language, but matters are less clear when the aim of concerted activity is not as directly tied to work conditions, or employees’ means of engaging in concerted activity appear extreme.

The hallmark case for determining whether concerted action is for mutual aid or protection is *Eastex, Inc. v. NLRB*.<sup>94</sup> The case involved employee leaflets opposing a proposal to put a right-to-work provision in the state constitution and the president’s veto of an increase in the federal minimum wage. The Court held that these aims were mutual aid and protection, even though they did not directly affect the employees’ work relationship, because they furthered employees’ interests generally.<sup>95</sup> *Eastex’s* recognition that political activity can be protected is important, for many types of modern, electronic-aided protests involve attempts to change public policy.<sup>96</sup> But there are limits, as many subsequent NLRB and judicial decisions have found certain actions that might indirectly help employees to be unprotected.<sup>97</sup>

One recent example of an employee’s electronic communications not satisfying the mutual aid and protection test is *Knauz BMW*.<sup>98</sup> Although the employee in *Knauz* engaged in what was almost certainly protected activity by complaining about the quality of a customer event and its impact on salespersons’ compensation,<sup>99</sup> the case ultimately turned on another of his Facebook posts. That post, which the NLRB found was the reason for the employee’s termination, made fun of an accident at another of the employer’s

<sup>93</sup> See, e.g., *supra* Part II.

<sup>94</sup> 437 U.S. 556 (1978).

<sup>95</sup> *Id.* at 566, 569–70.

<sup>96</sup> See, e.g., Laura Shin, *Fast Food Worker Protests over Minimum Wage Spread Across the Globe*, FORBES (May 15, 2014, 10:55 AM), <http://www.forbes.com/sites/laurashin/2014/05/15/fast-food-worker-protests-over-minimum-wage-spread-across-the-globe/> (noting use of website to aid international campaign to raise fast-food workers’ minimum wage).

<sup>97</sup> See, e.g., *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 89 (2d Cir. 1990) (trying to influence selection of supervisor not protected); *Local 174, UAW v. NLRB*, 645 F.2d 1151, 1152 (D.C. Cir. 1981) (holding that promotion of political candidates is not protected); *Orchard Park Health Care Ctr., Inc.*, 341 N.L.R.B. 642, 643 (2004) (calling state health department not protected because action concerned nursing home patients, not employees). See generally Paul E. Bateman, *Concerted Activity: The Intersection Between Political Activity and Section 7 Rights*, 23 LAB. LAW. 41 (2007) (stating that under current law, touting a particular candidate or party would not be protected, but appeals to legislators for general workplace issues are protected).

<sup>98</sup> 358 N.L.R.B. No. 164, 2012 WL 4482841 (Sept. 28, 2012).

<sup>99</sup> See *supra* notes 86–87 and accompanying text.

car dealerships.<sup>100</sup> As the Board found, this type of activity was not protected because it did not seek to protect or benefit employees.<sup>101</sup>

In addition to issues with the aim of employees' concerted activity, the manner in which they act can also be important. The NLRB has long declared that employees can lose protection under Section 7 if they engage in certain types of concerted activity—even if it would otherwise be protected—in an impermissible manner. It is hard to define precisely which conduct crosses the line into unprotected status, as the Board typically examines each case on its facts. But the most common examples involve conduct that violates criminal, property, or tort law;<sup>102</sup> breaches a collective-bargaining agreement;<sup>103</sup> threatens or harasses others;<sup>104</sup> or is disloyal to an employer.<sup>105</sup>

The *Hispanics United of Buffalo, Inc.* case<sup>106</sup> is a recent example of how this doctrine can affect electronic communications. In *Hispanics United*, the employer argued that it lawfully terminated employees for harassing another employee through a Facebook post and comments.<sup>107</sup> The employees acted in concert with the aim of defending criticism of their work, which would normally be protected, but the employer claimed that the post and comments lost protection because they were harassing.<sup>108</sup> Although the Board ultimately rejected that allegation because there was not objective evidence of harassment, abusive and harassing language is especially prevalent online.<sup>109</sup> As a result, employees must be careful not to let their emotions run too high when speaking

<sup>100</sup> The NLRB found that the termination was the result of Facebook posts that included photos of an incident at the other dealership in which a salesperson let the child of a customer sit in the driver seat of a car and the child drove the car into a pond; the pictures were accompanied with captions that included “This is your car. This is your car on drugs.” *Knauz BMW*, 358 N.L.R.B. No. 164, 2012 WL 4482841, at \*1 nn.1, 8.

<sup>101</sup> See *id.* at \*10–11 (ALJ finding that posts were not protected).

<sup>102</sup> See *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46 (1942) (work stoppage violated federal criminal statute).

<sup>103</sup> See *Mohave Elec. Co-op. v. NLRB*, 206 F.3d 1183, 1190–91 (D.C. Cir. 2000).

<sup>104</sup> See, e.g., *Clear Pine Mouldings*, 268 N.L.R.B. 1044 (1984) (threatening nonstrikers).

<sup>105</sup> *NLRB v. Local 1229, IBEW (Jefferson Standard)*, 346 U.S. 464, 472 (1953) (noting that “[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer”).

<sup>106</sup> 359 N.L.R.B. No. 37, 2012 WL 6800769 (Dec. 14, 2012); see *supra* notes 86–88 and accompanying text.

<sup>107</sup> *Hispanics United of Buffalo*, 359 N.L.R.B. No. 37, 2012 WL 6800769, at \*3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at \*4 (stating that “legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity” and that the employer improperly terminated the employees based on another employees subjective claim about feeling harassed (citation omitted)).

online because if their language is found to constitute harassment or abuse it will typically fall outside Section 7.<sup>110</sup>

Even if communications are not harassing or abusive, they may fall victim to Section 7's disloyalty exception. Employers frequently push the disloyalty doctrine, which arises from the Supreme Court's holding in *NLRB v. Local 1229, IBEW (Jefferson Standard)*.<sup>111</sup> In *Jefferson Standard*, the Court held that the employer did not violate the NLRA by firing employees whose picket signs disparaged their employer without tying the signs to a labor dispute.<sup>112</sup> The key to the ruling was that although employee criticism of an employer as part of a labor dispute was permissible, criticism that seeks to undermine the employer's business without publicly explaining the criticism's connection to a labor dispute constituted disloyal conduct that was unprotected by Section 7.<sup>113</sup> Under the *Jefferson Standard* analysis, employees have great leeway to criticize employers' practices as long as they explicitly tie those criticisms to a labor dispute. However, failure to make that connection clear could eliminate NLRA protection, and any employer retaliation against the unprotected conduct will go unremedied.<sup>114</sup>

The nature of social media and other digital communications presents a very real risk of a disloyalty finding under the *Jefferson Standard* doctrine. Employees often treat Facebook and other sites as private, even when they are available to the public. When that occurs, what employees may intend as a private airing of criticism may in fact be viewed by the NLRB and courts as unprotected disloyalty. Moreover, because employees are not writing their messages with the public in mind, they are less likely to make clear that the criticisms are part of a labor dispute.<sup>115</sup> In addition, the extremely wide reach of

<sup>110</sup> See, e.g., *Felix Indus., Inc. v. NLRB*, 251 F.3d 1051, 1053–54 (D.C. Cir. 2001) (noting, in case dealing with obscene employee statement, that Board determines whether employee conduct loses Section 7 protection by using a test that looks to (1) the location of the employee's statement; (2) the subject matter of the discussion in which the statement was made; (3) the nature of the statement; and (4) whether the statement was provoked by unlawful employer conduct).

<sup>111</sup> 346 U.S. 464 (1953).

<sup>112</sup> *Id.* at 476–77.

<sup>113</sup> *Id.* at 477.

<sup>114</sup> See *MasTec Advanced Techs.*, 357 N.L.R.B. No. 17, 2011 WL 3017454, at \*5 (July 21, 2011) (stating that employee communications to third parties are protected when the "communication indicated it is related to an ongoing dispute between the employees and the employer and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection" (quoting *Mountain Shadows Golf Resort*, 330 N.L.R.B. No. 1238, 1240 (2000))); see also *Five Star Transp.*, 349 N.L.R.B. 42, 46 (2006) (finding unprotected employee statements that a non-union competitor to their school bus driving company employer was "sub-standard" and "reckless" in part because it had previously hired sex offenders).

<sup>115</sup> A further problem is that most nonunion employees have no idea that they might need to tie their criticisms to a labor dispute.

electronic communications makes employers even more likely to object to online criticism. Employers almost never like employee complaints, but concerns over physical picketing at an individual worksite pales in comparison to the same message being broadcast over the Internet, where it can be picked up by anyone. As a result, employers have increasingly argued that public criticisms on social media sites leaves concerted activity unprotected under *Jefferson Standard*.<sup>116</sup> However, the NLRB thus far has found that comments on Facebook and other social media sites—even those open to the public—are more like conversations overheard by third persons, rather than communications directed at the public.<sup>117</sup> This conclusion will usually preclude employees' concerted activity from being considered disloyal and losing protection under *Jefferson Standard*. Yet, it remains unclear whether the courts will agree or whether the NLRB will consistently find that social media sites are not public, especially if the Board shifts to a Republican-majority in the future.

Another legal attack used by employers against social media criticism is the defamation claim. Under its defamation analysis, the Board will consider statements to be “maliciously untrue and unprotected, ‘if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.’”<sup>118</sup> One example of this issue occurred in *Triple Play Sports Bar & Grille*, where an employee posted criticism of her employer’s tax-withholding policies on her Facebook page, which led to a string of similar comments by other employees and customers.<sup>119</sup> The employer argued that because some of the subsequent comments were defamatory, the employee’s initial post was unprotected.<sup>120</sup> The NLRB rejected this argument and concluded that it would not hold employees liable for defamatory comments posted by others simply because the employees were participating in the same discussion.<sup>121</sup> This finding is significant because, given the potential for third parties to post

<sup>116</sup> See, e.g., *Triple Play Sports Bar & Grille*, 361 N.L.R.B. No. 31, 2014 WL 4182705, at \*4 (Aug. 22, 2014).

<sup>117</sup> *Id.* at \*5.

<sup>118</sup> *MasTec Advanced Techs.*, 357 N.L.R.B. No. 17, 2011 WL 3017454, at \*5 (July 21, 2011) (quoting *TNT Logistics North America, Inc.*, 347 N.L.R.B. 568, 569 (2006), *reversed. sub nom. Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008)) (finding that employees did not knowingly and maliciously make statements to mislead the public); see *Triple Play*, 361 N.L.R.B. No. 31, 2014 WL 4182705, at \*5 (citing *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 64–65 (1966)) (noting that NLRB analysis is based on the Supreme Court’s limitation of defamation claims in the union organizing context to instances of damage and “malice,” which involves knowingly or recklessly saying something false).

<sup>119</sup> 361 N.L.R.B. No. 31, 2014 WL 4182705, at \*4.

<sup>120</sup> *Id.* (arguing, among other things, that statements suggesting that the employer had taken portions of employees’ salaries that should have been submitted for taxes were defamatory and disloyal).

<sup>121</sup> *Id.* at \*6 (stressing that the employees never alleged that their employer took their money).

defamatory comments, a contrary conclusion would have severely undermined legal protection for employees' use of social media.

### C. Computer Use Policies

Although there has been an increase in the number of cases involving employer retaliation against digital collective action, the biggest impact on employer conduct may be the NLRB's willingness to scrutinize company electronic communications policies. The NLRB has long recognized that general policies barring certain communications can unlawfully chill employees' protected speech.<sup>122</sup> One common example is unlawful employer "wage gag rules" that prohibit employees from discussing their pay.<sup>123</sup> These rules, like other employer policies, will violate the NLRA if they directly prohibit protected activity, if the employer applies the policies against protected activity, if employees would reasonably interpret the policies as barring protected activity, or if the employer implemented the policies in response to union activity.<sup>124</sup>

The NLRB's willingness to apply this doctrine to electronic communications policies creates some tension with employers' concerns that these communications might harm the company's brand, lead to employer liability for workplace harassment, and create other possible harms to the business. Employers have criticized the NLRB for being overly aggressive in striking down these policies and thereby leaving them unnecessarily exposed to liability.<sup>125</sup> However, the Board—particularly the General Counsel—has illustrated how an employer can address its legitimate concerns with computer use while remaining on the correct side of the law.<sup>126</sup>

One example of an employer going too far in trying to limit abusive language and protect its reputation occurred in *Knauz BMW*. The employer in that case had implemented a "Courtesy" rule that prohibited "disrespectful" conduct or speech and that banned "language which injures the image or

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<sup>122</sup> See, e.g., *Republic Aviation Corp., v. NLRB*, 324 U.S. 793 (1945); *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004); *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>123</sup> See Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 187 (2004).

<sup>124</sup> *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. at 646–47.

<sup>125</sup> See, e.g., Lindsay Burke, *The NLRB Strikes Down Employer Policies on Social Media and the Confidentiality of Complaint Investigations*, COVINGTON & BURLING LLP (Aug. 13, 2013), <http://www.insideprivacy.com/social-media/the-nlr-strikes-down-employer-policies-on-social-media-and-the-confidentiality-of-complaint-investi/>.

<sup>126</sup> See *infra* notes 131–36 and accompanying text.

reputation of the” employer.<sup>127</sup> The NLRB concluded that this rule was overbroad, especially the reputation language, because employees would reasonably interpret it as prohibiting objections to their working conditions and attempts to seek support from other employees to improve those conditions.<sup>128</sup> Moreover, the *Knauz* policy did not “reasonably suggest” to employees that protected Section 7 activity was not covered by the policy.<sup>129</sup> This lack of clarity was significant because the Board has been clear that ambiguous rules “are construed against the employer.”<sup>130</sup>

In addition to Board case law, the NLRB’s General Counsel has issued three memoranda on social media issues that help illustrate that office’s approach to these cases and, possibly by extension, the Board itself.<sup>131</sup> Of particular use to employers is an examination of overly broad communication policies.<sup>132</sup> In the memorandum, the General Counsel helpfully explained why he considered several employer policies to be unlawful.<sup>133</sup> However, perhaps the most useful aspect of the memorandum for employers is the description of the case involving an employer—ironically, Walmart—that carefully constructed a lawful policy that took care to avoid giving employees the impression that they cannot engage in Section 7 communications.<sup>134</sup> The General Counsel relied heavily on the fact that Walmart’s policy clarified its intended scope and provided examples to minimize confusion.<sup>135</sup> Because the

<sup>127</sup> Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 2012 WL 4482841, at \*1 (Sept. 28, 2012). The rule applied to electronic communications but was not limited to them. *Id.*

<sup>128</sup> *Id.* at \*1–2 (suggesting that merely requiring “courteous, polite, and friendly” criticisms would be lawful); see also Costco Wholesale Corp., 358 N.L.R.B. No. 106, 2012 WL 3903806, at \*2 (Sept. 7, 2012) (finding unlawful a policy prohibiting “statements posted electronically . . . that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Costco Employee Agreement”).

<sup>129</sup> *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 2012 WL 4482841, at \*1.

<sup>130</sup> *Id.* at \*2 (quoting Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127, 2012 WL 3993589, at \*2 (Sept. 11, 2012)).

<sup>131</sup> See LAFE E. SOLOMON, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (May 30, 2012) [hereinafter SOCIAL MEDIA REPORT], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>; LAFE E. SOLOMON, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Jan. 24, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>; LAFE E. SOLOMON, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Aug. 18, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743>. Until the Board issues a decision disagreeing with the General Counsel, as long as employers use policy language that the General Counsel (which has prosecutorial discretion) finds lawful, they will not face an unfair labor practice complaint.

<sup>132</sup> SOCIAL MEDIA REPORT, *supra* note 131, at 19–24.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 20.



policy was not ambiguous, the General Counsel found that the policy was unlikely to lead employees to reasonably fear that protected activity was prohibited.<sup>136</sup> Employers are understandably concerned about their ability to regulate activity on their email networks, but Walmart's example provides them a clear path for achieving their goals while avoiding liability under the NLRA.

*D. Employee Use of Employer Electronic Communications Equipment and Systems*

Although electronic communications provide an additional and often effective tool for employee collective action, there are limitations to its value. As noted, access to the Internet has long been a barrier to employees, albeit a shrinking one.<sup>137</sup> A further problem, however, is related to the fact that many employees have access to the Internet either directly through their employers' equipment or by communicating with each other via work-provided email addresses. This reality gives employers a significant opportunity to limit employees' ability to use electronic communications. The NLRB has struggled in its attempts to regulate employees' access to employer electronic communications systems—first by avoiding the issue altogether for many years, then flipping from giving employers almost total authority to bar use of their digital systems to recently giving employees a limited right to use such systems.

1. The Right To Use Employer Email Systems

*i. The NLRB Initially Allows Employers To Ban Employees' Protected Email*

One of the key issues for employees' ability to engage in electronic communications is their access to employers' computer systems. As explained below, although this need may diminish over time, employee attempts to communicate with each other often still take place on company systems. Yet, whether employees have a right to access such systems has become a flashpoint within the NLRB. Indeed, as this Article was being written, the Board altered its approach to this issue by reversing an earlier decision and concluding that employees possess a limited right to use employers' email systems for NLRA-protected speech.<sup>138</sup>

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<sup>136</sup> *Id.* (noting that merely including a broad disclaimer was typically not sufficient to eliminate confusion).

<sup>137</sup> See *infra* notes 200–03 and accompanying text.

<sup>138</sup> See *infra* Part IV.D.1.ii.

The NLRB first addressed whether, and to what extent, employers could prevent employees from using work-provided electronic communications systems in its 2007 *Register-Guard* decision.<sup>139</sup> The employer in *Register-Guard* had a policy that stated that its “[c]ommunications 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.”<sup>140</sup> As is often the case, this policy was observed in the breach, with many employees openly using company email for personal solicitations and other messages.<sup>141</sup> The employer, however, did enforce the policy against one of its employees, the president of the local union, who sent union-related emails to employees’ work email addresses.<sup>142</sup> The employer gave the employee written warnings for violating the policy.<sup>143</sup>

Among the issues in *Register-Guard* was whether the employee had a general right to use the employers’ email system for Section 7 purposes.<sup>144</sup> Although the case seemed to fit easily under the traditional *Republic Aviation* test for employee workplace communications, the Board established a much different standard for employers’ control of their electronic and other personal property.

In *Republic Aviation v. NLRB*,<sup>145</sup> the Supreme Court approved a Board rule that limited employers’ ability to stop employees from discussing common concerns while at work. Under *Republic Aviation* and later cases, there is a rebuttable presumption that an employer violates Section 8(a)(1) if it restricts employees’ oral discussions about Section 7 topics during nonwork time and in nonwork areas.<sup>146</sup> The opposite presumption applies to written communications, which employers typically can prohibit as long as employees

<sup>139</sup> *Guard Publ’g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007), *enforced in part, enforcement denied in part*, 571 F.3d 53 (D.C. Cir. 2009) (holding that the employer’s electronic communications policy did not apply to facts in case but not ruling on Board’s analysis).

<sup>140</sup> *Id.* at 1111.

<sup>141</sup> *Id.* (personal messages included baby announcements, party invitations, dog walking services, and United Way solicitations).

<sup>142</sup> *Id.* at 1111–12 (employee sent one email from a work computer and the other two emails from a computer in the union’s office).

<sup>143</sup> *Id.* at 1111.

<sup>144</sup> Another issue was whether the employer violated Section 8(a)(1) by discriminatorily enforcing its policy against union emails. In answering that question in the negative, the Board significantly narrowed its discrimination exception in worksite communication cases. *See id.* at 1138.

<sup>145</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 (1945), *enforcing LeTourneau Co. of Ga.*, 54 N.L.R.B. 1253, 1262 (1944).

<sup>146</sup> *See LeTourneau Co. of Ga.*, 54 N.L.R.B. at 1260; *Peyton Packing Co.*, 49 N.L.R.B. 828, 843–44 (1943); *see also TeleTech Holdings, Inc.*, 333 N.L.R.B. 402, 403 (2001). An employer can rebut the presumption by showing, for instance, production or disciplinary justifications. *See, e.g., NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 110 (1956).

have some way to provide them to co-workers.<sup>147</sup> Another line of cases—*Babcock & Wilcox* and *Lechmere*—addressed employers’ ability to restrict union organizers’ access to the worksite and emphasized that employees have far stronger rights to engage in workplace communications than nonemployees.<sup>148</sup>

When faced with this precedent emphasizing employees’ right to communicate with each other on the employer’s real property, the NLRB in *Register-Guard* concluded that a different rule should apply to use of employers’ personal property. Indeed, the NLRB explicitly stated that employees lacked any right to use employers’ electronic communications equipment for Section 7 communications.<sup>149</sup> This meant that employers had an unfettered ability to prevent employees from using company-owned computer systems—or even company-provided email addresses—as long as the restriction does not fail an extremely narrow discrimination test.<sup>150</sup> This ruling imposed very few limits on employers’ ability to prevent employees from using company email or equipment to communicate with each other. Yet it did not last.

ii. *The NLRB Reverses Course and Recognizes Employees’ Limited Right To Use Company Email in Purple Communications*

In its 2014 *Purple Communications, Inc.*<sup>151</sup> decision, the NLRB reversed *Register-Guard*’s approach to workplace emails.<sup>152</sup> The employer in *Purple Communications* had implemented an electronic communications policy stating, among other things, that

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<sup>147</sup> Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 617, 620 (1962) (noting that a parking lot could allow for distribution).

<sup>148</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533, 541 (1992); *Babcock & Wilcox*, 351 U.S. at 113.

<sup>149</sup> *Register-Guard*, 351 N.L.R.B. 1110, 1114 (2007).

<sup>150</sup> Under the Board’s new discrimination definition in *Register-Guard*, employers can prevent Section 7-protected activity as long as they treat communications of a similar type equally. *Id.* at 1117–18 (allowing, for instance, employer to exclude messages related to “membership organizations,” but permitting messages about other organizations); see also Jeffrey M. Hirsch, *Email and the Rip Van Winkle of Agencies: The NLRB’s Register-Guard Decision*, in *WORKPLACE PRIVACY: HERE AND ABROAD—PROCEEDINGS OF THE NEW YORK UNIVERSITY 61ST ANNUAL CONFERENCE ON LABOR 204–09* (2009) (discussing and criticizing *Register-Guard*’s discrimination analysis).

<sup>151</sup> 361 N.L.R.B. No. 126, slip op. at 1 (Dec. 11, 2014).

<sup>152</sup> The Board in *Purple Communications* expressly declined to address the discrimination issue. See *id.* at 5 n.13.

[e]mployees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities: . . . [e]ngaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company . . . [and] [s]ending uninvited email of a personal nature.<sup>153</sup>

The union in *Purple Communications* objected to the policy in two different ways. First, it sought to overturn a lost election based, in part, on the argument that the policy interfered with employees' Section 7 rights.<sup>154</sup> Second, the union filed an unfair labor practice charge alleging that the policy violated Section 8(a)(1) because employees had a right to use their employer's email system.<sup>155</sup> The Board, in an initial decision, overturned the election for reasons unrelated to the email issue.<sup>156</sup> A few months later, the NLRB addressed the unfair labor practice issue in the case and reversed *Register-Guard*.<sup>157</sup>

In *Purple Communications*, the NLRB adopted a modified *Republic Aviation* analysis. Under this analysis, the Board will "presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time."<sup>158</sup> As is the case under the traditional *Republic Aviation* analysis, an employer may rebut this presumption "by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights."<sup>159</sup> Examples of such special circumstances might include bans on large video or audio files, as well as other messages that interfere with productivity substantially more than a typical email.<sup>160</sup> But even when an employer can show that such circumstances exist,

<sup>153</sup> *Id.* at 2–3.

<sup>154</sup> *Id.* at 3.

<sup>155</sup> *Id.* at 1–2; *see also supra* Section II.C.

<sup>156</sup> 361 N.L.R.B. No. 41 (2014).

<sup>157</sup> *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 1. This decision will be referred to simply as "*Purple Communications*," because the earlier representation decision will not be discussed further in this Article.

<sup>158</sup> *Id.* slip op. at 14.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*; *see, e.g.,* *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1019 (S.D. Ohio 1997) (computer system's performance harmed by spammer's large volume of e-mail); *Washington Adventist Hosp., Inc.*, 291 N.L.R.B. 95, 102–03 (1988) (finding that electronic message was not protected by NLRA because it automatically appeared on computers and required employees to delete it before disappearing).

the limitations must be “no more restrictive than necessary to protect the employer’s interests.”<sup>161</sup>

The NLRB’s rationale for overturning *Register-Guard* flowed primarily from *Republic Aviation* and basic common law.<sup>162</sup> As the Board recognized, *Republic Aviation* and subsequent Supreme Court and NLRB precedent clearly required employers’ real property and business interests to be balanced against employees’ Section 7 right to communicate.<sup>163</sup> The one exception was when *nonemployee* communications were at issue, in which employers’ property interests automatically win out in virtually every case.<sup>164</sup> But that exception did not apply in *Purple Communications* or *Register-Guard* because only *employee* communications was at issue in those cases.

In *Purple Communications*, the Board emphasized that its decision in *Register-Guard* undervalued employees’ right to communicate at work, while it overvalued employers’ property interests.<sup>165</sup> In particular, *Register-Guard* not only gave unwarranted deference to employer interests, but also failed to acknowledge that workplace communications were especially vital to employees’ ability to exercise their Section 7 rights.<sup>166</sup> More specifically, according to the Board, *Register-Guard* also “inexplicably failed to perceive the importance of email as a means by which employees engage in protected communications.”<sup>167</sup> Given the increasing importance of email to workplace conversations, and the widespread employer tolerance of some personal use of email, the Board in *Purple Communications* concluded that the need to recognize protection for such communications was even more important than it had been in 2007, when the Board decided *Register-Guard*.<sup>168</sup> Thus, the Board

<sup>161</sup> *Purple Commc’ns*, 361 N.L.R.B. No. 126, slip op. at 14 (stressing that “that an employer contending that special circumstances justify a particular restriction must demonstrate the connection between the interest it asserts and the restriction . . . [a]nd, 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”).

<sup>162</sup> *Id.* slip op. at 4–5, 9–12.

<sup>163</sup> *Id.* slip op. at 10–11; see also *supra* notes 145–48 and accompanying text.

<sup>164</sup> *Id.* slip op. at 10–11. In *Purple Communications*, the Board stressed that it was not addressing nonemployee communications. *Id.* slip op. at 13.

<sup>165</sup> *Id.* slip op. at 4.

<sup>166</sup> *Id.* slip op. at 4–5. In its opinion, the Board cited, among other sources, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491–92 (1978); *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 325 (1974); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *LeTourneau Co. of Ga.*, 54 N.L.R.B. 1253, 1260 (1944), *aff’d. sub nom. Republic Aviation v. NLRB*, 324 U.S. 793 (1945); Hirsch, *Communication Breakdown*, *supra* note 5, at 1101, 1124.

<sup>167</sup> *Purple Commc’ns*, 361 N.L.R.B. No. 126, slip op. at 4 (noting also that that importance had grown since *Register-Guard* issued).

<sup>168</sup> *Id.* slip op. at 6–8. The Board also distinguished and criticized earlier cases dealing with employee use of employers’ personal equipment. *Id.* slip op. at 8–11; see also Hirsch, *Van*

decided to reverse its earlier decision and use the *Republic Aviation* standard that applies other types of workplace employee communications.

Although the Board relied upon *Republic Aviation*, it recognized that email has some differences from more traditional communications and adjusted the *Purple Communications* analysis accordingly. For instance, unlike in-person communications under *Republic Aviation*, employees' right to use email does not depend on whether an employee sending or reading protected email is in a work area.<sup>169</sup> This is a sensible alteration, as there is little legitimate need to protect work areas against email communications when employees already use email for work purposes.<sup>170</sup> Moreover, it is difficult to imagine how the Board or parties could apply a distinction between work and nonwork areas when email is involved.<sup>171</sup>

The Board also refused to apply the traditional distinction between oral solicitations and written distributions.<sup>172</sup> Under NLRB interpretations of *Republic Aviation*, employers can ban oral solicitations only in work areas and during work time, but could ban written distributions virtually any place and any time at work, as long as employees had some alternate means of distributing the written material at the worksite.<sup>173</sup> Email straddles the line between oral and written distributions because it is written like a distribution (without the litter problem that was part of the rationale for lesser protection of written material)<sup>174</sup> but can also be intended as a solicitation like oral communications.<sup>175</sup> Thus, keeping the distinction would have required the NLRB to make complex determinations based on the substance of individual emails.<sup>176</sup> As a result, the Board wisely chose to abandon this distinction when email was at issue. Indeed, a good case can be made that this distinction never

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*Winkle*, *supra* note 150, at 193–94 (criticizing equipment cases relied upon by *Register-Guard* as, among other things, never substantively discussing issue).

<sup>169</sup> *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 13–14. Under the *Republic Aviation* analysis, employers can presumptively ban communications in work areas. See *TeleTech Holdings, Inc.*, 333 N.L.R.B. 402, 403 (2001).

<sup>170</sup> See Hirsch, *Van Winkle*, *supra* note 150, at 200–01 (arguing for elimination of work/nonwork area distinction for electronic communications).

<sup>171</sup> See *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 31–34 (Johnson, M., dissenting).

<sup>172</sup> *Id.* slip op. at 11–12.

<sup>173</sup> *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 616, 620 (1962) (noting parking lots and entrance to company building).

<sup>174</sup> *Id.*

<sup>175</sup> See *supra* note 169.

<sup>176</sup> Hirsch, *Van Winkle*, *supra* note 150, at 203 (discussing the NLRB Division of Advice's complex proposed analysis for distinguishing emails that are solicitations from emails that are distributions).

made sense in any situation,<sup>177</sup> but the Board cannot be faulted for striking down the distinction only as much as necessary to decide the case at hand.

Although the work area and written/oral distinctions do not apply to email, in *Purple Communications* the Board did maintain the condition that employees' presumptive right to communicate at work is limited to nonwork time.<sup>178</sup> This will prove complicated in some cases because when employees frequently use email, they often have jobs without clearly defined work and break times.<sup>179</sup> When that is the case, presumably, the Board will not allow the employer to create a rule limiting email usage only to nonwork time, as that would essentially gut the right espoused in *Purple Communications*. But, even if this prediction becomes reality, there will be gray areas that the Board will have to address.<sup>180</sup>

One peculiar aspect of *Purple Communications* is that the Board limited its decision to employee *emails*, reserving judgment on other electronic communications, such as texts or instant messaging.<sup>181</sup> The Board was likely trying to keep its decision narrow, but it will have to examine these other forms of communication at some point and it is curious why it did not do so in *Purple Communications*. When that time comes, it is likely that the *Purple Communications* presumption will apply, as other forms of electronic communication share enough characteristics with email to enjoy the same presumption.<sup>182</sup> However, one exception could be the use of an employer's social media or other public communications; unlike more personal emails and texts, those types of communications can often be identified as the employer's own communications.<sup>183</sup>

The Board also refused to state that employees have a general right to use employers' email systems.<sup>184</sup> This means that the *Purple Communications* presumption applies only when employers provide employees permission to use company email.<sup>185</sup> The limitation is an understandable concession to

<sup>177</sup> See *id.* at 201–02 (arguing for elimination of oral and written communications distinction in all cases).

<sup>178</sup> *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 14–15.

<sup>179</sup> *Id.* slip op. at 15 n.72; see also *id.* slip op. at 25 (Miscimarra, M., dissenting).

<sup>180</sup> For instance, it may not be clear if there are time periods when an employer legitimately expects employees to ignore personal emails.

<sup>181</sup> *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 14 & n.70.

<sup>182</sup> See *id.* slip op. at 22–23 (Miscimarra, M., dissenting) (noting importance of Facebook, Twitter, and other social media for collective action); *id.* slip op. at 30 (Johnson, M., dissenting) (arguing that rationale of majority decision applies to “any kind of employer communications network”).

<sup>183</sup> See *id.* slip op. at 14 n.70 (noting refusal to rule on social media).

<sup>184</sup> *Id.* slip op. at 14–16 (noting also that it was not addressing nonemployees' right to use employer email).

<sup>185</sup> *Id.* slip op. at 15.

employers' interests in not extending email access to employees who do not need it for their jobs. This limitation will prevent some employees from taking advantage of email for protected communications, but it is unclear whether it will be a significant number. In some cases, employers may choose not to provide company email to avoid falling under *Purple Communications*, but that is not likely to happen often in situations where employee collection action would benefit from email access. That is because when employees frequently use email for work—and, therefore, email will be especially effective for protected communications—employers will be loath to restrict access and harm their business operations.

### iii. A Free Speech Objection to Purple Communications

It is worth briefly noting Member Johnson's First Amendment objection to the majority's decision in *Purple Communications*. Member Johnson argued that the decision conflicts with the First Amendment and Section 8(c)<sup>186</sup> of the NLRA because employers will have to pay for employees to write and read speech that is hostile to them during working time,<sup>187</sup> will have to pay the "licensing, electricity, and maintenance bills" that allow the writing and transmissions of employees' hostile speech, and will have to pay "fees and costs, plus the costs of incrementally adding more storage space" to archive this speech.<sup>188</sup> These arguments are unconvincing.

First, contrary to Member Johnson's position,<sup>189</sup> the costs involved with allowing protected emails, if any, are miniscule at best; except for the most extreme cases,<sup>190</sup> hostile employee speech will be such a tiny percentage of the overall number of workplace emails that the marginal cost will be virtually zero.<sup>191</sup> Second, Member Johnson's concern proves too much. In particular, his attempt to tie this case to *Harris v. Quinn*<sup>192</sup> falls flat. The

<sup>186</sup> 29 U.S.C. § 158(c) (2013) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.").

<sup>187</sup> However, the majority decision clearly limited the presumption to nonworking time. *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 15 ("The presumption that we apply is expressly limited to nonworking time.").

<sup>188</sup> *Id.* slip op. at 56 (Johnson, M., dissenting).

<sup>189</sup> *Id.* slip op. at 57 (Johnson, M., dissenting).

<sup>190</sup> See *supra* note 160.

<sup>191</sup> See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 34 (1986) ("[B]ecause the interest on which the constitutional protection of corporate speech rests is the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views clearly identified as those of the speaker is *de minimis*."); see also Hirsch, *Communication Breakdown*, *supra* note 5, at 1122–23.

<sup>192</sup> 134 S. Ct. 2618 (2014).



majority's concern in the *Harris* dicta that Member Johnson relied upon—a state employer's agreement that employees must pay some dues to a union<sup>193</sup>—is a far cry from a requirement that employers must allow employees to use their pre-existing access to company email for NLRA-protected messages. Indeed, his argument would make the *Republic Aviation* rule unconstitutional, as that case also requires employers to “pay”—via the costs of owning and maintaining real property—for employees to engage in hostile speech.<sup>194</sup>

The *Purple Communications* majority highlighted the problems with Member Johnson's argument by making an analogy to Google transmitting Gmail messages, which no one confuses as speech created or paid for by the company.<sup>195</sup> Member Johnson responded that use of employers' email systems is different from Gmail because there is confusion about whether the messages come from the employer, but he fails to explain why that is true other than noting that the email address might include the employer's account name.<sup>196</sup> However, no reasonable employee—especially not one with even a passing familiarity with his or her company's email system—would think that such messages are employer speech. Moreover, Member Johnson's entire argument is built on his objection to employers having to tolerate hostile speech. Yet, how can anyone reasonably be confused about whether an employer sponsored speech hostile to it? Finally, a further analogy may help illustrate the problems with Member Johnson's argument: the Federal Communication Commission's “must carry” rule, which requires cable companies to transmit certain local broadcast channels.<sup>197</sup> The Supreme Court explicitly rejected cable companies' argument that the must carry rule unconstitutionally forced them “to transmit speech not of their choosing.”<sup>198</sup> Given that a company can be forced to carry content from another company (and possible competitor), then surely an employer can be required to allow employees to engage in NLRA-protected speech through their pre-existing access to the company's email system.

#### iv. *The Impact of Purple Communications*

At least until the White House changes political parties and the Board flip-flops again, *Purple Communications* will remain the governing labor law for employee email access at work. This new reality begs a larger question: what is the impact of the *Purple Communications* rule? There is not a clear

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<sup>193</sup> *Id.* at 2628–34.

<sup>194</sup> *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 16 n.78.

<sup>195</sup> *Id.* slip op. at 16.

<sup>196</sup> *Id.* slip op. at 58 (Johnson, M., dissenting) (noting the possibility of an “employer.com” address and that his main concern is not confusion, but that an employer will have to subsidize another's speech).

<sup>197</sup> 47 U.S.C. § 534(b)(1)(B) (2013).

<sup>198</sup> *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653–56 (1994).

answer to this question, a reality perhaps best illustrated by Member Johnson's dissent, which alternates between decrying the major harms that the majority decision will cause and dismissing the decision as inconsequential.<sup>199</sup>

Contrary to Member Johnson's claims, the impact on employers will likely be small. Indeed, email is almost certainly the least costly form of employee communication from the employer's perspective.<sup>200</sup> On the other hand, where employees regularly use email, *Purple Communications* could provide an extremely useful tool for employees to engage in collective action. This is particularly true when employees' access to electronic communications is dependent on employer equipment. However, that condition will become less true over time as more employees obtain their own access through smartphones and other devices. Indeed, in many of today's workplaces employees already own their own mobile devices and have personal cellular plans that do not require the use of any employer-owned system.<sup>201</sup> As this trend grows, the reach of *Purple Communications* will diminish.<sup>202</sup> Yet, even if employees have their own devices, using them for organizing purposes requires access to employees' email addresses or text numbers. Because employer email systems make this type of information more readily accessible and usable, *Purple Communications* will remain relevant for some time.<sup>203</sup>

## 2. Employer Surveillance of Email

Although in *Purple Communications*, the Board recognized employees' right to use company email for Section 7 purposes, their freedom to exercise

<sup>199</sup> To be more accurate (and perhaps more fair), Member Johnson sees the effect on employees' rights as minor and the effect on employers' interests as significant. See, e.g., *Purple Commc'ns*, 361 N.L.R.B. at \*61 (Johnson, M., dissenting) (stating that the Board has "created a sweeping new rule that . . . threatens to undermine an employer's right . . . to have a productive workforce" and that the Board "should not be burning up government resources . . . by refighting a war over terrain that indisputably no longer matters today to Section 7, if it ever did in the past").

<sup>200</sup> See Hirsch, *Communication Breakdown*, *supra* note 5, at 1222–23.

<sup>201</sup> Recent estimates are that just over half of U.S. employees own devices that they use at work. See Rachel King, *Forrester: 53% of Employees Use Their Own Devices for Work*, ZDNET (June 13, 2012), <http://www.zdnet.com/blog/btl/forrester-53-of-employees-use-their-own-devices-for-work/79886>, cited in Sprague, *supra* note 87 (discussing blurring of distinction between personal and work electronic communications).

<sup>202</sup> See Christine Neylon O'Brien, *Employer E-mail Policies and the National Labor Relations Act: D.C. Circuit Bounces Register-Guard Back to the Obama Board on Discriminatory Enforcement Issue*, 61 LAB. L.J. 5, 12 (2010) (noting growth and advantages of employees' use of own electronic communication equipment).

<sup>203</sup> Cf. NLRB Representation-Case Procedures, 79 Fed. Reg. 74307, 74335 (proposed Dec. 15, 2014) (adding new requirement that "Excelsior lists"—which traditionally were home addresses of employees eligible to vote in a union election—include employee email addresses if available to the employer).

that right is dependent in part on the risk of employer surveillance. On this topic, the NLRB in *Purple Communications* helpfully provided guidance, even though there was no direct surveillance issue raised in the case.

With their newfound right to use employers' email systems, employees must be cognizant of employers' ability to monitor that email. Although retaliating against employees for sending protected email is unlawful, retaliation is already a common and hard-to-remedy problem.<sup>204</sup> Moreover, email monitoring can provide employers with information that is useful for legal attempts to thwart collective action, such as employees' goals and strategies. Therefore, while electronic collective action provides many benefits to employees, it also exposes those efforts in ways that traditional coordination does not.

The risk involved for employees using electronic communications via workplace equipment or systems is that their employers have easy access to those communications.<sup>205</sup> Many employees appear to have a false sense of security when it comes to privacy—albeit one that may be diminishing as recent consumer-related online security breaches get headlines.<sup>206</sup> However, employees need to understand that employers have significant leeway to monitor their computer systems. Indeed, the federal law most directly aimed at maintaining privacy for online information, the Stored Communication Act, provides employers with a significant exemption to search their own communication systems.<sup>207</sup>

<sup>204</sup> See Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 188 (2001) (arguing that Board damage awards in discharge cases involve significant limits and delays).

<sup>205</sup> Employers can also use other technologies to monitor employee activity, sometimes in ways that provide information about protected activity. See William A. Herbert & Amelia K. Tuminaro, *The Impact of Emerging Technologies in the Workplace: Who's Watching the Man (Who's Watching Me)?*, 25 HOFSTRA LAB. & EMP. L.J. 355, 370–86 (2008) (discussing global positioning systems (GPS) and radio frequency identification (RFID) technology at work).

<sup>206</sup> See, e.g., Robin Sidel, *Home Depot's 56 Million Card Breach Bigger Than Target's*, WALL ST. J. (Sept. 18, 2014), <http://www.wsj.com/articles/home-depot-breach-bigger-than-targets-1411073571>. Employees may have state tort claims for invasion of privacy based on employer monitoring, but it is usually difficult to win such claims. See Ariana R. Levinson, *Workplace Privacy and Monitoring: The Quest for Balanced Interests*, 59 CLEV. ST. L. REV. 377, 391–94 (2011) (describing state invasion of privacy tort). Also, public employees may have Fourth Amendment claims, but those can be difficult to win as well, especially if employers notify employees that they may monitor electronic communications. See *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (assuming, but explicitly refusing to decide, whether employee had a reasonable expectation of privacy in sent texts); cf. Herbert, *Can't Escape*, *supra* note 74, at 482–502 (discussing constitutional protections for employees' social media use); Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597 (2012) (discussing First Amendment protections for public teachers' social media use).

<sup>207</sup> Although the Stored Communications Act prohibits intentionally accessing stored electronic communications without authorization, it provides exceptions for, among other things, the monitoring of one's own electronic communication systems. See 18 U.S.C. § 2701(c)(1)

Labor law provides some protection against employer monitoring through its surveillance doctrine, but it is unclear how much this helps. The NLRB has long concluded that, absent special circumstances, an employer violates Section 8(a)(1) by observing employees engaged in protected activity or giving employees an impression that it is making such observations.<sup>208</sup> This rule attempts to prevent employers from chilling Section 7 rights through their monitoring, or apparent monitoring, of employees engaged in protected conduct.<sup>209</sup> However, an employer can justify extra levels of monitoring when it can show that a reasonable, objective justification for the surveillance.<sup>210</sup>

Even prior to *Purple Communications*, the NLRB's surveillance doctrine was relevant to electronic communications.<sup>211</sup> However, in contrast to many instances of traditional surveillance—such as photography, videotaping, and physical observation—it is very easy for employers to monitor their own electronic communications systems and very hard for employees to detect such monitoring.<sup>212</sup> As a result, even though there has been a risk of violating

(2013); see also William A. Herbert, *Workplace Electronic Privacy Protections Abroad: The Whole Wide World Is Watching*, 19 U. FLA. J.L. & PUB. POL'Y 379, 384 (2008); Ariana R. Levinson, *Toward a Cohesive Interpretation of the Electronic Communications Privacy Act for the Electronic Monitoring of Employees*, 114 W. VA. L. REV. 461, 492–93, 526–29 (2012) (describing possible applicability of Wiretap Act, as well as exceptions to Stored Communications Act); 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, 38–40 (2000) (citing exceptions). However, the Stored Communications Act does provide more protection against employer attempts to access employee communications from sites that it does not own. See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 879–80 (9th Cir. 2002) (holding that employer's unauthorized access to employee's personal website may violate Stored Communications Act, although noting that under 18 U.S.C. § 2701(c)(2), no violation would exist if an authorized user provided access to the employer).

<sup>208</sup> See, e.g., *Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (stating that photographing or videotaping Section 7 activity has unlawful tendency to intimidate employees). The Board will find that an unlawful impression of surveillance exists where, “under all the relevant circumstances, reasonable employees would assume from the [employer's action or] statement . . . that their union or other protected activities had been placed under surveillance.” *Frontier Tel. of Rochester, Inc.*, 344 N.L.R.B. 1270, 1275–76 (2005).

<sup>209</sup> *Nat'l Steel*, 156 F.3d at 1271–72; *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984) (noting that surveillance has “natural, if not presumptive, tendency to discourage [union] activity”).

<sup>210</sup> See *Nat'l Steel*, 156 F.3d at 1271 (citing legitimate security interests, gathering evidence for legal proceeding, or reasonable anticipation of misconduct or violence).

<sup>211</sup> See *Frontier Tel. of Rochester*, 344 N.L.R.B. at 1275 (finding impression of surveillance of message posted on Yahoo! web page); Hirsch & Hirsch, *supra* note 58, at 1177–79 (arguing that the NLRB could look to whether an employer's monitoring of electronic communications consists of normal screening for improper use (e.g., pornography or confidential information) or whether the screening generally provides information about the content of communications and the senders' identities).

<sup>212</sup> See Levinson, *Electronic Monitoring of Employees*, *supra* note 207, at 469–70 (discussing employer electronic monitoring practices). Monitoring third-party systems, such as an

Section 8(a)(1), it is unsurprising that many employers regularly monitor communications on their digital networks and equipment.<sup>213</sup> *Register-Guard*'s overly exuberant concern for employer personal property might have exacerbated this problem by giving employers hope that the Board would provide increased legal protection to engage in such monitoring. But in *Purple Communications*, the NLRB clarified its approach to electronic monitoring by emphasizing that its surveillance doctrine would apply to email, but suggesting that a somewhat employer-friendly analysis would apply.

The Board explicitly stated that its *Purple Communications* rule “does not prevent employers from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability.”<sup>214</sup> These reasons are sensible, as employers have valid concerns about these work-related issues, especially given potential liability for electronic harassment.<sup>215</sup> Yet, in responding to employers’ concern that giving employees the right to use employer email would unfairly subject them to liability under the surveillance doctrine, the Board suggested that employers would retain broad protection for their monitoring efforts.

The crucial aspect of the Board’s approach to electronic surveillance was its comparison of email monitoring to the monitoring of public collective activity.<sup>216</sup> Under the Board’s traditional surveillance doctrine, it is lawful to observe employees who publicly engage in collective action unless an employer increases its normal monitoring or otherwise does something different in reaction to protected activity.<sup>217</sup> Based on this public activity rule, the Board in *Purple Communications* concluded that an employer can lawfully gather information about protected collective action as part of its normal monitoring of email.<sup>218</sup>

The Board’s approach is problematic for several reasons. First, it is not obvious why email should be classified in the same manner as public activity.

employee’s social media account, is more difficult for employers, although just as hard for employees to detect. See *infra* note 223.

<sup>213</sup> One 2007 survey found that 43% of employers monitored the email of its employees; 73% of those employers use technology and 40% have individuals read email. AM. MGMT. ASS’N & EPOLICY INST., 2007 ELECTRONIC MONITORING & SURVEILLANCE SURVEY (Feb. 28, 2008), available at <http://www.plattgroupllc.com/jun08/2007ElectronicMonitoringSurveillanceSurvey.pdf>.

<sup>214</sup> *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 15 (Dec. 11, 2014).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* slip op. at 16 (citing *Eddyleon Chocolate Co.*, 301 N.L.R.B. 887, 888 (1991)).

<sup>218</sup> *Id.* slip op. at 16 & n.75 (stressing that increased monitoring in reaction to collective activity, such as a union campaign, will still be unlawful).

Unlike picketing or other types of public acts, there is typically a veneer of privacy that attaches to email. In other words, although employees may be aware that their employer can monitor email, employees who send messages to select individuals—as opposed to a company listserv or public social media site—are actively limiting their audience in a way that traditional public collective activity does not.<sup>219</sup>

Second, the Board's approach seems overly broad, as it permits and encourages employers to engage in widespread and comprehensive monitoring as a matter of policy.<sup>220</sup> As a result, employee communications will always be known to such employers.<sup>221</sup> That is always a risk when using an employer's email system, but by making such monitoring lawful, the NLRB is undermining the very right to use email that it established in *Purple Communications*. The policy underlying the surveillance doctrine is the recognition that monitoring, or the appearance of monitoring, chills employees' willingness to engage in collective action.<sup>222</sup> By refusing to place limits on employer monitoring of emails, including requiring prior notice,<sup>223</sup> the NLRB is allowing that same chilling to occur. Given that risk, the Board might have considered limiting employers' general ability to read the substance of employee emails, such as requiring the use of automated filtering software or a legitimate business reason before a company official can read emails.<sup>224</sup>

Employer monitoring of employee electronic communications is also a threat even when the employer does not control the communications systems. Employees' frequent use of social media to complain about work conditions has not gone unnoticed by employers.<sup>225</sup> When these sites are publicly

<sup>219</sup> The Board typically excuses observation of public collective activity because “[i]f a union wishes to organize in public it cannot demand that management must hide,” *Larand Leisureslies, Inc.*, 213 N.L.R.B. 197, 205 (1974), or that if “[u]nion representatives and employees who choose to engage in their [u]nion activities at the [e]mployer's premises should have no cause to complain that management observes them.” *Emenee Accessories, Inc.*, 267 N.L.R.B. 1344 (1983) (quoting *Milco Inc.*, 159 N.L.R.B. 812, 814 (1966), *enforced*, 388 F.2d 133 (2d Cir. 1968)).

<sup>220</sup> See *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 59–60 (Johnson, M., dissenting) (criticizing majority for failing to provide employers more guidance on what kind of email monitoring will be lawful).

<sup>221</sup> See *id.* slip op at 60 (arguing that majority decision will mean that “it will be impossible for an employer to effectively monitor employee use of email, without examining the content to some degree, and creating the impression that it is surveilling union activity”).

<sup>222</sup> See *Nat'l Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998); *Frontier Tel. of Rochester, Inc.*, 344 N.L.R.B. 1270, 1276 (2005), *enforced*, 181 F. App'x. 85 (2d Cir. 2006).

<sup>223</sup> The Board noted that employers could lawfully notify employees of monitoring for legitimate reasons, but did not require it. *Purple Commc'ns*, 361 N.L.R.B. No. 126, slip op. at 15.

<sup>224</sup> See *supra* note 213 (noting employers' use of technology to monitor email).

<sup>225</sup> See *supra* notes 86–87 and accompanying text.

accessible, employers are free to read what their employees are saying, likely without fear of a surveillance violation under the NLRA.<sup>226</sup> Employees, of course, can make access to their social media sites private in an attempt to avoid employer monitoring. However, many employers have attempted to get around these attempts to maintain privacy by, among other things, conducting forensic searches of company equipment to find passwords for employees' personal email accounts<sup>227</sup> and even demanding that employees provide their online passwords as a condition of employment.<sup>228</sup> This latter tactic has become enough of a real or perceived problem that 18 states have enacted statutes banning employers from demanding that employees or job applicants provide passwords to their personal online accounts.<sup>229</sup> For employees in states without this protection, aggressive employers risk only their reputation if they want to demand such information and thereby stifle a significant outlet for employee communications.

## V. CONCLUSION

The explosion in electronic communications over the last couple of decades has transformed the way we communicate. This transformation has not gone unnoticed by workers, who increasingly are using electronic communications as part of their efforts to improve their work conditions. However, in most cases, reliance on technology has played a small role in worker collective action. In order for workers and their advocates to take full advantage of the possible benefits of electronic communications, they must explore new ways that technology might aid their attempts to communicate with the public and other workers, as well as to collect and share information.

One of the barriers to the expansion of workers' use of electronic communications are employers, who often have strong interests in limiting or monitoring these communications. Labor and other laws are still developing ways to ensure that workers have the opportunity to use technology as part of

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<sup>226</sup> See *supra* note 219; *Facebook*, *supra* note 76, at 1008–09 (noting also that it is unclear whether the NLRB will find surveillance when a manager gains access to a Facebook posting from a “friend” of the relevant employee, even though the manager lacks direct access to the site).

<sup>227</sup> See Sprague, *supra* note 87, at 19–23 (describing cases brought by employees under the Stored Communications Act and state common-law privacy claims); Levinson, *Workplace Privacy*, *supra* note 206, at 388–94 (discussing state statutes and common-law claims that might give protection to employees' electronic communications).

<sup>228</sup> See Sprague, *supra* note 87, at 20–21.

<sup>229</sup> See *id.* at 20–21 nn.135–37 (listing state statutes, as well as proposed statutes in 19 other states and the U.S. Congress); see also Ariana R. Levinson, *Social Media, Privacy, and the Employment Relationship: The American Experience*, 2 SPANISH LAB. L. & EMPLOY. REL. J. 15, 16–21, 23–25 (2013), available at <http://ssrn.com/abstract=2265609> (discussing state and federal constitutional limits employers' viewing employees' and applicants' social media sites).

their collective actions, while also balancing the legitimate business concerns of employers. Recent advances in NLRB law have improved this balance by providing employees with more access to workplace electronic communications, but there is still a great deal of uncertainty and opportunity for employer interference. Ultimately, however, the law can only accomplish so much. If workers want to be able to take full advantage of the digital age, they must take the initiative and develop more and better uses of modern communications technology.



