

The National Labor Relations Board: Perspectives on social media

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THE NATIONAL LABOR RELATIONS BOARD: PERSPECTIVES ON SOCIAL MEDIA

*Christine Neylon O'Brien**

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I. INTRODUCTION

“What is the NLRB?” This is the response I received from a colleague when I told him about my paper on the National Labor Relations Board’s social media cases. It is striking how little people know about the NLRB. Many people do not know what the Board is, what it does, or even how to recognize the agency by its initials. But in the private sector workforce, it is increasingly important to know what this federal administrative agency does, as well as to understand its power to regulate what workplace rules and actions are lawful under the National Labor Relations Act (NLRA).¹ Both employees and employers benefit from understanding the requirements of the NLRA—employees because they can avoid discipline or discharge for conduct that is

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1. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006). According to the NLRB, “[m]ost employees in the private sector are covered under the NLRA. The law does not cover government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).” *Frequently Asked Questions: Which Employees Are Protected Under the NLRA?*, NLRB, <http://perma.cc/ACD4-H495> (last visited Mar. 6, 2014).

unprotected,² and employers because they can avoid legal liability for interfering with protected concerted activities (PCAs), thereby committing unfair labor practices (ULPs).³

Perhaps the most common misconception regarding the NLRA is that it protects only union members and union organizing. This is simply not so. When I was first practicing law, a friend of a friend called because he had been fired from a moving company and needed help. The former employee was not a union member, but I suggested that he file a charge at the regional office of the NLRB because the fellow was raising issues about employee wages with his boss when they got into a heated debate and he was fired. He filed a complaint with Region 1 of the NLRB and ultimately received a monetary settlement from his former employer.

NLRA § 7 protects employees when they raise shared concerns relating to wages, hours, and working conditions, or mutual aid or protection.⁴ The NLRB protects these employees' rights, and the statute is not limited to union organizing and collective bargaining.⁵ The law protects those who are not union members, as well as those who are, and § 7 rights apply to communication on social media as well as face-to-face interactions.⁶

What conduct do employees engage in on social media that might come under their employers' scrutiny and yet still receive NLRA protections? Employees are posting and "liking" on Facebook, tweeting, texting, blogging, uploading videos on YouTube, using Instagram, Snapchat, Pinterest, LinkedIn,

2. See *Rights We Protect*, NLRB, <http://perma.cc/39TL-BSQY> (last visited Mar. 6, 2014).

3. Unfair labor practices are defined in § 158 of the NLRA. 29 U.S.C. §158 (2006). When the NLRA was enacted in 1935, it provided employees with the substantive right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157. The NLRB protects employees' PCAs and intervenes to remedy employer or union ULPs. *Rights We Protect*, *supra* note 2.

4. See 29 U.S.C. § 157 (2006).

5. See *id.* § 151 (2006); *Rights We Protect*, *supra* note 2.

6. JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 80 (2d ed. 2013) (noting NLRA § 7 protection of speech for non-union employees in private sector).

Wikis, and more, with new sites constantly adding to the mix. Clearly, technology has changed the work world over the past thirty years.⁷ FaceTime is now an application on your iPhone rather than the “face time” that was expected at work in years past. Work is no longer contained within the physical boundaries of workplaces or within the strict time confines of the workday, and employees today combine their work and personal lives in a way that was unthinkable in the past. The NLRB social media cases reflect this new accommodation of work and life as technology moves to the center of it all. The cases focus on employers having or enforcing social media policies (SMPs) and other rules regarding employee interaction that restrict employee rights under the NLRA, and in many instances, the cases involve employers disciplining or discharging employees for engaging in PCAs on social media.

II. THE NLRB’S TAKE ON EMPLOYEE SOCIAL MEDIA POSTINGS: TESTING FOR EMPLOYER UNFAIR LABOR PRACTICES

In construing adverse employment actions because of employees’ social media use, the NLRB applied the same test it historically has applied to face-to-face conduct—whether the communications are covered by NLRA § 7.⁸ Because the NLRB’s decisions regarding employer rules that unduly restrict PCAs are the same whether they apply to conduct on social media or not, the Board’s recent decisions regarding employer work rules that infringe on PCAs in both social media and in person are both relevant to gaining an understanding of the limits the Board places on employer work rules. The standard that the NLRB has developed to test whether work rules, including SMPs, infringe employees’ § 7 rights is outlined in its decisions in *Lafayette Park*⁹ and *Lutheran Heritage Village-Livonia*.¹⁰ First, an

7. See Nancy B. Schess, *Then and Now: How Technology Has Changed the Workplace*, 30 HOFSTRA LAB. & EMP. L.J. 435, 435–36 (2013).

8. See Christine Neylon O’Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OR. L. REV. 337, 375 (forthcoming 2014), <http://perma.cc/JVM2-SJJA>; Steven Greenhouse, *Even If It Enrages Your Boss, Social Net Speech is Protected*, N.Y. TIMES, Jan. 22, 2013, at A1, <http://perma.cc/G3SK-CBTC>.

9. *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enforced*, 203 F.3d 52

employer rule is unlawful if it restricts activities that § 7 explicitly protects—for example, a rule that prohibits discussion of wages, hours, or working conditions.¹¹ Second, if the rule does not explicitly restrict PCAs, it will violate the Act 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 the exercise of Section 7 rights.¹²

III. HIGHLIGHTS FROM TOP TEN NLRB CASES

This past summer, I created a table of the top ten NLRB cases on Facebook firings and employer social media policies.¹³ Since then, additional relevant cases have been reported or discussed, and I also review these to add clarity to the NLRB's rules for social media.¹⁴ First, I offer some highlights from the top ten cases. These cases illustrate just how easy it is for both employers and employees to make mistakes if they are unaware of NLRA protections for employees.

Although a few NLRB cases came before the Board's Division of Advice regarding social media conduct and policies before 2010,¹⁵ the first news of an NLRB case in this area went viral in Fall 2010 after the *New York Times* featured an article about an American Medical Response (AMR) emergency medical

(D.C. Cir. 1999).

10. Martin Luther Mem'l Home (*Lutheran Heritage Vill.-Livonia*), 343 N.L.R.B. 646 (2004).

11. See Lafayette Park Hotel, 326 N.L.R.B. at 825; *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. at 646.

12. *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. at 647.

13. See O'Brien, *The Top Ten NLRB Cases*, *supra* note 8, at 343.

14. See *infra* Part IV.

15. See Christine Neylon O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act*, 45 SUFFOLK U. L. REV. 29, 40–46 (2011) (discussing two earlier cases: Advice Memorandum from the NLRB Office of the Gen. Counsel to Marlin O. Osthus, Reg'l Dir. of Region 18 (Dec. 4, 2009) [hereinafter Sears Advice Memo.]; Advice Memorandum from the NLRB Office of the Gen. Counsel to J. Michael Lightner, Reg'l Dir. of Region 22 (May 5, 2010) [hereinafter MONOC Advice Memo.]).

technician (EMT) whose employer fired her shortly after the employee made negative comments about her supervisor in Facebook postings.¹⁶ The EMT was a union member who asserted her *Weingarten* right,¹⁷ that is, the right to request a union representative's assistance when filling out an incident report relating to patient complaints.¹⁸ The supervisor refused her request and told her to fill the report out by herself, and she was sent home early.¹⁹ Thereafter, the EMT wrote comments on Facebook that her supervisor was a "scumbag" and a "17"—hospital code for a psychiatric patient.²⁰

AMR terminated the EMT,²¹ but thereafter her union filed an unfair labor practice (ULP) charge with the NLRB resulting in the issuance of a complaint against the company.²² As a condition of the settlement, the NLRB required AMR to revise its SMP nationwide so that it complied with § 7.²³ The complainant received a monetary settlement rather than reinstatement.²⁴ Even though the employer settled with the complainant, in addition to requiring AMR to revise its SMP, the NLRB also required the company to post a notice of employee rights under

16. See Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES (Nov. 8, 2010), <http://perma.cc/D5RU-H4QZ> (discussing AMR case).

17. A *Weingarten* right is named after the case that recognized that an employee who is faced with an investigatory interview that reasonably could lead to discipline or discharge is entitled to request a union representative to be present during the interview. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–57 (1975).

18. Advice Memorandum from the NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg, Reg'l Dir. of Region 34, at 3 (Oct. 5, 2010), <http://perma.cc/84LN-2AN2> [hereinafter AMR Advice Memo]; see also O'Brien, *The First Facebook Firing Case*, *supra* note 15, at 29–31 (discussing the AMR case, the law concerning social media and § 7 of NLRA, and the Weingarten issue).

19. AMR Advice Memo, *supra* note 18, at 3.

20. *Id.*

21. *Id.* at 4.

22. See *id.* at 1.

23. Press Release, NLRB, Settlement Reached in Case Involving Discharge for Facebook Comments (Feb. 7, 2011), <http://perma.cc/BFN4-JEYN>.

24. NLRB Settlement Agreement, Am. Med. Response of Conn., Inc., No. 34-CA-12576 (Feb. 7, 2011) (copy on file with author); see Melanie Trotman, *Facebook Firing Case is Settled*, WALL ST. J., (Feb. 8, 2011, 12:01 AM), <http://perma.cc/46SQ-Y5MP>.

the NLRA as well as a promise not to violate those rights.²⁵

In contrast to *AMR*, in the *Walmart* case, an employee was clearly not protected under the NLRA when he posted a foolish Facebook rant about issues unrelated to PCAs.²⁶ In reading the facts, one wonders why this employee thought this Facebook posting would not result in an adverse employment action.²⁷ Of course, because Facebook is an online forum, material employees post may serve as a basis for discipline or discharge.²⁸ In this case, the former Walmart employee posted some truly outrageous, politically incorrect comments including suggestions as to how the government should limit the number of children per family based on family income, comparing this practice to culling deer populations.²⁹ He also posted a slur against handicapped individuals.³⁰ He was fired for these comments, despite his defense that he was “just running off at the mouth.”³¹ The NLRB did not order reinstatement because his conduct was not a PCA under NLRA § 7; his comments did not address working conditions, nor did they raise any shared concern or complaint regarding the workplace.³²

The NLRB in *Walmart* did not determine that the company’s social media policy (SMP) unnecessarily infringed upon employee rights because Walmart promptly revised it to avoid a subsequent finding of an unfair labor practice.³³ The NLRB’s Acting General Counsel subsequently included Walmart’s revised

25. See *id.*; Press Release, *supra* note 23.

26. Advice Memorandum from the NLRB Office of the Gen. Counsel to Chip Harrell, Reg’l Dir. of Region 11, at 4–5 (May 30, 2012), <http://perma.cc/PS8K-R7FU> [hereinafter Walmart Advice Memo.].

27. See Rebecca Stang, Note, *I Get By With a Little Help From My “Friends”: How the National Labor Relations Board Misunderstands Social Media*, 62 DEPAUL L. REV. 621, 621–22 (2013) (noting that “[f]or many Americans, complaining about a job is one of the perks of having one” but expressing concern that the NLRA was written before the existence of social media so “it is unclear how its language applies when a conversation about work moves from the water cooler to a Twitter feed”).

28. See Walmart Advice Memo, *supra* note 26, at 5.

29. *Id.* at 4.

30. *Id.*

31. *Id.* at 4–5.

32. *Id.*

33. See *id.* at 1.

SMP as an example of a model policy in its May 2012 Third Report on Social Media.³⁴

The General Counsel's Office Advice Memoranda from the *AMR* and *Walmart* cases, and the Board's first decision on a social media policy in the *Costco* case³⁵ and subsequent cases, make clear that the Board will exercise the remedy of requiring revisions to SMPs to the extent the employer policy unlawfully interferes with § 7 rights. Only one of these top ten cases surveyed did not involve SMP revision. In *Hispanics United of Buffalo*, the focus was not on a SMP, but rather on reinstatement of wrongfully discharged employees because the Board concluded that the employees were lawfully engaged in PCA when they discussed work performance concerns in various Facebook postings.³⁶

In some cases, managers who were unaware of the NLRA's protections reasoned that it was perfectly fine to fire employees for discussing wages with their coworkers. Perhaps these managers believed that employee wages were solely the employer's business, but they are clearly also the business of the employees who are paid the wages. Employee discussion of wages is plainly a PCA.³⁷ In *Jones & Carter*, the employer classified an employee discussion of salaries as a violation of its confidentiality rule and terminated the employee, but as the Administrative Law Judge (ALJ) noted, prohibiting employees from discussing wages undoubtedly violates the NLRA,³⁸ and therefore it was not lawful to terminate them for violation of what was clearly an illegal rule under federal law.³⁹

34. OFFICE OF THE GEN. COUNSEL, NLRB, MEMORANDUM OM 12-59, REPORT OF THE ACTING GEN. COUNSEL CONCERNING SOCIAL MEDIA CASES 22-24 (May 30, 2012).

35. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, slip op. at 1, 2012 WL 3903806 (Sept. 7, 2012).

36. *Hispanics United of Buffalo, Inc. (HUB)*, 359 N.L.R.B. No. 37, slip op. at 3, 2012 WL 6800769 (Dec. 14, 2012).

37. *Jones & Carter, Inc.*, No. 16-CA-027969, slip op. at 10, 2012 WL 5941221 (A.L.J. Nov. 26, 2012), *aff'd*, No. 16-CA-027969, 2013 WL 754064 (N.L.R.B. Feb. 8, 2013), <http://perma.cc/T5A7-DSS7>. The ALJ's decision was adopted by the NLRB in the absence of exceptions filed within the requisite period. *Id.*

38. *See id.* at 9-12.

39. *See id.* at 16 (citing *Taylor Made Transp. Servs.*, 358 N.L.R.B. No. 53, slip op. at 1, 2012 WL 2069673 (June 7, 2012) (noting violation of Act for

Likewise, in *Bettie Page Clothing*, the employees were fired for discussing terms and conditions of employment, as well as actions of their supervisor, in various Facebook postings.⁴⁰ The NLRB ordered these employees to be reinstated, and further required the employer to revise its SMP, along with its company information policies that inhibited disclosure of salaries.⁴¹ As a defense, the employer claimed that the employees actually tried to entrap the company into committing an NLRA violation by firing them because, after the firing, one employee posted on Facebook a silly line from an old *The Monkees* television episode.⁴² The line quoted was: “Muhahahahahaha!!! ‘So they’ve fallen into my crutches.’”⁴³ This “defense” was promptly dismissed as irrelevant because the Board concluded that the employer wrongfully terminated the employees for engaging in PCAs.⁴⁴

SMPs which can be construed to prohibit discussion of wages or working conditions will often be found overbroad and therefore in violation of § 7. For example, in *Dish Network*, an employer’s rule prohibiting postings of disparaging or derogatory comments electronically during company time, without more, was too restrictive and therefore unlawful because it failed to clarify that employees could “discuss” such matters during work breaks and non-work time.⁴⁵ Further, employer media policies that prohibit discussion of work matters with the media without prior authorization from management have also been judged too restrictive on PCAs because these restrictions were designed to inhibit contact with the media and the possibility of negative media commentary about shared protected workplace concerns.⁴⁶ Similarly, in *DirectTV*, the Board also found overbroad a company information policy that restricted discussion of certain

employer to enforce unlawful rule against disclosing wage rates)).

40. See Design Tech. Grp., LLC (*Bettie Page Clothing*), 359 N.L.R.B. No. 96, slip op at 1–2, 2013 WL 1753561 (Apr. 19, 2013).

41. *Id.* at 2–3.

42. *Id.* at 1–2 & n.4.

43. *Id.* at 1 n.4 (citing *The Monkees: Monkee Chow Mein* (NBC television broadcast Mar. 13, 1967)).

44. *Id.* at 1–2.

45. Dish Network Corp., 359 N.L.R.B. No. 108, slip op. at 5, 2013 WL 1952196 (Apr. 30, 2013).

46. *Id.* at 6.

information and as a remedy required rescission of portions of the policy so that employees would reasonably understand that they have the right to discuss wages, hours, and working conditions, including the right to have such discussions with the media.⁴⁷

In *Costco*,⁴⁸ and again in *Knauz BMW*,⁴⁹ the NLRB further demonstrated that employers draft overly broad and ambiguous SMPs at their own risk. In both cases, the NLRB required revisions to the companies' SMPs that included what activities constitute permissible conduct protected by § 7, reasoning that employees should not fear engaging in PCAs.⁵⁰ *Costco's* overly restrictive non-disparagement policy was found to be unlawful because it had no exclusion for legally protected communications.⁵¹ In *Knauz BMW*, the company was required to revise its "courtesy" rule prohibiting disrespectful, profane, or other language which injured the image or reputation of the dealership.⁵² The Board also noted that to the extent ambiguous rules can be interpreted to prohibit PCAs, they will be construed against the employer.⁵³ In that case, the Board found that a car salesman's action of posting pictures on Facebook of a car accidentally driven into a pond during a sale at the dealership was not protected.⁵⁴ However, other posts complaining to co-workers about the quality of food provided at a work-related sales event *were* protected by § 7 because the latter reflected a shared concern regarding terms and conditions of employment.⁵⁵

47. See *DirectTV U.S. DirecTV Holdings, LLC*, 359 N.L.R.B. No. 54, slip op. at 2–3, 6, 2013 WL 314390 (Jan. 25, 2013).

48. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012 WL 3903806 (Sept. 7, 2012).

49. *Karl Knauz Motors, Inc. (Knauz BMW)*, 358 N.L.R.B. No. 164, 2012 WL 4482841 (Sept. 28, 2012).

50. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, slip op. at 2, 4; *Knauz BMW*, 358 N.L.R.B. No. 164, slip op. at 2–3; see also *Target Corp.*, 359 N.L.R.B. No. 103, slip op. at 2 (Apr. 26, 2013) (noting "employees should not have to decide at their own peril what conduct a rule covers" (citing *Flex Frac Logistics*, 358 N.L.R.B. No. 127, slip op. at 2 (2012))).

51. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, at 2.

52. *Knauz BMW*, 358 N.L.R.B. No. 164, at 2–3.

53. *Id.* at 2 (citing *Flex Frac Logistics*, 358 N.L.R.B. No. 127, slip op. at 2 (2012)).

54. *Id.* at 10–11.

55. *Id.* at 10.

This was so because the cheap food might lessen the likelihood of sales and commissions on luxury vehicles. Because the NLRB found that the salesman's posts making fun of the mishap were the reason for the salesman's termination in *Knausz*, rather than the posts regarding the cheap food, he was not reinstated.⁵⁶

The Board's *EchoStar* decision further highlighted the NLRB's admonition that SMPs may not be overbroad.⁵⁷ *Echostar's* SMP featured a non-disparagement clause, as well as another clause restricting access to media or government agencies by first requiring contact with the company's general counsel.⁵⁸ In *DirectTV* and *Dish Network*, the Board required revisions regarding the right to contact government agencies without prior approval of the company counsel.⁵⁹ The Board's decisions clearly demonstrate its position that employers must draft and enforce SMPs in ways that do not interfere with employees' exercise of their § 7 rights.

IV. MORE RECENT NLRB SOCIAL MEDIA DECISIONS

The NLRB recently issued a decision in *MCPc, Inc.* in which a panel of three Board Members ruled that the company committed an unfair labor practice by maintaining an overly broad confidentiality rule in its handbook.⁶⁰ The rule provided that "dissemination of confidential information within [the company], such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination."⁶¹ In fact, the employer discharged an engineer for mentioning the high salary of a newly hired corporate executive at a team building meeting where he and other engineers were discussing heavy workloads.⁶² He raised the possibility that several engineers could have been hired with that salary, and

56. *Id.* at 11.

57. *EchoStar Techs., L.L.C.*, N.L.R.B. No. 27-CA-066726, 2012 WL 4321039 (A.L.J. Sept. 20, 2012), *aff'd*, (N.L.R.B. Nov. 1, 2012).

58. *Id.* at 19, 21–22.

59. *DirectTV U.S. DirecTV Holdings, LLC*, 359 N.L.R.B. No. 54, slip op. at 6 (Jan. 25, 2013); *Dish Network Corp.*, 359 N.L.R.B. No. 108, slip op. at 8 (Apr. 30, 2013).

60. *MCPc, Inc.*, 360 N.L.R.B. No. 39, slip op. at 1 (Feb. 6, 2014).

61. *Id.* at 2.

62. *Id.* at 1.

two of his colleagues agreed.⁶³ The Board ruled that the employee was discharged for engaging in protected concerted activity.⁶⁴ The Board ordered rescission of the confidentiality rule; dissemination of handbook revisions to employees; reinstatement of the employee to his former position or one substantially equivalent; and backpay, including reimbursement for adverse tax consequences on receipt of the lump sum payment.⁶⁵ While Member Miscimarra agreed with the Board's decision on the confidentiality rule, he disagreed with the Board's current standard of finding a rule unlawful where "employees would reasonably construe the language to prohibit Section 7 activity," and advocated reexamination of the standard in a future case.⁶⁶

The NLRB released a Memorandum from its Division of Advice (DOA) on a case involving Giant Food LLC and their overly broad confidentiality information ban.⁶⁷ The DOA wrote that the company's social media guidelines could legitimately include a non-disparagement clause, but it was unlawful to broadly ban the use of "confidential or non-public information," the company logo, or posting a video made on-site without prior written approval.⁶⁸ The DOA foresaw that such guidelines could potentially include unlawful prohibitions on online § 7 communications including "electronic leaflets, cartoons, or even photos of picket signs containing the [company] logo."⁶⁹ Additionally, the video prohibition could prevent sharing information about a picket line.⁷⁰ The confidential information clause also required that questions regarding what is covered under the non-public information ban be brought to a manager.⁷¹

63. *Id.*

64. *Id.* at 1–2.

65. *Id.* at 2–3.

66. *Id.* at 1 n.4 (citing *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646, 647 (2004)).

67. See Advice Memorandum from the NLRB Office of the Gen. Counsel to Wayne Gold, Reg'l Director of Region 5 (Mar. 21, 2012), <http://perma.cc/8MG-9AYQ>. (released July 18, 2013) [hereinafter Giant Food Memo.]; see also Michael O. Loatman, *Grocer Giant Food Gets Mixed Review From NLRB as to Social Media Policies*, DAILY LAB. REP. (BNA) No. 147, at A-13 (July 31, 2013).

68. Giant Food Memo., *supra* note 67, at 1.

69. *Id.* at 12.

70. *Id.* at 13.

71. *Id.* at 4.

When placed ahead of employees' exercise of § 7 rights, prior approval requirements by a manager or a company's general counsel unduly restrict PCAs.⁷² Finally, a general savings clause stating that the company would not apply any policy in a manner that violated the law did not salvage the guidelines because the guidelines very clearly prohibited activities specifically designated as PCAs under § 7.⁷³ Employees would not understand from this generic disclaimer that protected activities were, in fact, allowed.⁷⁴ The *Giant Foods* DOA Memorandum is entirely consistent with NLRB policy that employees should not have to guess what conduct is permitted by the company when the conduct is protected by § 7.⁷⁵

Another recent Administrative Law Court decision found fault with a car dealership's restrictive rules in its employee handbook.⁷⁶ The dealership, Boch Honda, worked with the NLRB regional office to amend its SMP and other handbook rules in reaction to unfair labor practice charges by the union.⁷⁷ The contested clauses that were deemed overly restrictive concerned confidential and proprietary information, discourtesy, inquiries concerning employees, dress code and personal hygiene, solicitation and distribution, and SMPs.⁷⁸ However, the Administrative Law Judge (ALJ) focused on one provision that was not changed, which he found to be problematic.⁷⁹ That rule banned employees who had contact with the public from wearing "pins, insignias, or other message clothing."⁸⁰ The ALJ noted that the company did not amend the handbook provisions until after the issuance of the complaint and that it did not modify the dress code provision.⁸¹ In addition, the company failed to provide assurances that it would not interfere with employees' § 7 rights

72. *See id.* at 11–12.

73. *Id.* at 14.

74. *Id.*

75. *Id.*; *see* 29 U.S.C. § 157 (2006).

76. Boch Imports, Inc., No. 1-CA-83551 (N.L.R.B. Div. of Judges Jan. 13, 2014), <http://perma.cc/KNQ4-GTFB>.

77. *Id.* at 1–3.

78. *Id.*

79. *Id.* at 1.

80. *Id.*

81. *See id.* at 3, 5.

in the future.⁸² Based on these findings, the ALJ proceeded to review all of the previously extant provisions in the employer's policies, finding them in violation of the Act.⁸³ As to the unchanged dress code provision, he found that banning pins from car repair areas because of the safety hazard and potential to injure employees and vehicles was an adequate special circumstance for the prohibition, and thus allowed it.⁸⁴ However, the ALJ found that the blanket prohibition on insignias and message clothing violated the Act, and ordered the provision rescinded with the exception of the pin prohibition.⁸⁵

The remedial order included posting a notice at Boch's facilities nationwide because the overbroad rules had been maintained companywide.⁸⁶ The notice included an order to cease and desist from interfering with employees in their exercise of § 7 rights, as well as reference to the revised dress code provision.⁸⁷ The notice included a summary of the rights that federal law provides under § 7 of the NLRA, and further specified that the other overly restrictive policies besides the dress code provision had been revised.⁸⁸ Thus, despite Boch Honda's attempts to remedy its unfair labor practices through cooperation with the NLRB regional staff,⁸⁹ the ALJ's order included findings regarding the already revised provisions, as well as the one provision that the company had not yet amended.⁹⁰ The takeaway from this decision is that an employer would be well advised to repair handbook provisions prior to issuance of complaint by the Region, and amend *all* of those provisions deemed overly restrictive of protected concerted activities if it hopes to avoid remedial orders including posting a notice, rather than merely communicating the revisions to its employees.

The 2013 ABA Symposium on Technology and Labor and Employment Law also focused on recent NLRB cases having a

82. *Id.* at 5.

83. *Id.* at 5–9.

84. *Id.* at 8.

85. *Id.* at 9.

86. *Id.* at 10.

87. *Id.*

88. *Id.* at 11 app.

89. *Id.* at 3.

90. *Id.* at 10.

social media focus.⁹¹ In *Triple Play Sports Bar & Grille*, the Board has not yet decided an appeal from an ALJ's decision in favor of the employees.⁹² In that case, one employee was discharged for "liking" a co-worker's Facebook post that denigrated the co-owner's ability to effectively handle taxation withholding paperwork.⁹³ His co-worker commented on the same Facebook wall that she too owed money and that the co-owner responsible for the paperwork was "such an asshole"; she was also discharged.⁹⁴ The ALJ found that the two employees were discharged for engaging in PCAs and that their conduct was not sufficiently egregious as to lose NLRA protection.⁹⁵ The ALJ decision is interesting because it extends protection beyond the usual requirements for PCA as defined by the Office of General Counsel.⁹⁶ Under *Triple Play*, the meaningful participation element (required for NLRA protection) could include co-worker comments or actions that demonstrate a general affinity or solidarity with another employee's opinion, such as clicking the "like" button on Facebook, in addition to comments or actions more traditionally associated with PCAs such as comments about union activity or terms and conditions of work.⁹⁷

Where does the NLRB draw the line on protecting social media conduct that is otherwise protected under § 7 if the conduct involved conflicts with the employer's legitimate business interests? The *Wolters Kluwer* case, also discussed at the ABA Symposium, illustrates this consideration.⁹⁸ In *Wolters*

91. See Pamela Jeffrey et al., *Social Media and New Technology Issues for Unions and Employees: The NLRA and Beyond*, ABA NAT'L SYMP. ON TECH. & LAB. & EMP. L., 2-10 (Apr. 21-23, 2013), <http://perma.cc/VSX8-2S7D> [hereinafter ABA SYMP.].

92. Three D, LLC (*Triple Play*), No. 34-CA-12915, 34-CA-12926, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012), <http://perma.cc/HL2G-4DZP>; Order Transferring Proceeding to the National Labor Relations Board, Three D, LLC, No. 34-CA-12915 (Jan. 3, 2012), <http://perma.cc/HL2G-4DZP>.

93. *Triple Play*, No. 34-CA-12915, 34-CA-12926, slip op. at 5.

94. *Id.* at 4.

95. *Id.* at 9.

96. See *id.* at 8-9.

97. See ABA SYMP., *supra* note 91, at 5 n.11 (discussing significance of ALJ's decision in *Triple Play*).

98. Advice Memorandum from the NLRB Office of the Gen. Counsel to Marlin O. Osthus, Reg'l Dir. of Region 18 (Nov. 28, 2011), <http://perma.cc/JX7L-GL3N> [hereinafter *Wolters Kluwer Advice Memo.*].

Kluwer, the General Counsel's Division of Advice applied a modified *Atlantic Steel* analysis regarding when concerted activity on social media results in loss of NLRA protection.⁹⁹ Because Facebook comments do not present the same issue of disruption or undermining of shop discipline that are present in an actual workplace, the DOA incorporated what it deemed to be "relevant considerations from the *Jefferson Standard* test."¹⁰⁰ The *Jefferson Standard* considerations relate to whether the employee's conduct was so opprobrious as to lose NLRA protection, with an emphasis on the place of discussion, the subject matter, the nature of the employee's outburst, and whether the outburst was provoked by an employer ULP.¹⁰¹ Based upon these criteria, the DOA concluded that the employee's comments were not so disparaging or opprobrious that they would cause him to forfeit NLRA protection, thus determining that his discharge was a ULP.¹⁰²

This was so even though the employee's tweet regarding the new software content management system that Wolters Kluwer adopted (that was actually produced by Ektron), contained the following crude language: "10x the horsepower but -10x productivity. suck my ass ektron."¹⁰³ Conduct on social media "generally fares well" under this modified *Atlantic Steel* analysis because "the postings occur and exist outside the workplace in cyberspace and cannot, for the most part, be said to disrupt work or pose any kind of real threat."¹⁰⁴ This makes sense if one considers that by its very nature, social media's place of discussion is generally outside the workplace, thus decreasing its immediate impact on the workplace. However, in some instances, employees may be using social media and discussing comments

99. *Id.* at 4 (citing *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1976)). See also ABA SYMP., *supra* note 91, at 10 (citing *Wolters Kluwer* as an example of the modified *Atlantic Steel* analysis).

100. Wolters Kluwer Advice Memo., *supra* note 98, at 4 n.7 (citing *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464 (1953)).

101. *Id.* at 4 n.9 (citing *Jefferson Standard*, 346 U.S. at 816).

102. *Id.* at 6.

103. *Id.* at 1–2. The Division of Advice noted that the NLRA allows "some leeway" on the use of "intemperate language." *Id.* at 6 (quoting *Beverly Health & Rehab. Servs. Inc.*, 346 N.L.R.B. 1319, 1323 (2006)).

104. ABA SYMP., *supra* note 91, at 9.

amongst themselves during work hours, thus increasing its impact and potential for disruption.

Clearly, some employee comments on social media may have such a significant negative impact on a business that the conduct crosses the line from covered § 7 conduct and becomes egregious misconduct not protected by § 7. Another recent ALJ decision illustrates this point.¹⁰⁵ In *Richmond District Neighborhood Center*, two employees at a teen center who were engaged in Facebook communications exceeded the boundaries of § 7's protection, and thus the ALJ upheld their discharges.¹⁰⁶ In this case, a Facebook conversation between the teen center's activity leader and program leader was peppered with profanity but more importantly, according to the employer, it reflected an insubordinate attitude that was detrimental to the center's eligibility for grants and funding, and furthermore, to the safety of the youth it served.¹⁰⁷ The ALJ noted that while there was leeway for harsh language and impulsive behavior when engaging in concerted activity, the employer "could lawfully conclude that the actions proposed in the Facebook conversation were not protected under the Act and that the employees were unfit for further service."¹⁰⁸ Though the Facebook comments showed the employees were engaged in concerted activity, there was evidence to support the employer's claim that the comments were detrimental and egregious enough to exclude their activities from NLRA protection.¹⁰⁹

V. ANALYSIS AND CONCLUSION

The NLRB social media cases brought the issue of § 7 rights to the forefront of private sector employment law, starting with the first Facebook firing case in the fall of 2010.¹¹⁰ The cases since this time show a clear pattern that provides guidance for

105. *Richmond Dist. Neighborhood Ctr.*, N.L.R.B. No. 20-CA-91748, 2013 WL 5670868 (A.L.J. Nov. 5, 2013).

106. *Id.* at 6.

107. *Id.* at 2–6.

108. *Id.* at 6.

109. See Lawrence E. Dubé, *NLRB ALJ Calls Facebook Chatter Concerted but Decides Firing of Workers Was Justified*, DAILY LAB. REP. (BNA) No. 223, at A-12 (Nov. 18, 2013).

110. See *supra* Part III.

employers and employees: employers should not implement SMPs that unnecessarily infringe employees' § 7 rights—that is, policies that specifically restrict, or those that employees would reasonably construe as restricting, § 7 activities—and employers should not discipline or discharge employees for engaging in PCA on social media.¹¹¹

We will continue to see many more of these NLRB social media cases. The NLRB has made clear that it will pursue ULP complaints against companies that maintain SMPs or other rules that “reasonably tend to chill employees in the exercise of their Section 7 rights.”¹¹² What do the average employer and employee learn from the examples in these cases? First, employers need to review their policies to ensure that they do not interfere with PCAs under the NLRA. In addition, employers need to carefully draft social media guidance policies in order to avoid interference with § 7 rights. Generally, any policy that is overbroad or ambiguous must be revised, narrowed, and spell out exceptions to restrictions. Employers should be aware that their company rules, including those concerning discussion of wages, hours, and working conditions, as well as mutual aid or protection, whether in person or on social media, must be able to withstand NLRB scrutiny. Furthermore, employers should make clear which conduct is protected and which is not, so that employees can use social media in a more conscientious manner. For example, with respect to discussion of wages, which some employees could reasonably conclude was confidential information and therefore fear violating confidentiality clauses, an employer should affirmatively state that discussion of wages, hours and working conditions, as well as matters regarding mutual aid or protection, are permitted and protected in order to avoid a finding that its policy is unlawfully overbroad.

Employers should also be proactive in avoiding ULP violations because, at a minimum, any finding of a ULP violation requires an employer to post a notice of its wrongdoing, a statement of employee rights, and a prospective promise not to violate these rights. In addition, employees who are disciplined or

111. *Id.*

112. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

discharged for exercising their § 7 rights are protected by the NLRA and are likely to be reinstated with back pay and interest as well as other remedies. However, employee conduct will not be covered by § 7 if the matter or concern is not shared, or if the conduct is so egregious that it becomes a second independent basis for discipline or discharge.¹¹³

Finally, even though electronic communication enjoys the same legal protections as face-to-face discussion, the content and manner must meet the Board's criteria for protection. Rules relating to confidentiality¹¹⁴ and discussion of § 7 matters should be carefully scrutinized so as to prevent their interference with rights protected by § 7 of the NLRA.

113. See Advice Memorandum from the NLRB Office of Gen. Counsel to Dennis Walsh, Reg'l Dir. of Region 4, at 3 (May 8, 2013), <http://perma.cc/EP5B-JSBT>.

114. See Target Corp., 359 N.L.R.B. No. 103, slip op. at 19 (Apr. 26, 2013) (noting Board upheld ALJ's order that information security policy prohibiting employees from disclosing confidential information on social media and beyond was overbroad and unlawfully prohibited discussion of matters protected under § 7).