UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

PURPLE COMMUNICATIONS, INC.	)		
	)	Case Nos.	21-CA-095151
and	)		21-RC-091531
	)		21-RC-091584
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)		
	)		

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in response to the National Labor Relations Board's (NLRB or the Board) Notice and Invitation to File Briefs, dated April 30, 2014. The brief urges the Board to affirm the holding of its decision in *Register Guard,* 351 N.L.R.B. 1110 (2007), *enf. granted,* 571 F.3d 53 (D.C. Cir. 2009).

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 of the nation's largest private sector companies, collectively providing employment to millions of people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and other HR compliance requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The vast majority of EEAC's member companies are employers subject to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq*., as well as Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C §§ 2000e *et seq.* and other federal employment nondiscrimination laws. A large majority also are federal government contractors subject to the nondiscrimination and affirmative action requirements of Executive Order 11,246, the Vietnam-Era Veterans Reemployment Adjustment Act (VEVRAA), 38 U.S.C. §§ 4211 *et seq.*, and

Section 503 of the Rehabilitation Act of 1973 (Section 503), 29 U.S.C. § 793. As such, EEAC's interest in whether employers will continue to be allowed lawfully to restrict non-work-related employee access to corporate email and information technology systems includes, but is much broader than, the potential NLRA issues raised by the Board's questions. Because of its interest in both the application of the nation's fair employment laws, as well as the effective mitigation of enterprise-wide risk, the issues presented in this case are extremely important to the nationwide constituency that EEAC represents.

EEAC has an interest in, and a familiarity with, the practical issues and policy concerns raised in this case. Indeed, because of its significant experience in these matters, EEAC is well-situated to brief this Board on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Purple Communications provides communication services to the hearing impaired, primarily in the form of sign language interpretation during video calls. *Purple Communs., Inc.*, Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584 (N.L.R.B. Oct. 24, 2013), at 2. The company maintains 15 call centers throughout the U.S., which are staffed and provide video call interpretation services 24 hours a day, seven days a week. *Id.* This matter arises in the context of a 2012 union organizing campaign at seven of the call centers. *Id.*

At issue are two workplace rules contained in the company's employee handbook. *Id.* at 3-4. The first prohibits certain employee conduct, including "causing, creating, or participating in a disruption of any kind during work hours on Company property." *Id.* at 3. The second rule regulates employee use of company-provided equipment, including email, computer, cell and/or

smart phones and voicemail systems. *Id.* at 3-4. It establishes that such equipment is provided and maintained "to facilitate Company business," and should be used for business purposes only. *Id.* at 3.

In addition, the policy provides that "employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment" to, among other things, engage in "activities on behalf of organization [sic] or persons with no professional or business affiliation with the Company" or "sending uninvited email of a personal nature." *Id.* at 3-4.

The Communications Workers of America filed unfair labor practice charges with the Board, claiming that the two rules unlawfully interfered with employees' rights to engage in protected concerted activity. *Id.* at 1, 9. Thereafter, the Board's General Counsel issued a complaint alleging that Purple Communications' actions violate Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA). *Id.* at 2, 4. An Administrative Law Judge (ALJ) found that the first policy in question represents an "overly broad restriction" that impermissibly interferes with employee NLRA rights. *Id.* at 5.

As to the email use policy, however, the ALJ observed that in *Register Guard*, 351 N.L.R.B. 1110 (2007), *enf. granted*, 571 F.3d 53 (D.C. Cir. 2009), the Board held that "employees have no statutory right to use the [Employer's] e-mail system for Section 7 purposes" and thus an employer's rule prohibiting the use of such a system for "non-job-related solicitations" does not violate the Act. *Id.* at 5-6.

The General Counsel has appealed the ALJ's decision to the full Board, which on April 30, 2014 published a Notice and Invitation to File Briefs addressing the following questions:

1. Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?

2. If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?

3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?

4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?

5. Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register Guard* was decided. How should these affect the Board's decision?

SUMMARY OF ARGUMENT

The Board should affirm the holding of its decision in *Register Guard*, 351 N.L.R.B. 1110 (2007), *enf. granted*, 571 F.3d 53 (D.C. Cir. 2009), that employees do not have a statutory right under the National Labor Relations Act (NLRA) to use an employer's equipment or media for non-work purposes, so long as the employer's restrictions are applied in a nondiscriminatory manner. In *amicus curiae* EEAC's view, were the Board to reconsider *Register Guard* and, in doing so, require that employers provide broad access to email and communications systems for non-work-related purposes, the practical consequences would be substantial.

Among other things, barring employers from maintaining and enforcing nondiscriminatory rules restricting use of company-provided email and information systems for

any reason unrelated to completing work-related tasks would expose them to enterprise-wide risk of substantial harm not only to their business operations, but also to their employees and customers. In addition to interfering with productivity, open company email access for any non-work reason increases significantly the likelihood of damaging data security breaches that can occur when, for instance, email-transmitted viruses are introduced into a system, or when a large email attachment fatally corrupts vital files or overloads the network.

A rule restricting an employer's ability to limit corporate email use to work-related tasks also invariably would make it easier for employees to engage in workplace misconduct, while making it much more difficult for the employer to prevent and correct EEO violations. For example, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000-e *et seq.*, makes it unlawful for employers to discriminate on the basis of race, color, religion, sex or national origin. Workplace harassment is a form of unlawful discrimination under Title VII.

In the context of sexual harassment specifically, the U.S. Supreme Court has held that employers must make proactive efforts to prevent such workplace misconduct. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Where unsuccessful in preventing sexual harassment, employers must act swiftly to remedy the violation and to prevent recurrence. Because many of the behaviors and actions that can create a hostile working environment can be carried out more extensively and with much greater ease via email, a broad personal email use rule would only exacerbate the risk of EEO noncompliance. Under such a scenario, it would be extremely difficult, if not impossible, for employers to police employee conduct and prevent abuse. Such a requirement also could

severely impair employer efforts to mitigate risk in other areas, such as in cyber security, trade secrets, and the like.

To the extent that allowing broad employee access to employer communications for reasons unrelated to the particular job the employee is tasked with performing raises substantial code of conduct, cyber security, and other business risks that significantly outweigh any potential convenience gained as a result of such access, the Board should decline the General Counsel's invitation to overturn its decision in *Register Guard*, which permits employers to prohibit *all* non-work email use, so long as those restrictions do not discriminate against NLRA-protected activity. If the Board decides to overturn *Register Guard* and the long-standing Board precedent underlying that decision, however, any alternative standard it establishes should allow employers, at a minimum, to place reasonable restrictions on the time and manner of employee access to company-provided employer electronic communications for non-work-related purposes.

ARGUMENT

I. THE BOARD SHOULD REAFFIRM *REGISTER GUARD'S* SOUND RULE, BASED ON WELL-ESTABLISHED PRINCIPLES, THAT EMPLOYERS MAY LAWFULLY PROHIBIT NON-WORK-RELATED USE OF COMPANY-PROVIDED EMAIL SYSTEMS SO LONG AS THEY DO NOT ACT IN A MANNER THAT DISCRIMINATES AGAINST SECTION 7 ACTIVITY

The first question posed by the Board in its April 30, 2014 Notice and Invitation to File Briefs is whether it should "reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes." *Purple Communs., Inc.*, 21-CA-095151, 21-RC-091531, 21-

RC-091584 (Apr. 30, 2014) (NOTICE AND INVITATION TO FILE BRIEFS). For all of the reasons explained below, *amicus curiae* EEAC's answer to that question respectfully is no.

The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq*., makes it unlawful for an employer to interfere with, restrain or coerce employees in the exercise of their rights to organize, participate in unions, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §§ 157, 158(a)(1). These provisions have been interpreted to prohibit employers from adopting and enforcing rules that unduly restrict the ability of employees to communicate about matters relating to unions and working conditions.

At the same time:

> The NLRA was enacted to improve the capitalist system. Consequently, capitalism's basic assumptions concerning private ownership of property became an implicit part of the statute. As a result, several rights of employers, although not expressly provided for in the Act, have been read as essential ingredients in the statutory scheme.
>
> Chief among these are the employer's property rights. The Supreme Court articulated the statute's foundation of respect for property rights in *NLRB v. Babcock & Wilcox Co*.: "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."

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, 6 (2000) (footnotes omitted). With that principle in mind, courts have interpreted the NLRA as permitting employers to place reasonable restrictions on workplace communications in order to protect legitimate business interests. The Act does not protect workplace speech or conduct that is genuinely insubordinate, disloyal or unduly disruptive, for instance. *See, e.g., Bob Evans Farms, Inc. v. N.L.R.B.*, 163

F.3d 1012, 1024 (7th Cir. 1998) (NLRA "does not protect employees who protest a legitimate grievance by resort to unduly and disproportionately disruptive or intemperate means").

In addition, recognizing that "[w]orking time is for work," *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943), *enf.* 142 F.2d 1009 (5th Cir. 1944), this Board, the U.S. Supreme Court and federal courts of appeals long have allowed employers to ban solicitation of employees at their work stations during working time. *See also Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945); *Cooper Tire & Rubber Co. v. N.L.R.B.*, 957 F.2d 1245, 1250-51 (5th Cir. 1992). It is also well-established that employers generally may restrict employees' use of company property, such as bulletin boards, copying and fax machines, to business-related purposes, provided they enforce those restrictions uniformly, without regard to the subject matter of the communications. *See Local 174,Int'l Union,UAW v. N.L.R.B.*, 645 F.2d 1151 (D.C. Cir. 1981).

A. *Register Guard* Establishes A Straightforward Rule That Is Understandable To Both Employers And Employees And Relatively Easy To Administer

In *Register Guard*, 351 N.L.R.B. 1110 (2007), *enf. granted*, 571 F.3d 53 (D.C. Cir. 2009), this Board held that employees do not have a statutory right under the NLRA to use an employer's equipment or media for non-work purposes, so long as the employer's restrictions are applied in a nondiscriminatory manner. At issue there was the validity of a company policy prohibiting the use of its email system for "non-job-related solicitations" of any nature, including NLRA Section 7 matters. *Id.* at 1110.

In considering the question, the Board first observed that, "[c]onsistent with a long line of cases governing employee use of employer-owned equipment," *id.* at 1114, an employer "has a

'basic property right' to 'regulate and restrict employee use of company property'" – which includes corporate email communications systems. *Id.* (citation omitted). It went on to note:

> Respondent has a legitimate business interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate emails.

Id. It thus found "no basis … to refrain from applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications," *id.* at 1116 (footnote omitted), and concluded that employers may lawfully prohibit non-work-related employee use of its email system, so long as they do not act "in a manner that discriminates against Section 7 activity." *Id.* (footnote omitted).

The standard enunciated by the Board in *Register Guard* "appears as a sensible approach to the realities of email usage where monitoring employee email is costly, especially given the widespread use of technology in the workplace." Nicole Lindquist, *You Can Send This But Not That: Creating and Enforcing Employer Email Policies Under Sections 7 and 8 of the National Labor Relations Act After Register Guard*, 5 Shidler J. L. Com. & Tech. 15, at *21 (2009). It is true that in general, email use policies can be very difficult to police. A more permissive standard – under which the employer presumably would have little or no control over employees' non-work use of its email and information technology systems – would be even more difficult to police, however, requiring greater scrutiny and more regular monitoring of employee email communications.

B. Permitting Broad Employee Access To Corporate Email Communication Systems Would Not Necessarily Facilitate Section 7 Activity, And In Some Instances Would Be Only Marginally Beneficial

In any event, permitting unchecked employee access to employer-provided email systems would not necessarily facilitate, and in some instances would be entirely ineffective in advancing, Section 7 activity. Some employee populations – often comprised of lower skilled, lower wage workers – have no access to company email *at all.* Attempting to engage those employees in Section 7 activity via email and other company-provided electronic means therefore would be all but futile.

Furthermore, there is every reason to believe that advances in social media technology have made work email a second-tier means of non-work-related communication among employees generally. "Although email is still widely used, further advancements of the Internet have largely turned email into a legacy application." Andrew C. Payne, *Twitigation: Old Rules in A New World,* 49 Washburn L.J. 841, 844 (2010) (footnote omitted). Indeed, "social-networking websites have become the preferred form of communication. In 2009, social networking surpassed email in worldwide reach." *Id.* at 848 (footnotes omitted). The Board is acutely aware of the growing use of social media in the workplace, and has for some time now been actively regulating employer practices in that space.

Given the increasingly more popular means of employee communications via social media coupled with the substantial risks inherent in allowing access to corporate information technology systems for non-work purposes, the strong employer interests in maintaining the integrity of such systems must outweigh the purported convenience to some, but not all,

employees of utilizing company systems for communications unrelated to their specific job responsibilities.

II. BARRING EMPLOYERS FROM PLACING LEGITIMATE, NONDISCRIMINATORY RESTRICTIONS ON NON-WORK USE OF CORPORATE EMAIL AND OTHER INFORMATION TECHNOLOGY SYSTEMS WOULD EXPOSE THEM TO ENTERPRISE-WIDE COMPLIANCE RISK

A rule that restricts an employer's ability to prohibit non-work-related email use during working time would create serious and wide-ranging business and compliance concerns, including the risk that as more employees tap into email and other systems for non-work purposes, the likelihood of data security breaches also will increase – thus causing substantial harm to the employer's business, its employees and its customers. There also is great concern that such a rule would make it easier for employees to engage in workplace misconduct, while making it much more difficult for the employer to prevent and correct EEO violations. EEAC therefore urges the Board to decline the invitation to reverse *Register Guard* in favor of an unnecessarily broad, unworkable "open access" email rule.

A major, real-world concern that arises as soon as an employer's IT system is connected to the outside world is that of data security. One person opening the wrong outside e-mail could unleash a virus that fatally corrupts vital system files, physically overload a network and bring the system to a halt, or worse. These types of consequences interfere with the productivity of all employees who are dependent upon the network to do their jobs.

The financial, reputational, and commercial business costs associated with increasingly common data security breaches can be incalculable. Even a declaration that "the network is down" often is extremely disruptive to a business operation. Cyber security concerns are

particularly acute among federal contractors that may have access to highly sensitive government data, which if compromised could in some instances have serious national security implications.

The risk to corporate America of data security breaches has grown significantly over the last 15 years. As one commentator observed:

> Around [the year] 2000, academic commentators and practicing risk professionals began to recognize the significant liability risks that the movement towards electronic data storage and Internet business posed to companies and organizations. Over a decade ago, businesses were confronting information theft, insertion of malicious codes, denial of service attacks, access violations, failure of computer security, programming errors, and misuse or misappropriation of intangible assets. In the late 1990s, some estimates put business costs related to computer security breaches in the hundreds of billions of dollars. … Damages as a result of electronic security breaches have not slowed since.

Lance Bonner, *Cyber Risk: How The 2011 Sony Data Breach And The Need For Cyber Risk Insurance Policies Should Direct The Federal Response To Rising Data Breaches*, 40 Wash. U. J.L. & Pol'y 257, 262 (2012) (footnotes omitted).

Bulletin board postings, leaflets, or face-to-face communications are not dependent upon access to an employer's information technology systems, and thus do not raise the data security concerns posed by non-work email communications. Email communications thus cannot "be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper." *Register Guard*, 351 N.L.R.B. 1110, 1121 (2007) (Liebman, M., dissenting in part), *enf. granted*, 571 F.3d 53 (D.C. Cir. 2009).

An "open access" email use policy also could make it easier for employees to engage in conduct implicating federal workplace equal employment opportunity (EEO) and nondiscrimination laws. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, for instance, makes it unlawful for an employer to discriminate "against any

individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin ...." 42 U.S.C. § 2000e-2(a)(1). In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court ruled that a "plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 477 U.S. 57, 66 (1986). *See also Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (establishing standards for determining when an environment is sufficiently hostile or abusive to be actionable). Accordingly, "many employers today aggressively react to sexual harassment allegations ...." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 496 (D.C. Cir. 2008).

In its dual holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court established the pitfalls that lie ahead of an employer that fails to conduct prompt and effective investigations of complaints of potential sexual harassment. Holding that an employer is subject to vicarious liability for unlawful harassment of one employee by another, the Court created an affirmative defense applicable only in situations where no tangible employment action has been taken. *Id.*

The first of two necessary elements of the defense is that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior ...." *Ellerth*, 524 U.S. at 765, *Faragher*, 524 U.S. at 807. The Court later described the defense as "a strong inducement [for employers] to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability." *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 278 (2009) (citation omitted). In other words, the Supreme Court has ruled that an employer must make an effort to prevent sexual harassment in the workplace.

Where the employer has not been successful at prevention, it needs to act quickly to remedy the situation.

"Many of the behaviors that could give rise to a hostile work environment--propositions, the sharing of pornography, highly sexualized or derogatory language and jokes--can occur as easily via electronic communications as in face-to-face interactions…." Marion Crain & Pauline T. Kim, *A Holistic Approach to Teaching Work Law*, 58 St. Louis U. L.J. 7, 11 (2013) (footnote omitted). Indeed, the same types of comments, cartoons, and the like that can create a racially or sexually hostile working environment when conveyed in verbal or written form can be disseminated more broadly and with much greater ease via email. A rule that requires an employer to allow its employees unfettered access to company-provided electronic communications systems for non-work-related purposes only exacerbates the risk of EEO noncompliance. As the Seventh Circuit has observed, "the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible." *Muick v. Glenayre Elec.*, 280 F.3d 741, 743 (7th Cir. 2002).

The risk of an employer's electronic communications being misused in such a manner is far from isolated. Studies have shown, for instance, that as much as 70% of adult content internet traffic occurs during the workday, with work computers providing many employees' primary means of accessing sexual material online.

The point here is not that the Board or any court ever would consider those types of behaviors to be NLRA-protected. Rather, the relative ease with which inappropriate and/or

harassing behavior occurs online – during work hours – counsels strongly in favor of permitting an employer to restrict all non-work email and electronic communications, so as to minimize the *opportunity* for employees to engage in this type of misconduct.

III. IF THE BOARD ELECTS TO CREATE A NEW STANDARD GOVERNING EMPLOYEE ACCESS TO EMPLOYER ELECTRONIC COMMUNICATIONS, THE RULE MUST ALLOW EMPLOYERS TO IMPOSE REASONABLE RESTRICTIONS ON THE TIME AND MANNER OF SUCH COMMUNICATIONS

In the unfortunate event that the Board finds it prudent to overturn *Register Guard* and the long-standing Board precedent underlying that decision, *amicus curiae* EEAC urges that it establish a reasonable alternative that allows employers to place reasonable restrictions on the time and manner of employee access to company-provided employer electronic communications for non-work-related purposes. Such a rule should make clear that where company policy does not already permit personal use of email, such use, whether for Section 7 purposes or not, cannot occur during times when the employee is expected and being paid to carry out business-related functions. Likewise, non-work email use may not unreasonably interfere with the job duties and performance of the user's co-workers or infringe upon employee privacy rights.

An alternative standard also must reiterate that non-work employee email communications – *whether intended to exert Section 7 rights or not* – cannot be used to harass, intimidate or otherwise discriminate against any employee on the basis of a legally protected characteristic or in retaliation for statutorily-protected conduct, nor can it be utilized intentionally to disclose proprietary information regarding the employer's business, intellectual property, trade secrets, or other sensitive company information. In order to be protected, any alternative standard also must require that employees comply in all respects with the company's information

technology data security requirements when utilizing work email and other electronic communications for non-work purposes. Finally, a *Register Guard* replacement standard should create a rebuttable presumption that employer disciplinary action for failing to comply with any of the above-referenced requirements is lawful.

CONCLUSION

For the foregoing reasons, *amicus curiae* Equal Employment Advisory Council respectfully submits that the Board should affirm the holding of its *Register Guard* decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2014, an electronic copy of the foregoing was filed on the NLRB e-filing website and served by electronic mail on:

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