On August 1, 2018, the National Labor Relations Board (NLRB) invited briefs on "whether the Board should adhere to, modify, or overrule its 2014 decision in Purple Communications, Inc." The following questions and answers revisit Purple Communications and examine the standard the NLRB may return to if it does indeed overrule that landmark case.

How did Purple Communications change the legal landscape?

Purple Communications, Inc. was a watershed case. It was the NLRB’s first attempt to redefine the fundamental nature of employer property rights. Previously, the Board and courts had routinely enforced an employer’s right to control its property and limited that control only when the employer exercised it in a way that discriminated against Section 7 activities. For example, employers could have bulletin boards but prohibit employees from using them for nonwork purposes, and employers could provide copy machines for employees to do their jobs but prohibit employees from using the machines for personal purposes. Purple Communications changed that fundamental understanding of property rights by holding that the National Labor Relations Act (NLRA) gives employees the right to use their employers’ email systems even if their employers have neutral rules prohibiting employees from using the email systems for personal purposes—absent “special circumstances” (a term that the Purple Communications Board neither defined or provided meaningful standards for employers to evaluate and apply).

Before Purple Communications, the Board recognized that employers had the right to restrict employee use of email systems for certain types of personal purposes and were not required to allow employees to use email systems for all personal purposes. In its 2007 Register Guard decision, the Board affirmed an employer’s property right to let employees use email for certain personal purposes, such as personal banter, lunch invitations, etc., while prohibiting them from using the email for the purpose of soliciting support for or participation in an outside organization or cause.

Although Purple Communications emphasized that its holding was limited to employer-provided email systems, both union and employer attorneys assumed the Board would extend that holding to other types of employer-provided property. In fact, relying on Purple Communications’ analysis, regional NLRB directors issued complaints alleging employers violated the Act by having neutral policies restricting employee access to employer property other than email systems.

What are examples of practical problems in the workplace resulting from the Purple Communications decision?
Significant practical problems result from the decision's interplay with two other changes to the law made by the Obama Board: (1) its significant expansion of what constitutes concerted activity under Section 7, and (2) its limitations on employers' facially neutral policies and rules designed to discourage bullying and harassment, while encouraging teamwork, cooperation, and civility in the workplace.

1. As to the first point, decades of established Board law made clear that Section 7's protections extended only to concerted activities—in other words, activities involving two or more employees (or activities of one employee acting on behalf of others). The Obama Board redefined that standard, finding that the activity of a single employee is concerted when it implicates other employees' terms and conditions of employment. That redefinition turned most employee complaints and personal gripes into “concerted” activity protected under Section 7.

2. As to the second point, the Obama Board dramatically curtailed employers' rights to have policies that prohibited employees from harassing one another or bullying others, or to have policies that required employees to be respectful to others, to foster teamwork, or to not be insubordinate.

The interplay of these two significant changes with *Purple Communications* created practical problems for employers. As the Board had made it impossible for employers to restrict harassment generally, *Purple Communications* gave employees the protected right to harass others using the employers' email systems provided the harassment was not prohibited by law, substantially expanding the impact of the harassment due to the broad reach provided by the email system. Similarly, because employee gripes about other employees and supervisors are now generally deemed protected concerted activity under Section 7, *Purple Communications* gave employees the right to broadly disseminate their negative comments and complaints—even as to sensitive issues such as complaints about sexual harassment by a supervisor. Such email use can be damaging to employers' ability to conduct effective investigations. It can also be harmful to employers' ability to protect the privacy of all individuals involved while conducting, and pending the conclusions of, an investigation.

As we all know in the human resources (HR) world, investigating allegations (and even information about) illegal harassment is the right thing to do, but also a legal obligation that is necessary to protect employers from liability. *Purple Communications* further demonstrated that the Obama Board would sacrifice important employee and employer rights in its effort to expand the scope of Section 7 of the NLRA (*Banner Health* is another such example).

Can you expand on how the Board's decision in *Register Guard* was different than its determination in *Purple Communications*?

*Register Guard* focused on the Act's prohibition against discrimination against Section 7 activities and recognized that nothing in the NLRA gives employees property rights that legally belong to their employers. Since generally-applicable neutral restrictions on certain types of employee email use do not discriminate on the basis of protected Section 7 activities, *Register Guard* held they were acceptable.

HR professionals and in-house counsel deal with discrimination issues every day. We routinely evaluate employers’ rules or employee conduct from the perspective of whether the rule or conduct discriminates against one or more employees based on an employee's legally-protected status. When evaluating whether an employee has been discriminated against, we look to how other similarly-situated employees have been treated. One group of employees may be required to follow schedules or rules that do not apply to employees in a different department, but differences in
treatment are not illegal discrimination when the employees are treated differently because they are dissimilar. Even in application, employers confront situations where the nature or severity of the misconduct makes two employee situations dissimilar and justifies treating the two employees differently. That is not illegal discrimination.

Register Guard applied that approach, which the courts have sanctioned since the adoption of anti-discrimination laws, to the NLRA. Register Guard recognized that employers could have legitimate reasons to allow employees to use their email systems for certain personal uses, such as socializing in the workplace (which fosters positive morale), but prohibit certain classifications or types of email use that is more disruptive to the workplace, poses greater security threats to the employers' computer systems, or imposes greater costs on the employers (in terms of storage costs due to the number of recipients or size of the email and/or attachments). Register Guard recognized that treating those types of employee use of an email system differently was logical because they are dissimilar, and thus such different treatment did not violate Section 7. The Board in Register Guard concluded the employer could legally prohibit employees from using the employer's email system to solicit for outside organizations or causes because that prohibition applied broadly to any type of solicitation for an outside organization or cause. It did not limit only email solicitations for unions or other Section 7 activities.

Each year, employers deal with employee frustration about how to handle solicitations in the workplace—even for worthwhile organizations or causes—because the employees being solicited feel uncomfortable having to tell their peers (or boss) "no." The majority of these concerns have nothing to do with employees soliciting for unions. Register Guard recognized that employers had legitimate reasons (not related to stopping union organizing drives) for adopting neutral prohibitions against such activities. Register Guard logically applied the concept of illegal discrimination—developed by our courts and applied by us for decades under anti-discrimination statutes—to the NLRA.

Is the Board likely to overrule Purple Communications and, if so, what standard might the board adopt instead?

Register Guard is the most logical, reasonable standard in that it ensure that employees are not discriminated against for engaging in protected activities while also avoiding the creation of a Section 7 right for employees to use employer property when Congress did not put any such right into the NLRA.

What do you make of Member Mark Gaston Pearce's dissent from the board's invitation of briefs over whether Purple Communication should be modified or overruled?

Member, and former Chair, Pearce understandably believes his interpretation of the Act— as adopted by the Board majority in Purple Communications— was and is correct. I would expect him to continue to espouse that position and view with hostility any effort by the Trump Board to revisit it. Before joining the NLRB of course, Member Pearce had a long and distinguished career as a union-side lawyer.

What's the main takeaway here for HR professionals?

Change is coming. We just don't know for sure when—and we don't know how long it will last. Nevertheless, we should expect a return to the far more rational and manageable standard of Register Guard. Unfortunately, given the nature of politics and
how often we deal with NLRB-directed change, employers may want to have electronic, rather than hard-copy, policies and procedures. They can be changed far more quickly, and at much less cost.

The author of this article was previously quoted on this topic on SHRM Online.