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Social Media Activity & the Workplace: Updating the Status ofSocial Media

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Social Media Activity & the Workplace: Updating the Status of Social Media

SARAH D. DAVIS*

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I. INTRODUCTION

Everywhere you look today, you see social media; it is on your phone, tablet, e-reader, computer, and even on your television. Today, everyone feels the need to be constantly connected, but is "social media" affecting us in our professional lives? Does it make you a more efficient employee or is

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it a landmine that could ruin your career? Could social media do more harm than good?

Social media is defined as "forms of electronic communication ([such] as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content ([such] as videos)."[1] Over the past decade, the use of social media has exploded, and it has left many people, including employers, with questions as to its proper uses, and how much control can be exercised over another's social media activity.[2] This paper lays out the history of several popular social media websites and the effects of these sites on employers.[3] Section III of this paper will explore the National Labor Relations Act ("NLRA" or "Act") and how it applies to employees' uses of social media; it will also analyze recent decisions and rulings of the National Labor Relations Board ("NLRB" or "Board").[4] Finally, this paper will address why social media policies are important in the workplace and provide a few guidelines to help employers in the drafting of social media policies.[5]

II. THE HISTORY OF SOCIAL NETWORKING SITES AND THEIR USE IN THE WORKPLACE

A. Facebook, MySpace, and Twitter

Today, there are many social networking sites available online, but the most popular and most widely used is Facebook.[6] The groundwork for Facebook began in 2003, when Mark Zuckerberg and his Harvard roommates launched Facemash.[7] Facemash quickly became a hit, but was short lived, as Harvard demanded the site be shut down.[8] In February 2004, "Mark Zuckerberg and co-founders Dustin Moskovitz, Chris Hughes[,] and Eduardo Saverin launch[ed] Facebook from their Harvard dorm room."[9]

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1. *Social Media*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20 media (last visited Dec. 12, 2012).

2. *Id.* (noting that the first use of social media was in 2004); *see also The History and Evolution of Social Media*, WEBDESIGNER DEPOT, http://www.webdesignerdepot.com/2009/10/the-history-and-evolution-of-social-media/ (last visited Dec. 12, 2012).

3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. *See The History and Evolution of Social Media*, *supra* note 2, at 1, 5.

7. *The History of Facebook*, WEBHOSTINGREPORT.COM, http://www.webhostingreport.com/ learn/facebook.html (last visited Dec. 12, 2012).

8. *Id.*

9. *Timeline*, FACEBOOK NEWSROOM, http://newsroom.fb.com/content/default.aspx?NewsAreaId =20 (last visited Dec. 12, 2012).

Facebook began as an application for Harvard students, but quickly expanded to become available to college students, high school students, and employees, and it is now available to the public generally.[10] Facebook allows one to stay connected to friends and co-workers and also allows individuals to share their lives publicly.[11] By December 2004, Facebook had approximately "1 million [active] users," and by December 2005, it had "6 million [active] users."[12] As of July 2011, Facebook had "over 750 million active users."[13]

MySpace, which was released around the same time as Facebook and offered the same types of applications, quickly took off. In 2002, eUniverse developed MySpace and made it available to eUniverse employees.[14] In order to increase the number of users, eUniverse developed a competition for its employees "to see who could sign up the most users."[15] Through this competition, the network was released to the public at large, and MySpace reached twenty million users.[16] MySpace continued to grow, reaching its 100 millionth account in August of 2006, making it "the most popular social networking website in the U.S.A."[17] Though MySpace was number one in 2006, Facebook surpassed MySpace in 2008; however, MySpace still has many active users and is a well-known means for social networking.[18]

Twitter was released after both Facebook and MySpace but has become an extremely popular social media platform.[19] Twitter is described as "a real-time information network that connects you to the latest . . . [information] about what you find interesting."[20] A user needs to "[s]imply find the [public streams] . . . [that] most compel[] [the user] and follow the conversations."[21] Twitter launched on July 15, 2006, and less than two years later, Twitter reached 1.3 million registered users.[22] By April 2010,

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10. *Timeline*, *supra* note 9.

11. Josh Lowensohn, *Newbie's Guide to Facebook*, WEBWARE-CNET (Aug. 1, 2007), http://news.cnet.com/newbies-guide-to-facebook/.

12. *Timeline*, *supra* note 9.

13. Brenna Ehrlich, *Facebook Hits 750 Million Users*, MASHABLE (July 6, 2011), http://mashable.com/2011/07/06/facebook-750-million/.

14. *The History of MySpace*, WEBHOSTINGREPORT.COM, http://www.webhostingreport.com/learn/myspace.html (last visited Dec. 12, 2012).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See The History and Evolution of Social Media*, *supra* note 2 (MySpace was founded in 2003, Facebook was founded in 2004, and Twitter was founded in 2006).

20. *About*, TWITTER, http://twitter.com/about (last visited Dec. 12, 2012).

21. *Id.*

22. Tim Nudd, *Infographic: A Visual History of Twitter, The Biggest Names, Greatest Hits, Business Models and More*, ADWK. (Oct. 3, 2011), http://www.adweek.com/adfreak/infographic-visual-history-twitter-135400.

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Twitter had 105 million registered users, and in September 2011, there were 200 million registered users of Twitter.[23] Twitter is extremely popular and used by many celebrities, including Lady Gaga, Katy Perry, and Britney Spears, allowing their fans to stay connected to what these celebrities are involved in.[24] Astonishingly, there are "1 billion tweets post[ed] every 5 days."[25]

Social media websites are widely used and a large part of today's society.[26] People post and tweet constantly on these sites; some post about intimate moments, while others use it as a place to vent about their troubles.[27] Businesses are even beginning to use these platforms as a way to connect with customers.[28] Because of the wide spread use, employers may have some concerns with respect to social media and their employees: Do their employees think before they post?;[29] Could their employees accidentally share trade secrets or client lists by posting on Facebook?; and Are their employees giving their brand a negative image by posting or tweeting negatively about work?[30]

B. Employee Awareness and Their Social Media Activity

In 2009, Deloitte LLP conducted a survey which asked employees about their social media activity and their consideration of consequences before posting.[31] This survey demonstrates "that there is great reputational risk associated with social networking . . . ," and that many employees in fact do not think before they post.[32]

"[Seventy-four percent] of employees surveyed say it's easy to damage a company's reputation on social media."[33] However, many employees do

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23. *Id.*
24. *Id.*
25. *Id.*
26. *See The History and Evolution of Social Media*, *supra* note 2.
27. *See id*.
28. JD Rucker, *Instead Of Marketing, Businesses Should Be Using Social Media for Customer Support*, BUS. INSIDER (Feb. 13, 2012), http://articles.businessinsider.com/2012-02-13/strategy/31051513_1_social-media-twitter-customer-service.
29. *See infra* Part II.B.
30. *See infra* Part II.C.
31. Deloitte, Social Networking and Reputational Risk in the Workplace: Deloitte LLP 2009 Ethics & Workplace Survey Results (2009), *available at* http://www.deloitte.com/assets/DcomUnited States/Local%20Assets/Documents/us_2009_ethics_workplace_survey_220509.pdf.

The survey was conducted by telephone and the sample consisted of "2,008 employed adults comprising 1,000 men and 1,008 women 18 years of age and older, living in private households in the continental United States." *Id.* at 15. The phone surveys were "completed during the period April 9-13 and 16-19, 2009." *Id.*

32. *Id.* at 2, 8.
33. *Id.* at 4.

not consider this before posting. "Fifty-three percent of employee respondents said their social networking pages are none of their employer's business," while "[s]ixty-one percent of employees say that even if employers are monitoring their social networking profiles or activities, they won't change what they're doing online . . . ."[34] Additionally, "[t]wenty-seven percent of employees surveyed *don't consider the ethical consequences* of posting comments, photos, or videos online—and more than one-third don't consider their boss, their colleagues, or their clients."[35] It is apparent that many employees do not think about the consequences of their posts before sharing information on social media sites, and forty-nine percent of employees surveyed said that a company policy would not change how they behave online.[36]

Chairman of the Board for Deloitte, Sharon L. Allen, stated: "While the decision to post videos, pictures, thoughts, experiences, and observations to social networking sites is personal, a single act can create far-reaching ethical consequences for individuals as well as organizations."[37] It is clear from the survey results that many employees do not care about the effects that their posts may have on others. Ms. Allen's statement has been proven true on many occasions, and the next subsection provides a few examples of employee tweets gone wrong.

C. Social Media Mishaps & Their Effects on Employers

Employee posts and tweets on social media sites have caused many employers problems and have caused some employers to lose major contracts. New Media Strategies is one such example. Chrysler had a contract with a social media marketing firm, New Media Strategies, which managed its social media websites.[38] In early March 2011, a tweet was posted on ChryslerAuto's Twitter account which stated "'I find it ironic that Detroit is known as the #motorcity and yet no one here knows how to f***ing drive.'"[39] The tweet was posted by a now former employee at New Media Strategies and was quickly removed from Twitter, however the next day, Chrysler announced that it would "'not renew its contract with New Media Strategies . . . for the remainder of 2011.'"[40] Some criticized

34. Deloitte, *supra* note 31, at 6.
35. *Id.* at 8 (emphasis in original).
36. *Id.* at 7.
37. *Id.* at B.
38. *See* Alison Diana, *Chrysler Addresses Twitter Foul-Up*, INFO.WK. (Mar. 10, 2011, 12:10 PM), http://www.informationweek.com/internet/social-network/chrysler-addresses-twitter-foul-up/229300704.
39. *Id.*
40. *Id.*

Chrysler for severing their contract with New Media Strategies over the tweet, but Chrysler's manager of electronic communications, Ed Garsten, stated: "'This company is committed to promoting Detroit and its hard-working people,'" and the inappropriate tweet "went against Chrysler's new ad campaign that promotes the city."[41]

Another example of how the social media activity of one employee can affect an entire company is found in the situation between 2K Games and The Render Group. The Render Group is a public relations firm that was "in charge of publicity for the long-awaited Duke Nukem game . . . ."[42] Once Duke Nukem Forever was released it began receiving negative reviews.[43] As the negative reviews filtered in, an employee of The Render Group tweeted "'[t]oo many went too far with their reviews . . . we r [sic] reviewing who gets games next time and who doesn't based on today's venom.'"[44] The tweet was deleted forty minutes after it was posted, but the damage had been done.[45] 2K Games expressed that they did not support the tweet and had no connection to it whatsoever.[46] Despite many apologies from The Render Group "on the firm's Twitter feed, 2K Games decided to dissolve their relationship with The Render Group . . . ."[47]

The above examples demonstrate the impact that *one* tweet from *one* employee can have on an entire company. The issue then becomes whether an employer can punish employees for damaging posts and whether an employer can prevent such posts and tweets through the implementation of a social media policy.[48]

III. THE NATIONAL LABOR RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD

A. *The National Labor Relations Act*

Many conflicts between employers and employees involving social media have been addressed and ruled on by the National Labor Relations

41. *Id.*
42. *Id.*
43. Daniel Emery, *Duke Nukem PR Firm Dropped Following Online Review Row*, BBC NEWS TECH. (June 16, 2011), http://www.bbc.co.uk/news/technology-13795782.
44. David Silverberg, *Duke Nukem Forever's PR Firm Fired for Threatening Tweet*, FUTURE OF MEDIA (June 15, 2011), http://www.futureofmediaevents.com/2011/06/15/duke-nukem-forevers-pr-firm-fired-for-threatening-tweet/.
45. Emery, *supra* note 43; Silverberg, *supra* note 44.
46. *Id.*
47. Silverberg, *supra* note 44.
48. *See infra* Parts III, IV.

Board.[49] In making their decisions, the NLRB looks to settled labor law, generally the National Labor Relations Act, to determine whether the employer has interfered with an employee's protected rights and thus engaged in an unfair labor practice.[50] The NLRA was enacted "in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[51]

The advice and decisions rendered by the NLRB dealing with adverse actions against employees for use of social media platforms, center around two major sections of the NLRA, section 7 and section 8(a)(1).[52] Section 8(a)(1) states that "[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the National Labor Relations Act] . . . ."[53] Section 7 gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection . . . ."[54]

The issue in the recent social media cases has been whether firing or taking other adverse action against an employee because of a Facebook or MySpace post, or a tweet, is an unfair labor practice because such action interferes with and restrains protected concerted activity.[55] Thus, the heart of the issue is when does a post or tweet constitute a protected concerted activity? This issue has been addressed by the NLRB numerous times, but is still unsettled.[56]

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49. *See, e.g.*, Nat'l Labor Relations Bd., Memorandum OM 11-74: Report of the Acting General Counsel Concerning Social Media Cases (Aug. 18, 2011) [hereinafter August Memorandum], *available at* http://privacyblog.littler.com/uploads/file/NLRBAugust18Memo.pdf.

50. *See* Arthur Carter et al., *NLRB: Board's Aggressive Agenda Unabated: Required Notice, Rulemaking, Social Media, and the Boeing Case*, LEXOLOGY (Dec. 7, 2011), http://www.lexology.com/library/detail.aspx?g=17fccd01-ec7d-403f-8fa0-301170f907eb.

51. *National Labor Relations Act*, NAT'L LAB. REL. BOARD, http://www.nlrb.gov/national-labor-relations-act (last visited Dec. 13, 2012).

52. *See* National Labor Relations Act §§ 7, 8(a)(1), 29 U.S.C. §§ 157, 158(a)(1) (2011); *see also* August Memorandum, *supra* note 49.

53. National Labor Relations Act § 8(a)(1).

54. *Id.* § 7 (emphasis added).

55. *See* August Memorandum, *supra* note 49.

56. *See id.*

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B. Recent NLRB Cases—When is Social Media Activity a Protected Concerted Activity under Section 7?

Over the past few years, the NLRB has been faced with ruling on or providing advice for many cases involving social media.[57] The first to gain the attention of the media was *American Medical Response of Connecticut, Inc*.[58] That case was settled before the NLRB could make a decision as to whether the employee's social media posting was protected concerted activity, leaving employers with little guidance; however, prior to settlement, the NLRB did issue an advice memorandum.[59] Since the settlement of *American Medical Response*, many cases have come before the NLRB involving employees' uses of social media, giving employers some guidance.[60] Most recently, on August 18, 2011, the NLRB issued a Memorandum which briefly outlined some of the major cases that have come before it for decision and for advice dealing with social media activity.[61] This subsection takes a deeper look at the five major cases that have come before the NLRB over the past few years and tries to provide employers with more detail and better guidance as to what social media posts and tweets constitute protected concerted activity under the NLRA.

1. American Medical Response of Connecticut, Inc.

The events leading to this dispute began in November 2009.[62] On November 7, 2009, Dawnmarie Souza, an employee of American Medical Response ("AMR"), responded to a car accident where the driver of one of the cars refused to be examined and refused to go to the hospital.[63] Souza informed the "call-in supervisor" of the incident, who told Souza to "document the refusal-of-care as a 'cancel.'"[64] Later in the same night, Souza responded to a fall at the New Haven police station, where she found that same individual "lying in the lobby, complaining that she was

57. *See id.*
58. Complaint and Notice of Hearing, Am. Med. Response of Conn., Inc., No. 34-CA-12576 (N.L.R.B. Oct. 27, 2010); *see also* Am. Med. Response of Conn., Inc., NAT'L LAB. REL. BOARD, https://www.nlrb.gov/category/case-number/34-ca-012576 (last visited Dec. 13, 2012).
59. *See* Matthew Deffebach et al., *NLRB Social Media Status Update: Is the Board Sending Employers a Friend Request?*, LEXOLOGY (Sept. 7, 2011), http://www.lexology.com/library/detail.aspx?g=d9257e89-a1c5-4737-8776-64929fcdefa4.
60. *See, e.g.*, August Memorandum, *supra* note 49.
61. *See generally id.*
62. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice of the Nat'l Lab. Rel. Board to Jonathan B. Kreisberg, Reg'l. Dir. Region 34, at 2 (Oct. 5, 2010) [hereinafter Am. Med. Response of Conn., Inc. Memo], *available at* http://www.nlrb.gov/category/case-number/34-ca-12576.
63. *Id.*
64. *Id.*

injured."[65] Souza transported the individual to a nearby hospital and upon arrival to the hospital had further complications with the individual and her husband.[66] Souza reported the events to the "call-in supervisor" who "told her not to worry about the incident and laughed."[67]

The following morning, Souza returned to work at AMR and was called into the office of her supervisor, Frank Filardo.[68] Filardo informed Souza that a complaint had been filed against her and required that she fill out an incident report, which she refused to do without a union representative present.[69] She later completed the incident report and faxed it to AMR that same day.[70] The following day, Souza posted a comment on her Facebook page about the incident with Filardo.[71] The post and comments were as follows:

> Her first post state[d], "Looks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor." An AMR supervisor then responded, "What happened?," and a current AMR employee posted, "What now?" Souza answered, "Frank being a dick." A former AMR employee next wrote "I'm so glad I left there," and the current AMR employee stated, "Ohhh, he's back, huh?" Souza replied, "Yep, he's a scumbag as usual." The thread ended with the current AMR employee telling Souza to "[c]hin up!"[72]

Souza was suspended from work on November 9, 2009 and fired on December 1, 2009, for, among other things, her "derogatory remarks about [her] supervisor on 'Facebook.'"[73] On October 5, 2010, the NLRB Office of the General Counsel rendered an Advice Memorandum, which found that Souza's Facebook activity was protected under the NLRA.[74]

The NLRB stated that Souza "engaged in protected activity by . . . discussing supervisory actions with coworkers in her Facebook post[,]"[75] and noted that "[i]t is well established that the protest of supervisory actions

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65. *Id.*
66. *Id.* at 2-3.
67. Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 3.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 3-4.
73. *Id.* at 4-5.
74. *See generally* Am. Med. Response of Conn., Inc. Memo, *supra* note 62.
75. *Id.* at 9.

is protected conduct under Section 7."[76] Once the NLRB decided that Souza's supervisory protest was protected activity, the second step they took was to "determine if Souza lost the protection of the Act by referring to her supervisor as a '17,' 'dick,' and 'scumbag' in the Facebook post."[77] In order to make this determination, the NLRB applied the *Atlantic Steel Co.*[78] standard which states that "[t]he Act protects statements made during the course of protected conduct unless they are so egregious as to remove the employee's conduct from the protection of the Act."[79] To determine if the statement was "so egregious as to remove the employee's conduct from the protection of the Act," the Board looked to four factors: "(1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[80]

The Board looked to each factor and determined that "Souza's conduct was not so opprobrious as to lose the protection of the Act."[81] The board noted that the statements were made online and did not disrupt the work of any employee, and that the comments were made about supervisor activity, which is protected.[82] The Board then explained that the third factor does not make the statement unprotected because the name-calling was not accompanied by any verbal or physical threats.[83] Finally, it noted that the fourth factor weighs strongly in favor of Souza's conduct being protected because the post was made only after she had been threatened by her supervisor.[84] Therefore, the NLRB advised that Souza's Facebook post was protected, and she did not lose the protection of the Act under the *Atlantic Steel Co.* standard.[85]

Based on the advice memorandum, it seemed as though employers were finally going to get some guidance from the NLRB about employees' social media activity, however this case was settled prior to the hearing.[86]

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76. *Id.* at 9 n.16; August Memorandum, *supra* note 49, at 4.
77. Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 9.
78. 245 N.L.R.B. 814 (1979).
79. Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 9 (citing *Atlantic Steel Co.*, 245 N.L.R.B. at 816); *see* August Memorandum, *supra* note 49, at 4-5.
80. Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 9.
81. *Id.*
82. *Id.* at 9-10.
83. *Id.*; *see* August Memorandum, *supra* note 49, at 5.
84. Am. Med. Response of Conn., Inc., *supra* note 67, at 10; *see* August Memorandum, *supra* note 49, at 5.
85. Am. Med. Response of Conn., Inc., *supra* note 67, at 10; *see* August Memorandum, *supra* note 49, at 5.
86. *See generally* Am. Med. Response of Conn., Inc., *supra* note 67. *See also* Aaron R. Gelb et al., *A Virtual Minefield: The NLRB and Social Media*, LEXOLOGY (Nov. 3, 2011), http://www.lexology.com/library/detail.aspx?g=ad1dced6-d563-4c0f-b8e4-bce80c98f473.

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2. *JT's Porch Saloon & Eatery, Ltd.*

Less than a year after *American Medical Response of Connecticut, Inc.* gained media attention, the section 8(a)(1) case of *JT's Porch Saloon & Eatery, Ltd.* came before the NLRB for advice "as to whether the [JT's Porch Saloon & Eatery, Ltd.] unlawfully discharged [an employee] for posting a message on his Facebook page that referenced the Employer's tipping policy, in response to a question from a nonemployee."[87]

In the case at hand, the employee was a bartender at JT's Porch Saloon & Eatery, Ltd., and when hired, he was informed of the employer's unwritten policy that bartenders are not entitled to any tips, even if they help serve food.[88] In the fall of 2010, the employee expressed his dislike about this policy with another employee, but no action was taken by either employee as a result of this conversation.[89] However, "[o]n February 27, 2011, the [employee] had a conversation on Facebook with his step-sister."[90] She had asked him how work went that day, and he responded by complaining that he does the job of a waitress, but does not get any tips.[91] Along with complaining about the tip situation, the employee went on to call the employer's customers "'rednecks' and stated that he hoped they choked on glass as they drove home drunk."[92] No other employees commented on these posts and the posts were not discussed before or after with any other employees.[93] The employee was informed both on May 7, 2011, and May 8, 2011 that he was being terminated because of his Facebook posts.[94]

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87. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice of the Nat'l Lab. Rel. Board, to Gail R. Moran, Acting Reg'l. Dir. Region 13, at 1 (July 7, 2011) [hereinafter JT's Porch Saloon & Eatery, Ltd. Memo], *available at* https://www.nlrb.gov/case/13-CA-046689; *see* August Memorandum, *supra* note 49, at 13.

88. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 1; *see* August Memorandum, *supra* note 49, at 13.

89. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 1; *see* August Memorandum, *supra* note 49, at 13.

90. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 1; *see* August Memorandum, *supra* note 49, at 13.

91. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 1; *see* August Memorandum, *supra* note 49, at 13.

92. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 1-2; August Memorandum, *supra* note 49, at 13.

93. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 2; *see* August Memorandum, *supra* note 49, at 13.

94. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 2; *see* August Memorandum, *supra* note 49, at 13.

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Based on the above facts, the NLRB advised that the employer did not violate section 8(a)(1) of the NLRA because the employee did not engage in any protected concerted activity.[95]

> The Board's test for concerted activity is whether activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The question is a factual one and the Board will find concert "[w]hen the record evidence demonstrates group activities, whether specifically authorized in a formal agency sense or otherwise[.]"[96]

The Board explained that concerted activity includes both "individual activities that are the 'logical outgrowth of concerns expressed by the employees collectively'"[97] and "'circumstances where individual employees seek to initiate or to induce or to prepare for group action' and where the individual employees bring 'truly group complaints' to management's attention."[98]

The Board then determined that the employee's actions were not concerted even though they addressed conditions of employment because: (1) "he did not discuss his Facebook posting with any of his fellow employees either before or after he wrote it, and none of his coworkers responded to the posting[;]" (2) there were "no employee meetings or any attempt to initiate group action with regard to the tipping policy or the awarding of raises[;]" and (3) the employee made "no effort to take the bartenders' complaints about these matters to management."[99] Therefore, because the employee's Facebook post, though it dealt with employment conditions, was not acknowledged by other employees and no other employee responded, such a post did not fit within the protected concerted activity of section 7 of the Act.[100] This consequently, could not lead to an unfair labor practice under section 8(a)(1) of the Act, resulting in a recommendation by the Board to dismiss the charge.[101]

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95. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 2; *see* August Memorandum, *supra* note 49, at 13-14.

96. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 2 (quoting Meyers Indus. (*Meyers II*), 281 N.L.R.B. 882, 885-86 (1986), *aff'd sub. nom.* Prill v. N.L.R.B., 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988)); *see* August Memorandum, *supra* note 49, at 13-14.

97. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 2 (quoting Five Star Transp., Inc., 349 N.L.R.B. 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008)).

98. *Id.* at 3 (quoting *Meyers II*, 281 N.L.R.B. at 887).

99. *Id.*; *see* August Memorandum, *supra* note 49, at 13-14.

100. JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87, at 3.

101. *See id.*; *see also* National Labor Relations Act §§ 7, 8(a)(1); August Memorandum, *supra* note 49, at 15.

3. Wal-Mart

In the same month as *JT's Porch Saloon & Eatery, Ltd.*, the Board issued advice on "whether [Wal-Mart] violated Section 8(a)(1) by disciplining an employee for posting profane comments on Facebook that were critical of local store management."[102] On October 28, 2010, after speaking with the Assistant Manager, an employee posted the following to Facebook: "'Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!'"[103] Two co-workers then responded to this post with "bahaha like! :)" and "[w]hat the hell happens after four that gets u [sic] so wound up??? Lol."[104] The employee then went on to complain about the store's management and policies and proceeded to call the Assistant Manager "a super mega puta."[105] A co-worker printed out this feed and delivered it to the Assistant Manager who, on November 4, 2010, called the employee into his office and required him to take a one-day paid suspension.[106] The Assistant Manager proceeded to file a discipline report against the employee, which stated that he "would be terminated if such behavior continued."[107]

The Employee contended that this discipline was an unfair labor practice and that it violated section 8(a)(1) of the NLRA because his actions were protected under section 7.[108] The Board explained that:

> An individual employee's conduct is concerted when he or she acts with or on the authority of other employees, when the individual activity seeks to initiate, induce or prepare for group action, or when the employee brings truly group complaints to the attention of management. Such activity is concerted even if it involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization. On the other hand, comments made solely by and on behalf of the employee himself are not concerted. Comments must look toward group action; mere griping is not protected.[109]

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102. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice of the Nat'l Lab. Rel. Board , to Daniel L. Hubbel, Reg'l. Dir. Region 17, at 1 (July 19, 2011), [hereinafter Wal-Mart Memo], *available at* https://www.nlrb.gov/case/17-CA-025030; *see* August Memorandum, *supra* note 49, at 16.

103. Wal-Mart Memo, *supra* note 102, at 1; *see* August Memorandum, *supra* note 49, at 16.

104. Wal-Mart Memo, *supra* note 102, at 1-2.

105. *Id.* at 2; August Memorandum, *supra* note 49, at 16.

106. Wal-Mart Memo, *supra* note 102, at 2; August Memorandum, *supra* note 49, at 16.

107. Wal-Mart Memo, *supra* note 102, at 2; August Memorandum, *supra* note 49, at 16.

108. *See* Wal-Mart Memo, *supra* note 102, at 1.

109. *Id.* at 3 (internal quotations and citations omitted).

The Board in this case advised that the employee's posts were "mere griping" rather than protected concerted activity and gave several reasons for this conclusion.[110] First the Board noted that the posts did not "contain[] . . . language suggesting the [employee] sought to initiate or induce coworkers to engage in group action; rather they express only his frustration regarding his individual dispute with the Assistant Manager . . . ."[111] Second, the Board noted that the responses by his coworkers did not indicate that the employee's post was anything but an expression of his frustration, because the one coworker's post expressed humor in the situation, while the second co-worker was merely curious about the situation.[112] Finally, the Board noted that there was no "evidence that establishes that the [employee's] postings were the logical outgrowth of prior group activity."[113] Therefore, the Board advised that the charge be dismissed because Wal-Mart did not violate section 8(a)(1) of the NLRA.[114]

Wal-Mart, along with *JT's Porch Saloon & Eatery, Ltd.*, provides employers with some guidance as to how the NLRB defines concerted activity with respect to Facebook postings.[115] However, both advice memoranda show that making the determination of whether social media activity is protected concerted activity is very fact specific and must be taken on a case-by-case basis.[116] In the past year, there have been two cases that have gone before the National Labor Relations Board Division of Judges dealing with protected concerted activity and social media. Those cases are *Karl Knauz Motors, Inc. and Robert Becker*[117] along with *Hispanics United of Buffalo, Inc. and Carlos Ortiz*.[118]

4. Karl Knauz Motors, Inc. and Robert Becker

In this case, Robert Becker began working for Karl Knauz Motors, Inc. ("employer") in 1998 at a Land Rover dealership.[119] In 2004, he was transferred to the employer's BMW dealership, which was located next

110. *Id.*; August Memorandum, *supra* note 49, at 16.
111. Wal-Mart Memo, *supra* note 102, at 3; *see* August Memorandum, *supra* note 49, at 16.
112. *See* Wal-Mart Memo, *supra* note 102, at 3-4; August Memorandum, *supra* note 49, at 16-17.
113. Wal-Mart Memo, *supra* note 102, at 4.
114. *Id.*
115. *See id.*; *See also* JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87.
116. *See* Wal-Mart, Memo *supra* note 102; *see also* JT's Porch Saloon & Eatery, Ltd. Memo, *supra* note 87; August Memorandum, *supra* note 49.
117. No. 13-CA-46452 (N.L.R.B. Sept. 28, 2011), *available at* http://www.nlrb.gov/category/case-number/13-ca-046452.
118. No. 3-CA-27872 (N.L.R.B. Sept. 2, 2011), *available at* http://www.nlrb.gov/category/case-number/03-ca-027872.
119. Karl Knauz Motors, Inc. and Robert Becker, No. 13-CA-46452, at 1.

door.[120] The BMW dealership was to hold an "Ultimate Driving Event" ("Event") on June 9, 2010 "to introduce a redesigned BMW 5 Series automobile."[121] A meeting was held prior to the event with salespersons—which included Becker—to discuss what was expected of the salespersons during the event.[122] At this meeting, the general sales manager, Phillip Ceraulo, said that food would be provided to the customers, explaining that the dealership would "have a hot dog cart serving the clients, in addition to cookies and chips."[123] A few salespersons brought concerns during the meeting as to the quality of the food explaining that the dealership should provide something more sophisticated due to the caliber of the event.[124] Ceraulo stated "'[t]his is not a food event.'"[125] After the meeting, several salespersons continued to discuss the quality of the food and the effect that such food could have on the image of the dealership.[126]

On June 9, 2010, the day of the Event, "there was a hot dog cart (with hot dogs), bags of Doritos, cookies and bowls of apples and oranges."[127] Becker took many pictures at the Event of himself, along with other salespersons "holding hot dogs, water and Doritos and told [his coworkers] that he was going to post the pictures on his Facebook page."[128] A few days later, an accident occurred at the Land Rover dealership, which was also owned by Karl Knauz Motors, Inc.[129]

A salesperson allowed a thirteen-year-old child of a customer to sit in the driver's seat, and the child ended up driving the large vehicle into a pond on the dealership premises.[130] Becker was informed of the incident and could see it from the BMW dealership, at which point he proceeded to take pictures.[131] On June 14, 2010, Becker posted pictures of the Event, along with the pictures from the Land Rover accident, on his Facebook page, and provided comments under the pictures.[132]

Becker's first comment under the photographs from the Event was:

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120. *Id.*
121. *Id.* at 2.
122. *Id.*; *see* August Memorandum, *supra* note 49, at 6.
123. *Karl Knauz Motors*, No. 13-CA-46452, at 2; *see* August Memorandum, *supra* note 49, at 6.
124. *Karl Knauz Motors*, No. 13-CA-46452, at 2; *see* August Memorandum, *supra* note 49, at 6.
125. *Karl Knauz Motors*, No. 13-CA-46452, at 2.
126. *Id.*; *see* August Memorandum, *supra* note 49, at 6.
127. *Karl Knauz Motors*, No. 13-CA-46452, at 3; *see* August Memorandum, *supra* note 49, at 6.
128. *Karl Knauz Motors*, No. 13-CA-46452, at 3; *see* August Memorandum, *supra* note 49, at 6.
129. *Karl Knauz Motors*, No. 13-CA-46452, at 3.
130. *Id.*; August Memorandum, *supra* note 49, at 6.
131. *Karl Knauz Motors*, No. 13-CA-46452, at 3; *see* August Memorandum, *supra* note 49, at 6.
132. *Karl Knauz Motors*, No. 13-CA-46452, at 3; August Memorandum, *supra* note 49, at 6.

> I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years . . . the new 5 series. . . . The small 8 oz bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch . . . but to top it all off . . . the Hot Dog Cart. . . .[133]

The Event pages contained a number of pictures from the Event, painting it in a humorous light, and had many comments by Becker, his friends, and his relatives.[134]

The pictures from the Land Rover accident had many comments from Becker, one of which was:

> This is what happens when a sales Person sitting in the front passenger seat . . . allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOOPS![135]

An employee from the warranty department of the employer commented "'[h]ow did I miss all the fun stuff?'"[136] Under another photograph from the Land Rover accident, two other employees left comments about the picture.[137] On June 15, Becker was required to remove his posts and was fired on June 22, 2010.[138] The Administrative Law Judge ("ALJ") in this case was required to determine whether the postings from the Event, as well as the Land Rover Accident were protected concerted activity under the Act.[139]

The ALJ took a two-step approach to resolve the issues before him. First the ALJ determined whether the activity was concerted activity that was protected by the NLRA, and second the ALJ determined "whether the tone of the Facebook account of the Event [and Land Rover Accident] rose 'to the level of disparagement necessary to deprive otherwise protected activities of the protection of the Act.'"[140] In resolving the first issue, the judge began by determining whether the activity was concerted, then the

133. *Karl Knauz Motors*, No. 13-CA-46452, at 3.
134. *Id.* at 3-4; August Memorandum, *supra* note 49, at 6.
135. *Karl Knauz Motors*, No. 13-CA-46452, at 4.
136. *Id.*
137. *Id.*
138. *Id.* at 4-5; *see* August Memorandum, *supra* note 49, at 7.
139. *Karl Knauz Motors*, No. 13-CA-46452, at 7.
140. *Id.* (quoting Allied Aviation Serv. Co. of N.J., Inc., 248 N.L.R.B. 229, 231 (1980)). Note that this is the Jefferson Standard. *See* N.L.R.B. v. Elec. Workers Local 1229, 346 U.S. 464 (1953).

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judge looked to see whether such activity was protected under the NLRA.[141] Concerted activity as noted above "does not require that two or more individuals act in unison to protest, or protect, their working conditions,"[142] and there need not be an "'express discussion of a group protest . . . individual actions [are] concerted to the extent they involved a 'logical outgrowth' of prior concerted activity. The lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity.'"[143]

The ALJ held that the posting of the pictures from the Event were concerted activity, because prior to the posting there were comments at the meetings about the inadequacies of the food, along with further discussion between salespersons after the meeting.[144] The ALJ also noted that though "only Becker complained further about [the Event] on his Facebook pages without any further input from any other salesperson . . . it was concerted activities . . . ."[145] Thus, next it was determined that the posting of the photos from the Event and the further comments by Becker were in fact protected.[146] Because the wages of a salesperson are a combination of commission from profit on the sale of a vehicle, volume of sales, and a "Customer Satisfaction Index,"[147] the ALJ determined that customers could have been "turned off by the food offerings at the event and either did not purchase a car because of it, or [could have given] the salesperson a lower rating in the Customer Satisfaction Rating because of it . . ." resulting in lower wages for the salesperson.[148] Therefore, the posting of the pictures from the Event as well as the comments were protected concerted activity.[149]

Next, it was determined that the tone of the Facebook account did not rise "'to the level of disparagement necessary to deprive otherwise protected activities of the protection of the Act.'"[150] The ALJ noted that even though the account had a "mocking and sarcastic tone . . ." that was not enough for the activity to lose its protection.[151] Multiple cases and decisions were cited that explain that the use of "'literary techniques of satire and irony to make

141. *Karl Knauz Motors*, No. 13-CA-46452, at 8.
142. *Id.*
143. *Id.* (quoting N.L.R.B. v. Mike Yurosek & Son, Inc., 53 F.3d 261, 265 (9th Cir. 1995)).
144. *Id.*; *see* August Memorandum, *supra* note 49, at 7.
145. *Karl Knauz Motors*, No. 13-CA-46452, at 8.
146. *Id.*
147. *Id.* at 2.
148. *Id.* at 8.
149. *See* August Memorandum, *supra* note 49, at 7.
150. *Karl Knauz Motors*, No. 13-CA-46452, at 8 (quoting Allied Aviation Serv. Co. of N.J., Inc., 248 N.L.R.B. at 231); *see* August Memorandum, *supra* note 49, at 8.
151. *Karl Knauz Motors*, No. 13-CA-46452, at 8.

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[a] point, as opposed to a more neutral factual recitation of their dissatisfaction . . .'" does not deprive the communication or act of its protection under section 7 of the NLRA.[152] Thus, the employee does not have to use a neutral means to express his concerns. Here, the ALJ determined that the Facebook postings about the Event were both concerted and protected by section 7, and that the postings were not done in such a disparaging way as to deprive the activity of its section 7 protection.[153]

The ALJ then determined that the postings of the Land Rover accident were not protected concerted activity.[154] The posts were done "solely by Becker, apparently as a lark, without any discussion with any other employee . . . and had no connection to any of the employees' terms and conditions of employment."[155] It was then noted that no discussion of the tone is necessary because the posts are "obviously unprotected."[156]

Karl Knauz Motors, Inc. is a case that provides some guidance to employers.[157] It provides a two-step test that can be applied in determining whether social media activity is protected concerted activity under the NLRA.[158] It also provides guidance in that it provides applicable definitions for concerted activity.[159] Finally, this decision is important for employers because it is an example of two posts done at the same time, one of which was protected concerted activity and one of which that was not, demonstrating the difference between the two.[160] Another important case that has recently been decided before the NLRB Division of Judges, which has provided some guidance for employers, is *Hispanics United of Buffalo, Inc and Claros Ortiz*.[161]

5. *Hispanics United of Buffalo, Inc. and Claros Ortiz*

This case involves a group of five employees who were fired after posting on Facebook about another employee who criticized their work performance.[162] The five employees alleged that such firing violated section 8(a)(1) of the NLRA.[163] Lydia Cruz-Moore was hired in May 2010 by Hispanics United of Buffalo ("HUB"), a "not-for-profit corporation

152. *Id.* (quoting Pontiac Osteopathic Hosp., 284 N.L.R.B. 442, 452 (1987)).
153. *Id.* at 9.
154. *Id.*
155. *Id.*
156. *Karl Knauz Motors*, No. 13-CA-46452, at 9.
157. *See id.*
158. *Id.* at 7-8.
159. *See id.* at 8.
160. *See id.* at 7-9.
161. Hispanics United of Buffalo, Inc and Claros Ortiz, No. 3-CA-27872.
162. *See generally id.*
163. *Id.* at 1.

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which renders social services to its economically disadvantaged clients in Buffalo, New York."[164] Cruz-Moore often spoke with other employees and criticized their work and sometimes even threatened to raise concerns with HUB's Executive Director.[165] On October 9, 2010, in preparation for a meeting with HUB's Executive Director to discuss job performance, HUB employee Mariana Cole-Rivera posted the following on Facebook: "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about [sic] had it! My fellow coworkers how do u [sic] feel?"[166] Five of Cole-Rivera's coworkers commented on her post, and on October 12, 2011, she, along with four of those five employees, were fired for their posts.[167]

The five HUB employees argued that their firing was an unfair labor practice under section 8(a)(1) of the NLRA because they engaged in protected concerted activity.[168] The ALJ defined "'concerted activities' protected by Section 7" as "those 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'"[169] Concerted activity also exists in an individual action "so long as it is engaged in with the object of initiating of inducing group action,"[170] and that "[t]he object of inducing group action need not be express."[171] The post made by Cole-Rivera was the "first step toward taking group action . . ."[172] and because HUB grouped all five employees together in firing them, this "establishes that [HUB] viewed the five as a group and that their activity was concerted."[173]

Next, the ALJ determined that the activity was protected by the NLRA.[174] In the previous sections of this paper, the social media that was protected by the NLRA dealt with working conditions and the changing of such conditions, however here, employees were complaining about Cruz-Moore's comments regarding their working habits.[175] The ALJ noted that this is irrelevant because in *Aroostook County Regional Ophthalmology*

164. *Id.* at 1, 4.
165. *Id.* at 4.
166. *Hispanics United of Buffalo*, No. 3-CA-27872, at 4; August Memorandum, *supra* note 49, at 2.
167. *Hispanics United of Buffalo*, No. 3-CA-27872, at 4-6; *see* August Memorandum, *supra* note 49, at 2.
168. *Hispanics United of Buffalo*, No. 3-CA-27872, at 1.
169. *Id.* at 7 (quoting *Meyers II*, 281 N.L.R.B. 882; Meyers Indus. (*Meyers I*), 268 N.L.R.B. 493 (1984)); *see* August Memorandum, *supra* note 49, at 3.
170. *Hispanics United of Buffalo*, No. 3-CA-27872, at 7 (citing Mushroom Transp. Co., 330 F.2d 683, 685 (3d Cir. 1964); Whittaker Crop., 289 N.L.R.B. 933 (1988)).
171. *Hispanics United of Buffalo*, No. 3-CA-27872, at 7.
172. *Id.* at 8.
173. *Id.* at 9.
174. *Id.*
175. S*ee* August Memorandum, *supra* note 49, at 2-3.

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Center,[176] "the Board held that employee complaints to each other concerning schedule changes constituted protected activity" and thus here "[b]y analogy . . . the [employees'] discussions about criticisms of their job performance are also protected."[177] It has also established that "concerted activity for employees' mutual aid and protection that is motivated by a desire to maintain the status quo may be protected by Section 7 to the same extent as such activity seeking changes in wages, hours, or working conditions."[178] Thus, the ALJ found that the posts pertaining to the complaints of Cruz-Moore were protected concerted activity.[179]

The final inquiry of the ALJ was to determine whether such protection was lost due to misconduct engaged in "during the course of otherwise protected activity, . . . [by] look[ing] to the factors set forth in *Atlantic Steel Co.*"[180] The ALJ determined that the employees did not engage in any misconduct which made their conduct "so opprobrious as to lose protection under the Act."[181] The ALJ, applying the *Atlantic Steel Co.* factors held that: (1) the posts were not made at work; (2) "the Facebook posts were related to a coworker's criticisms of employee job performance, a matter the discriminatees had a protected right to discuss;" (3) no "outbursts" occurred; and (4) the factor of the outburst being provoked by an unfair labor practice of the employer is irrelevant in the situation at hand.[182] Therefore, the Facebook posts made by the five employees did not lose their protected status.[183]

Hispanics United of Buffalo, Inc. follows the same test as *Karl Knauz Motors, Inc.*, however *Hispanics United of Buffalo, Inc.* expands on the definition of protected concerted activity.[184] As discussed, the definition of protected concerted activity may include: (1) "discussions about criticisms of . . . job performance . . .;" (2) "activity . . . that is motivated by a desire to maintain the status quo . . .;" (3) activity that has not been brought to the attention of management before the firing; and (4) certain activity even when "there is no express evidence that [the employees] intended to take

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176. 317 N.L.R.B. 218 (1995), *enf. denied on other grounds* 81 F.2d 209 (D.C. Cir. 1996).

177. *Hispanics United of Buffalo*, No. 3-CA-27872, at 8; *see* Aroostook Cnty. Regional Ophthalmology Ctr., 317 N.L.R.B. at 220.

178. *Hispanics United of Buffalo*, No. 3-CA-27872, at 8 (citing Five Star Transp., Inc., 349 N.L.R.B. 42, 47 (2007)).

179. *Id.* at 9.

180. *Id.*; *see Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979). The *Atlantic Steel* factors are laid out in Part III.B.1. of this Article.

181. *Hispanics United of Buffalo*, No. 3-CA-27872, at 9.

182. *Id.*

183. *Id.*

184. *Id.* at 8-9; *see supra* Part III.B.4.

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further action, [even if] they were not attempting to change any of their working conditions."[185]

6. *So What is the Test?*

After reading the previous section, one may ask "What can I take from these NLRB advice memoranda and decisions?" The advice and decisions explained above provide a test with definitions for an employer to determine whether a specific social media activity conducted by an employee could be seen as protected concerted activity, and thus can help an employer determine the legality of certain adverse employment actions.

The first step for an employer to determine whether an employee's social media activity is protected is to determine whether the activity is concerted.[186] If the activity is not concerted, then the employer is free to reprimand and take adverse action against an employee for social media activity.[187] Concerted activity is defined generally in *Meyers II* as activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself"[188], but has been expanded to include: (1) "individual activities that are the 'logical outgrowth of concerns expressed by the employees collectively;'"[189] (2) "'circumstances where individual employees seek to initiate or to induce or to prepare for group action;'"[190] (3) circumstances "where individual employees bring 'truly group complaints' to management's attention;"[191] (4) certain activities that look toward group action that "involve[] only a speaker and a listener. . .;"[192] and (5) individual action taken "with the object of inducing group action" even if "[t]he object of inducing group action [is not] express" and has not been brought to the management's attention.[193]

If the activity in question is concerted, then the next inquiry is to determine whether the activity is protected.[194] Activity has been found to be protected if the activity deals with: (1) improving working conditions, hours

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185. *Hispanics United of Buffalo*, No. 3-CA-27872, at 8-9.
186. Carter, *supra* note 50.
187. *See id.*
188. *Meyers II*, 281 N.L.R.B. at 885-86 (quoting *Meyers I*, 268 N.L.R.B. 4, at 497).
189. JT's Porch Saloon & Eatery, *supra* note 92, at 2 (quoting *Five Star Transp., Inc*., 349 N.L.R.B. at 43-44).
190. *Id.* at 3 (quoting *Meyers II*, 281 N.L.R.B. at 887).
191. *Id.* (quoting *Meyers II*, 281 N.L.R.B. at 887).
192. Wal-Mart Memo, *supra* note 102, at 3.
193. *Hispanics United of Buffalo*, No. 3-CA-27872, at 7, 9.
194. *See Karl Knauz Motors*, No. 13-CA-46452, at 8; *see also Hispanics United of Buffalo*, No. 3-CA-27872, at 8.

and wages;[195] (2) maintaining the status quo;[196] (3) protesting supervisory actions[197] and; (5) "discussions about criticisms of [employees'] job performance . . . ."[198] If it is determined the activity is both concerted and protected by section 7 of the NLRA, then an employer cannot legally take action against the employee for the social media activity, unless the activity has lost such protection.[199]

To determine whether the activity has lost the Act's protection, the *Atlantic Steel Co.* standard or the *Jefferson* standard will be applied.[200] The *Atlantic Steel Co.* standard "is generally applied to an employee who has made public outbursts against a supervisor. . . ."[201] Such outbursts will be evaluated using the following factors: "(1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[202] The *Jefferson* standard on the other hand, "is usually applied where an employee has made allegedly disparaging comments about an employer or its product in the context of appeals to outside or third parties . . . [that are] so disloyal, reckless, or maliciously untrue as to lose the Act's protection."[203] Recall that the *Jefferson* standard is not met merely because an employee uses a sarcastic or mocking tone in the protected concerted activity.[204]

Because the determination of whether a tweet or post is a protected concerted activity under the NLRA is extremely fact sensitive and may be hard to determine from an employer standpoint, it is very important that employers have a social media policy in place to help guide their employees' social media activity.

IV. THE SOCIAL MEDIA POLICY

The increased use of social media, both personally and professionally, along with the carelessness of employees in their postings, show the need

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195. *Hispanics United of Buffalo*, No. 3-CA-27872, at 8 (citing *Five Star Transp., Inc.*, 349 N.L.R.B. at 47).

196. *Id.*

197. Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 9 n.16; *see also* August Memorandum, *supra* note 49, at 4.

198. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, at 8.

199. *See* Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 9.

200. *See* August Memorandum, *supra* note 49, at 7-8.

201. *Id.* at 8.

202. Am. Med. Response of Conn., Inc. Memo, *supra* note 62, at 9.

203. August Memorandum, *supra* note 49, at 8; *see* N.L.R.B. v. Elec. Workers Local 1229, 346 U.S. 464, 477-78 (1953).

204. *See Karl Knauz Motors*, No. 13-CA-46452, at 8; *see also* August Memorandum, *supra* note 49, at 8.

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for employers to have social media policies. The lawsuit that has been filed by PhoneDog, LLC against a former employee is a prime example of why social media policies are a must in today's society for employers.[205] PhoneDog's former employee had a Twitter account which was used for his work at the company, but now PhoneDog is claiming ownership of the former employee's Twitter followers.[206] "The company is alleging that the followers should be treated like a customer list, and therefore PhoneDog's property."[207] Had PhoneDog implemented a social media policy that addressed situations such as this, both time and money could have been saved.[208]

An employer may ask: "What should my social media policy contain?" Attorney Michael F. McGahan from Epstein Becker Green suggests that "a social media policy should normally include the following:"

- A written policy
- A signed acknowledgement form, including consent to monitoring and access to stored communications
- Definitions, e.g., "social media," confidential and/or proprietary information, working time, Company-issued equipment/devices
- Fair, consistent monitoring and enforcement
- The scope of monitoring, e.g., viewing Facebook profiles of existing employees, monitoring use of social media on Company-issued equipment/devices
- Possible disciplinary actions
- Periodic redistribution
- Training
- A clear process for reporting complaints/non-compliance
- A clear communication of prohibited activities[209]

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205. Order on Defendant's Motion to Dismiss Pursuant to FRCP 12(B)(1) and 12(B)(6), PhoneDog v. Kravitz, CV 11-03474 MEJ (2011) (No. 28), *available at* http://www.scribd.com/doc/72258605/Phonedog-v-Kravitz-11-03474-N-D-Cal-Nov-8-2011.

206. Pillsbury Winthrop Shaw Pittman LLP, *Dog Gone! And Their Twitter Followers Too?*, LEXOLOGY (Jan. 3, 2012), http://www.lexology.com/library/detail.aspx?g=2cfc4d2f=212a=4b51=88d4-8ee74b603091.

207. *Id.*

208. *Id.*

209. Michael F. McGahan, *The Workplace is Still For Working: Employers May Promulgate and Enforce Rules Limiting Personal Use of Social Media During Working Time*, LEXOLOGY (Nov. 23, 2011), http://www.lexology.com/library/detail.aspx?g=245b35a8-b406-4e05-87ee-b5336f61207f.

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The inclusion of items in an employer's social media policy should not be limited to those items listed above. As demonstrated from the PhoneDog example above, many more items may need to be included in a social media policy.[210] Those companies that encourage employees to use social media in attracting customers should address the issue of ownership of the account and "friends" and "followers."[211] Though employers should cover all angles in making social media policies, what can be addressed in these policies is somewhat restricted.[212]

Though social media policies are relatively new, "existing standards concerning workplace rules will be applied to social media policies," when evaluating their legality.[213] Therefore, social media policies cannot prohibit or restrict section 7 activity.[214] A test to determine whether employer policies violate section 7 or section 8(a)(1) of the NLRA was laid out in Lafayette Park Hotel.[215] The NLRB has noted "that an Employer may violate Section 8(a)(1) through the mere maintenance of certain work rules even in the absence of enforcement," meaning that a social media policy may violate the NLRA, even if not enforced.[216] The general test from *Lafayette Park Hotel* that can be applied to social media policies requires asking yourself "whether the rule in question [in the social media policy] 'would reasonably tend to chill employees in the exercise of their Section 7 rights.'"[217]

This broad rule, which provides little guidance, was redefined by the NLRB in Lutheran Heritage Village–Livonia.[218] The new test is a two-step inquiry. First, an employer must look to whether the rule in the social media policy "explicitly restricts Section 7 protected activities."[219] If it explicitly restricts section 7 activities, then that provision in the social media policy will be unlawful and thus unenforceable.[220] However, if there is no explicit restriction, the rule "will only violate Section 8(a)(1) upon a showing that: (1) *employees would reasonably construe the language to prohibit Section 7 activity;* (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict . . . Section 7

210. *See* Pillsbury Winthrop Shaw Pittman LLP, *supra* note 206.
211. *See id.*
212. *See* Carter, *supra* note 50.
213. *Id.*
214. *See id.*
215. 326 N.L.R.B. 824 (1998); *see* Sears Holdings (Roebucks), No. 18-CA-19081, 2009 WL 5593880, at *2 (N.L.R.B. Dec. 4, 2009).
216. *Sears Holdings*, 2009 WL 5593880, at *2.
217. *Id.* (quoting *Lafayette Park Hotel*, 326 N.L.R.B. at 825).
218. 343 N.L.R.B. 646 (2004).
219. *Id.*
220. *See id*.

rights."[221] The NLRB noted that the rule at issue should not be read in isolation and that "it will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity."[222]

Since the definition of section 7 protected concerted activity is continually changing and may be hard to define for an employer writing a social media policy, the test above seems to provide guidance that may not be all that helpful. However, in the NLRB's August 18, 2011 memorandum, a number of cases dealing with social media policies were addressed.[223] In one case, a hospital had a rule that "prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity."[224] It also had another rule which "prohibited any communication or post that constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member."[225] The NLRB held that these rules were unlawful and overly broad under the second inquiry of the *Lutheran Heritage* test because "employees could reasonably construe them to prohibit protected conduct."[226] The NLRB's two main concerns in this case were the lack of defining vague terms to explain the restrictions on those terms, which included "private or confidential" and the fact that "[t]he policy did not . . . *limit [broad terms] in any way that would exclude Section 7 activity*."[227]

In another case that came before the NLRB, an employer's handbook contained an "online social networking policy . . . [which] prohibited employees on their own time from using micro-blogging features to talk about company business on their personal accounts; from posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy . . . ."[228] The NLRB held that such policies were overly broad and unlawful because such a policy "would reasonably be construed to prohibit Section 7 activity."[229] Again, the main concern of the NLRB was that the policy contained no definitions or limitations on the

221. *Id.* (citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. at 647).

222. *Id.* at *3 (citing *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. at 647 (noting that "we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way."))

223. August Memorandum, *supra* note 49, at 18-23.

224. *Id.* at 18.

225. *Id.*

226. *Id.* at 19.

227. *Id.* (emphasis added).

228. August Memorandum, *supra* note 49, at 20.

229. *Id.*

rule, and the NLRB stated, "*[a]bsent such limitations or examples* of what was covered, the rules would reasonably be interpreted as prohibiting the employees' right to discuss wages and other terms and conditions of employment, as well as to communicate through the posting of pictures."[230]

Based on the NLRB's recent rulings in cases dealing with social media policies, it seems as though all that employers need to do to make sure that their social media policies are not overbroad is to provide a catch-all phrase that specifically states that none of the social media policy provisions prohibit or restrict section 7 activities.[231]

Therefore, as noted above, an employer should include many items and cover any topic that could become an issue with respect to social media, and the employer should be sure that the social media policy is in writing and signed by all employees.[232] Last, but definitely not least, the policy should define ambiguous terms and contain a provision that expressly states that no provision prohibits or restricts activities described in section 7 of the NLRA.[233] Having a solid social media policy that all employees are required to read may not stop all desired social media activity, but it will at least educate employees on the dos and don'ts of social media and hopefully deter them from inappropriate activity.

V. CONCLUSION

Over the past decade, the use of social media has skyrocketed. An emerging issue in the workplace centers on employees' social media activity and such activity's protection under the NLRA. The issue has become an important one because employees generally do not think about the consequences their posts could have on employers, coworkers, or clients before they post. Today, some guidance is available to employers. A two-prong test has been developed in order to determine whether an employee's social media activity is protected by the NLRA. If this test is not met, then an employer may take adverse action against the employee without fear that the employer is committing an unlawful employment practice as defined under the NLRA. Though the definition of protected concerted activity has been defined, and examples of protected concerted activity are now available to employers, it may still be difficult for an employer to determine if a particular activity is in fact concerted and protected; thus, it is important for employers to develop a written social media policy and have each

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230. *Id.* (emphasis added).
231. *See id.* at 18-23.
232. *See* McGahan, *supra* note 209.
233. *See* Carter, *supra* note 50.

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employee read and acknowledge that they have read the policy. However, an employer must make sure that the policy is not overbroad, which can be done by providing a provision in the policy which states that no provision in the social media policy is to prohibit or restrict any activity protected under section 7 of the NLRA. Social media and its role in society is still evolving, and the lines between personal and professional use are blurring, therefore it is important that employers be aware of the changing law and have sound social media policies in place.

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