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Ariana C. Green

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*Using Social Networking To Discuss Work: NLRB Protection for
Derogatory Employee Speech and Concerted Activity*

Ariana C. Green

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BOALT HALL

USING SOCIAL NETWORKING TO DISCUSS WORK: NLRB PROTECTION FOR DEROGATORY EMPLOYEE SPEECH AND CONCERTED ACTIVITY

Ariana C. Green[†]

Today's labor lawyers and judges struggle with how to apply 1930s laws to social networking cases. In particular, the "concerted activity" standard has been part of the National Labor Relations Act ("NLRA")¹ since 1935, but using it to assess online activity has led to inconsistent outcomes.² The 800 million active users on Facebook,³ about one-fifth of whom reside in the United States,⁴ engage in more than just friendly banter and picture posting. Along with Twitter,⁵ which has 100 million active monthly visitors,⁶ and other similar sites, Facebook has become a forum where employees complain about work and respond to colleagues' complaints.⁷ Yet most employees do not realize that the particular words they use in a late-night casual comment

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[†] J.D. Candidate, 2013, University of California, Berkeley School of Law.

1. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

2. *Compare* Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) (finding protected activity when employee Facebook posts criticizing a colleague solicit feedback from fellow employees) *with* Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-2503 (July 19, 2011) (finding no protection for an employee whose post complained about a manager but did not explicitly ask Facebook friends, many of whom were colleagues, whether or not they agreed with his position).

3. *Facebook Fact Sheet*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Feb. 5, 2012). Facebook is a social networking service that allows users to share pictures, information, links, and messages through individually created profiles. It further allows users to join groups and networks, and to express their preferences through the "like" button and by writing comments in response to posts, links, and photos.

4. *Id.*

5. *The fastest, simplest way to stay close to everything you care about*, ABOUT TWITTER, <http://twitter.com/about> (last visited Feb. 5, 2012). Twitter allows users to write and read "tweets," which are posts consisting of up to 140 characters. It facilitates online social networking and micro-blogging.

6. Elizabeth Gannes, *Twitter Finally Discloses How Many Active Users it Has*, ALL THINGS D (Sept. 8, 2011, 9:35 AM), <http://allthingsd.com/20110908/twitter-finally-discloses-how-many-active-users-it-has-100m>.

7. *See* Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) (finding protected activity when employee Facebook posts criticizing a colleague solicit feedback from fellow employees).

about an employer may determine whether or not their post⁸ results in a lawful firing, depending upon whether it is found to be “concerted.”⁹

The NLRA gives workers the right to engage in concerted activity,¹⁰ which means that an employer cannot fire an employee solely because she discusses topics such as management or salary with fellow employees, even in a public forum.¹¹ The concerted activity protection also applies when two or more employees act together to change the “terms and conditions” of the group’s employment, or when a single employee brings complaints on behalf of a group.¹² Instances of this protected concerted activity are apt to occur on social media sites.¹³ However, upon accepting a job, an employee likely will not receive a packet notifying her of her right to engage in concerted activity.¹⁴ Indeed, the NLRA has been described as “the best-kept secret in labor law.”¹⁵

In August 2011, the National Labor Relations Board (“NLRB” or “the Board”) mandated that employers post notices about the existence of the NLRA,¹⁶ but the potential efficacy of this mandate remains unclear, because the NLRB postponed the effective date of implementation to April 30,

8. The types of posts on Facebook and Twitter that this note discusses involve users writing original content expressing their views on particular matters, people, or events. Depending on the privacy settings a user selects, the posts could be viewed by a subset of Facebook ‘friends’ or Twitter subscribers, or by all Facebook users or anyone who views a user’s Twitter profile.

9. Memorandum from the Office of the General Counsel of the NLRB, Report of the Acting General Counsel Concerning Social Media Cases (Aug. 18, 2011) [hereinafter General Counsel 2011 Memorandum].

10. The National Labor Relations Act, 29 U.S.C. § 157 (2006).

11. *Employee Rights*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Feb. 5, 2012). If the employee were to act alone in disparaging an employer, she may lose the act’s protection, depending on the extent of her criticism and whether other protections, such as free speech protections, applied in the particular scenario.

12. *Id.*

13. *See, e.g.*, Memorandum from the Office of the General Counsel of the NLRB, Report of the Acting General Counsel Concerning Social Media Cases (Jan. 24, 2012) [hereinafter General Counsel 2012 Memorandum]; General Counsel 2011 Memorandum, *supra* note 9.

14. *See* William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 297–98 (2002).

15. *Id.* at 267.

16. Press Release, NLRB, Board Issues Final Rule to Require Posting of NLRA Rights (Aug. 25, 2011), *available at* <https://www.nlr.gov/news/board-issues-final-rule-require-posting-nlra-rights>.

2012.¹⁷ In the meantime, the ninety-three percent of employees who are not affiliated with a union¹⁸ may not know about these rights¹⁹ or the parameters of what types of statements could get them fired with no legal recourse. Since voicing workplace gripes at union meetings is no longer an option for most people, employees may want to share their grievances online through social networking,²⁰ but rightfully may worry about retaliation. Using social networking websites both shares the posts and maintains them, providing employers with a potentially incriminating record that is often unavailable with in-person conversations.²¹ Further, limited NLRB legal precedent leaves questions unanswered; determining whether a social media post involves concerted activity has become a challenge for the lawyers at the NLRB, which administers the NLRA and adjudicates unfair labor practice cases brought by its General Counsel.²²

17. *Employee Rights Notice Posting*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/poster> (last visited Feb. 5, 2012) (“[As of April 30, 2012] the notice should be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted. Employers also should publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there.”); Arthur T. Carter et al., *Update: NLRB Delays Notice Posting Rule’s Effective Date*, HAYNES & BOONE’S NEWSROOM (Dec. 28, 2011), http://www.haynesboone.com/nlr_delays_notice_posting_rule (noting that this postponement is a response to litigation; various parties are challenging the notice requirements).

18. Jeffrey M. Hirsch, *Making Globalism Work for Employees*, 54 ST. LOUIS U. L.J. 427, 430 (2010) (noting that “among the sharpest drops in union density is in the United States, where private sector union membership declined from 21.7% in 1977 to 7.2% in 2009”).

19. Press Release, American Rights at Work, Statement on Rule to Improve Awareness of NLRA Workplace Rights (Aug. 25, 2011), available at <http://www.americanrightsatwork.org/press-center/2011-press-releases/statement-on-rule-to-improve-awareness-of-nlra-workplace-rights-20110825-1036-416.html>. (quoting Kimberly Freeman Brown, Executive Director of American Rights at Work, as stating that “[s]tudies show that many employees are unaware of their rights under the NLRA, which protects union and non-union workers. Employers, even those who strive to act lawfully, are similarly uninformed”).

20. Michael J. Eastman, *A Survey of Social Media Issues Before the NLRB*, LABOR, IMMIGRATION & EMPLOYEE BENEFITS DIVISION, U.S. CHAMBER OF COMMERCE 1 (Aug. 5, 2011), <http://www.uschamber.com/sites/default/files/reports/NLRB%20Social%20Media%20Survey.pdf> (noting that as of Aug. 5, 2011, the U.S. Chamber of Commerce survey of publicly available materials found that the NLRB has reviewed more than 129 cases in some way involving social media).

21. *How to Post and Share*, FACEBOOK, <https://www.facebook.com/help/?page=12512004234100> (last visited Feb. 5, 2012).

22. Telephone interview with Lafe Solomon, Acting General Counsel of the NLRB (Oct. 14, 2011); see General Counsel 2011 Memorandum, *supra* note 9; Memorandum from the Office of the General Counsel of the NLRB, Report of the Acting General Counsel Concerning Social Media Cases (Jan. 24, 2012) (showing that the NLRB’s Acting General Counsel continues to issue Memos devoted to the subject of social media).

Recent cases highlight the problems that emerge from an over-reliance on the traditional concerted activity standard. Under these cases, if an employee solicits feedback from colleagues who are her Facebook friends and asks them to join her in some sort of work conditions-related protest, she is much more likely to get to keep her job if it is proven that the termination was in retaliation to the feedback-soliciting post.²³ If she does not explicitly talk about work conditions or directly ask for support, her case is weaker.²⁴ And if an employee's Facebook friends express their shared sentiment instead of just their sympathy in comments, the employee who posted will have a considerably better case for retaliatory firing.²⁵ Apparently, minor variations in language used in a post can have profound consequences.

The casual nature of Facebook posting²⁶ calls into question this approach. Sometimes, people who post simply sympathetic comments in response to a colleague's post may agree that action should be taken and may be willing to help, but may not make that clear with their off-the-cuff online responses. Yet, under the current legal approach, an employee's employment status can hinge on the particular words chosen for spontaneous Facebook posts and follow-up comments.²⁷ Compounding the problem, when NLRB Field Examiners²⁸ investigate cases involving Facebook posts, they

23. *Compare* Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) (finding protected activity when employee Facebook posts criticizing a colleague solicit feedback from fellow employees) *with* Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-2503 (July 19, 2011) (finding no protection for an employee whose post complained about a manager but did not explicitly ask Facebook friends, many of whom were colleagues, whether or not they agreed with his position).

24. *Compare* Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 *with* Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-2503.

25. *Compare* Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 *with* Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-2503. The NLRA concerted activity standard requires that a group of more than one person holds a particular belief in order for an individual who expresses her views to get protection under the Act. For this reason, the details of online responses become central to determinations of wrongful firing.

26. *See, e.g.*, Azedah Aalai, *Think Before You Post: The Perils of Online Intimacy*, PSYCHOLOGY TODAY (Sept. 11, 2011), <http://www.psychologytoday.com/blog/the-first-impression/201109/think-you-post>.

27. *Compare* Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 *with* Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-2503.

28. *Field Attorney and Field Examiner Positions*, Office of the General Counsel, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/careers/job-descriptions-and-listings/field-attorney-and-field-examiner-positions-office> (last visited Feb. 5, 2012) (explaining that "field examiners act on behalf of the General Counsel by investigating charges of unfair labor practices, recommending appropriate actions or remedies, conducting elections to determine union representation preferences, and acting as hearing officers in contested representation matters").

sometimes miss the context and underlying intent of online comments.²⁹ Context may be easier to determine in offline conversations, where people can respond to each other's comments in real time and where the precise words used constitute just one part of the interaction; much is conveyed through in-person contact and people's recollections of the tenor of a conversation.³⁰ Failing to recognize the differences between online and offline communications has created discordant legal rulings.³¹

In enforcing the NLRA and adjudicating cases involving unfair labor practices, lawyers, judges, and the Board at the NLRB have the power to shape social media policies related to employment situations.³² If no settlement is reached in a meritorious case, attorneys at the NLRB's regional offices bring cases on behalf of employees viewed as unlawfully terminated.³³ If the parties do not settle at the next stage, a case may go to an Administrative Law Judge, and then to several members of the Board on appeal.³⁴ Finally, certain cases will enter the court system on further appeal to a circuit court and then possibly to the Supreme Court.³⁵

The NLRB's Acting General Counsel has said that he endeavors to promote unified legal precedent in this area and has instructed that social

29. See, e.g., JT's Porch Saloon & Eatery, NLRB Adv. Mem., Case No. 13-CA-46689 (Jul. 7, 2011); Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-2503 (July 19, 2011). These cases will be discussed in Section III.C.3, *supra*, and it will be argued that the context of what led to the posts was overlooked, costing the employees protection under Section 7.

30. ARVID KAPPAS & NICOLE C. KRAMER, FACE-TO-FACE COMMUNICATION OVER THE INTERNET: EMOTIONS IN A WEB OF CULTURE, LANGUAGE, AND TECHNOLOGY 18 (2011) (noting that "many theorists claim that more communication cues are better—that the ability to convey nonverbal communication cues allows communicators to appreciate each other interpersonally and facilitates understanding their messages, or both").

31. Compare Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) (finding protected activity when employee Facebook posts criticizing a colleague solicit feedback from fellow employees) with Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-2503 (July 19, 2011) (finding no protection for an employee whose post complained about a manager but did not explicitly ask Facebook friends, many of whom were colleagues, whether or not they agreed with his position).

32. Paul Shukovsky, *Employers Must Recognize Federal Labor Act As Source of Social Media Policies Litigation*, 10 PRIVACY & SECURITY LAW REPORT 1629 (Nov. 14, 2011) (citing union attorney Barbara Camens, of Barr & Camens, as saying that the NLRA "is rapidly shaping up to be the biggest source . . . of litigation and legal risk with regard to social media policies").

33. *Investigate Charges*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/what-we-do/investigate-charges> (last visited Feb. 5, 2012).

34. *Id.*

35. OFFICE OF THE EXECUTIVE SECRETARY, GUIDE TO BOARD PROCEDURES, TENTATIVE DRAFT, 55–56 (Dec. 10, 2010).

media cases be brought to his attention.³⁶ His office writes Advice Memos that guide the attorneys in the regional offices as to whether to take a case and how to proceed.³⁷ The General Counsel has issued—and plans to continue to issue—periodic reviews of these social media cases, which further elucidate his office’s views on the contours of the NLRA in the digital space.³⁸ Even though social media cases present novel fact patterns due to the evolving nature of the platforms and social norms, for the most part, the General Counsel has applied existing labor law standards to social media cases, instead of modifying standards to take into account the way in which people use social media.³⁹

This Note considers twelve recent cases before the NLRB involving social media in the workplace. These twelve cases were among the fourteen⁴⁰ cases discussed in the General Counsel’s summer 2011 Social Media Memorandum (“the Memo”), which marked the first time the General Counsel devoted a review memo to social media cases.⁴¹ The cases shed light on what kinds of employee social media behavior receive protection and what kinds of social media policies pass muster with the General Counsel’s office.⁴² Because the Board has not drafted—and likely will not draft⁴³—social media-specific rules, these cases provide important insight into the

36. General Counsel 2012 Memorandum, *supra* note 13. See Memorandum from the Office of the General Counsel of the NLRB, Mandatory Submissions to Advice 11-11 (Apr. 12, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458047021e>.

37. *General Counsel Memos*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/publications/general-counsel-memos> (last visited Feb. 5, 2012). The Advice Memoranda are addressed to NLRB Region Directors concerning a pending unfair labor practice charge in their specific Region and are binding upon the Region but not upon the NLRB or its ALJs.

38. General Counsel 2012 Memorandum, *supra* note 13.

39. See General Counsel 2012 Memorandum, *supra* note 13; General Counsel 2011 Memorandum, *supra* note 9; Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 55 U. PENN. J. BUS. L. (forthcoming 2012), available at <http://ssrn.com/abstract=1982717> (noting that “the fact that employees are using Facebook and other social media tools to discuss work does not alter the basic analysis of what does and does not constitute protected concerted activity”).

40. This Note does not consider a case about a union posting an interrogation video on YouTube or a case about whether or not to allow employees media access. These cases presented issues less relevant to the scope of the undertaken analysis.

41. General Counsel 2012 Memorandum, *supra* note 13.

42. See General Counsel 2011 Memorandum, *supra* note 9.

43. Telephone interview with Lafe Solomon, Acting General Counsel of the NLRB (Jan. 24, 2011) (“[N]either the General Counsel nor the Board issues advisory opinions. Only the Board can do rulemaking, but it does this infrequently. The two rules the Board has issued since the 1980s—rules around elections and notice postings—have led to controversy.”).

General Counsel's nascent views on social media cases.⁴⁴ They also highlight potential inconsistencies with the current approach used by the General Counsel and provide a basis for critique and recommendations.

Part I of this Note summarizes how the NLRB operates, providing a glimpse into its structure, history, and functions. Part II addresses the ways that social media has become relevant to employers and employees. It discusses the challenge of regulating a fast-changing online space that fosters diverse attitudes and usages. It describes the predicament in which employers find themselves—trying to protect their brand and organizational integrity while striving to comply with laws that empower employees to communicate collectively concerning terms and conditions of employment. Many employers also believe that social media provides powerful tools for employers to keep employees informed and in contact.⁴⁵ Employees may even use social media to promote an employer's goods or service.⁴⁶ Meanwhile, employees hoping to keep their jobs in a bad economy may feel pressured to stay silent on issues that they may legally discuss, both offline and online. Without proper guidance from the NLRB General Counsel, employers and employees will continue to operate in an environment of uncertainty. Part III provides a framework for the case analysis and discusses the legal standards used to decide the Memo's social media cases, analyzing how the General Counsel applies the standards to the Memo's cases. Part IV offers recommendations about how to improve consistency among social media rulings.

44. See General Counsel 2011 Memorandum, *supra* note 9; Steven K. Ury, *Working with Social Networks: The Intersection of Labor Law and Ethical Issues Raised by Social Networking* 4–5, 5TH ANNUAL LABOR AND EMPLOYMENT LAW CONFERENCE (Nov. 2–5, 2011) (noting that “the last calendar year has seen proof of the importance of social networking in labor law as a flurry of decisions have come down from the General Counsel of the National Labor Relations Board”).

45. Press Release, Towers Watson, More Companies Worldwide Embracing New Media for Employee Communication, Towers Watson Study Finds (Nov. 17, 2011), available at <http://www.towerswatson.com/press/5879> (finding that “a majority of companies worldwide say they are becoming more knowledgeable about the use of social media tools to connect with and keep their workforces informed”).

46. See Dean Takahashi, *Hearsay Social raises \$18M so your employees won't embarrass you on social media*, VENTURE BEAT (Jul. 28, 2011, 4:30 AM), <http://venturebeat.com/2011/07/28/hearsay-social-raises-18m> (quoting the founder of Hearsay Social as offering to help companies transform their employees into ‘digital brand representatives’).

I. ROLE OF THE NLRB AND THE NLRA

The NLRB—an independent federal agency that administers the NLRA⁴⁷—has exclusive jurisdiction as the first adjudicator of unfair labor practice charges alleging violations of Section 8 of the NLRA,⁴⁸ which makes illegal what Section 7 protects.⁴⁹ Section 7 states:

Employees shall have 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].⁵⁰

Currently, the test for concerted activity addresses whether activity is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”⁵¹ A district court hears an NLRA-related case only if attorneys bring it forward claiming a violation of a different law.⁵² The NLRB defers to Congress to amend the statute.⁵³

A. NLRB STRUCTURE

The NLRB deals with private sector employees, not government or federal employees.⁵⁴ The NLRB does cover postal service employees, but not agriculture, airline, or railroad employees, which are covered by a separate

47. What We Do, National Labor Relations Board, <https://www.nlr.gov/what-we-do> (last visited Feb. 5, 2012).

48. Telephone interview with Research Department, National Labor Relations Board Washington D.C. Office (Oct. 13, 2011).

49. OFFICE OF THE EXECUTIVE SECRETARY, *supra* note 35, at 55–56.

50. The National Labor Relations Act, 29 U.S.C. § 157 (2006).

51. *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 885, 889 (1986), *aff'd sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir.1987), *cert. denied*, 487 U.S. 1205 (1988).

52. Research Department Interview, *supra* note 48. For example, if a case involves an NLRA violation but the cause of action has mainly to do with some other violation, a lawyer may argue such a case in a district court.

53. *Stillians v. State of Iowa*, 843 F.2d 276, 280 (8th Cir. 1988), *abrogated by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991) (stating that “only Congress legislates and only Congress can amend”).

54. *Final Rule for Notification of Employee Rights*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights> (last visited Feb. 5, 2012).

Act.⁵⁵ It conducts elections to determine whether employees are in favor of union representation, which is required before employees can form a union.⁵⁶ It also considers bargaining disputes and illegal picketing,⁵⁷ as well as cases involving an employee's right to discuss wages and working conditions.⁵⁸ The NLRB has jurisdiction over labor disputes under the NLRA, while other agencies and the courts have jurisdiction to hear labor-related issues under other federal and state laws.⁵⁹

The President nominates, and the Senate confirms, NLRB Board members.⁶⁰ The Board is supposed to consist of five members, but in recent years, difficulty getting appointees approved has meant that the Board has operated with as few as two members.⁶¹ The presidentially appointed General Counsel, a prosecutor, supervises the NLRB's field offices and cases and operates independently of the Board.⁶² The regional offices docket, investigate, settle, and prosecute unfair labor practice cases, receiving about

55. *Id.* Correspondence with Barry Winograd, Lecturer, Berkeley Law (Mar. 6, 2012) (on file with author) (“[T]he Railway Labor Act (RLA) to cover railroad employees was passed in 1926 and amended and strengthened in 1934, and again amended in 1936 to cover airline employees as well. The statutes reflected the political power of railroad unions, reaching back to the 19th Century. When the NLRA was being considered in 1935 as part of the New Deal, agricultural employees were excluded, in part to satisfy Southern Democrats who were concerned that it would undermine their rural supporters, particularly small farmers.”).

56. OFFICE OF THE EXECUTIVE SECRETARY, *supra* note 35 at 10.

57. *Is it legal to strike or picket an employer?*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/faq/questions/it-legal-strike-or-picket-employer> (last visited Feb. 5, 2012).

58. *Frequently Asked Questions*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/faq/nlr> (last visited Feb. 5, 2012).

59. For example, the U.S. Department of Labor, not the NLRB, hears complaints that directly concern overtime, minimum wage, prevailing wage, pension, worker safety, and child labor. U.S. DEPARTMENT OF LABOR, <http://www.dol.gov/whd> (last visited Feb. 5, 2012). The Equal Employment Opportunity Commission, not the NLRB, deals with cases about discrimination based on race, sex, age, disability, national origin, religion, and color, as well as sexual harassment cases. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov> (last visited Feb. 5, 2012). In California, the Division of Labor Standards and Enforcement, not the NLRB, hears cases about unpaid wages and vacation pay. DIVISION OF LABOR STANDARDS AND ENFORCEMENT, <http://www.dir.ca.gov/dlse> (last visited Feb. 5, 2012).

60. *Who We Are*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/board> (last visited Feb. 5, 2012).

61. *Background Materials on Two-member Board Decisions*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/news-media/backgrounders/background-materials-two-member-board-decisions> (stating that “from January 2008 to March 2010, the Board operated with three of its five seats vacant”) (last visited Feb. 5, 2012).

62. *The General Counsel*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/general-counsel> (last visited Feb. 5, 2012).

20,000 to 30,000 charges per year.⁶³ The Administrative Law Judges (“ALJs”), who have separate offices and function independently of the regional offices,⁶⁴ hear cases that have not settled.⁶⁵ Charges that employers failed to bargain or that they illegally punished employees for protected activity were the most common complaints brought before the NLRB in recent years.⁶⁶ Each regional office is responsible for issuing complaints, following an investigation, and prosecuting the complaint before the ALJ.⁶⁷

B. NLRB PROCEDURES

Once an employee or a union files a charge alleging a violation of Section 8 of the NLRA, either an NLRB attorney or a Field Examiner is assigned to investigate the charge.⁶⁸ In assigning NLRB personnel to specific cases, the attorneys in the regional office consider the experience of the NLRB lawyers and staff, the complexity of the case, and the existing workloads.⁶⁹ NLRB personnel investigate charges—whether they come from employees, employers, or unions—by collecting evidence and sometimes taking affidavits.⁷⁰ The Regional Director evaluates the findings or, in novel or significant cases, attorneys at the NLRB’s Division of Advice in Washington D.C. do the evaluations.⁷¹ If the D.C. lawyers believe the case has merit, they then send the case back to the regional office to proceed.⁷²

Social media cases are among these rare cases that always go through the D.C. Division of Advice. In an attempt to achieve coherent decision making in an emerging area of the law, the Acting General Counsel has ordered that the regional office lawyers send recommendations on all of the social media cases to the Division of Advice, which makes a suggestion to the General

63. *Investigate Charges*, *supra* note 33.

64. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW CASES AND MATERIALS* 293 (2010) (“ALJs are almost as independent of the agencies at which they preside as federal district judges are of the Executive and Legislative branches of government. ALJ salaries are determined by statute; agencies are prohibited from evaluating the performance of ALJs; agencies must use a random assignment method to assign cases to ALJs; and, agencies cannot fire or otherwise discipline an ALJ except for cause, as determined by another agency in a formal adjudication.”).

65. *Investigate Charges*, *supra* note 33.

66. *Id.*

67. OFFICE OF THE EXECUTIVE SECRETARY, *supra* note 35 at 58.

68. Research Department Interview, *supra* note 48; *Field Attorney and Field Examiner Positions*, *supra* note 28.

69. Telephone interview with Joe Frankl, Regional Director, NLRB Region 20, San Francisco (Dec. 8, 2011).

70. *Investigate Charges*, *supra* note 33.

71. *Id.*

72. *Id.*

Counsel, who then decides whether or not to issue a complaint.⁷³ The regional offices send reports and recommendations, but under current procedures, the Division of Advice decides whether social media cases have prosecutive merit before a complaint is issued.⁷⁴

As a general practice, the NLRB encourages parties to settle.⁷⁵ In recent years, over ninety percent of meritorious cases investigated by the NLRB have settled via an NLRB settlement or a private agreement.⁷⁶ Most commonly, regional office lawyers facilitate an Informal Board Settlement, which Regional Directors may be asked to approve.⁷⁷ In an Informal Board Settlement, the General Counsel agrees not to issue a complaint in the case, so long as the respondent takes certain remedial actions to restore the status quo.⁷⁸ In other cases, such as when the charged party has committed unfair labor practices repeatedly, the Board approves a Formal Board Settlement, which leads to the issuance of a Board Order and sometimes a court judgment.⁷⁹ The NLRB closes settled cases only after the parties comply with the terms of the settlement.⁸⁰

When parties do not reach settlement, lawyers in the regional offices can issue a complaint, usually against an employer.⁸¹ In fiscal year 2010, the NLRB lawyers issued 1,243 complaints dealing with such issues as unlawful threats, interrogations, or disciplinary actions and refusals to provide information or to bargain.⁸² Some of these led to hearings before an NLRB ALJ, while others settled prior to reaching a judge.⁸³ NLRB attorneys represent the General Counsel on behalf of charging parties in front of ALJs.⁸⁴ The NLRB attorneys cannot ask for an assessment of penalties.⁸⁵ Rather, under the NLRA, the attorneys can ask for make-whole remedies, including reinstatement and back pay, and other remedies such as requiring

73. Telephone interview with Lafe Solomon, Acting General Counsel of the NLRB (Oct. 14, 2011).

74. Correspondence with Joe Frankl, Regional Director, NLRB Region 20, San Francisco (Jan. 20, 2011).

75. *Facilitate Settlement*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/what-we-do/facilitate-settlements> (last visited Feb. 5, 2012).

76. *Id.*

77. *Id.*

78. OFFICE OF THE EXECUTIVE SECRETARY, *supra* note 35, at 58.

79. *Facilitate Settlement*, *supra* note 75.

80. *Id.*

81. *Id.*

82. NAT'L *Investigate Charges*, *supra* note 33.

83. *Id.*

84. *Id.* An individual charging party or a union charging party can have its own attorney participate.

85. *Id.*

notice postings.⁸⁶ NLRB attorneys seeking damages must file civil and criminal contempt actions in the appellate courts.⁸⁷

The NLRB currently has forty ALJs nationwide.⁸⁸ Some were ALJs elsewhere first—for example, with the Social Security Administration—or previously served as labor and employment law attorneys.⁸⁹ In order to maintain independence from the NLRB, ALJs are not subject to agency efficiency ratings, promotions, or demotions, and their salaries depend on the recommendations of an independent agency.⁹⁰ If any party appeals an ALJ decision, which the NLRB calls “filing exceptions,”⁹¹ any three members of the Board can review the ALJ decision.⁹² The Board reviews the case record and issues several hundred decisions per year, which can reverse holdings and change precedent.⁹³ Parties can appeal a Board decision to an appropriate circuit court.⁹⁴

After briefing and oral argument, circuit courts evaluate the factual and legal bases of a Board decision.⁹⁵ If the court agrees with the Board or finds that the responding party had no legal basis to oppose the Board action, or failed to oppose, it enters a judicial decree that requires abiding by the Board Order.⁹⁶ Nearly eighty percent of the approximately sixty-five NLRB cases decided by circuit courts in recent years have affirmed the Board’s ruling.⁹⁷ Either the NLRB or the parties bringing a case can appeal to the U.S. Supreme Court, but the U.S. Solicitor General must grant the NLRB permission before the NLRB can petition for certiorari.⁹⁸

86. *Id.*

87. *Enforce Orders*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/what-we-do/enforce-orders> (last visited Feb. 5, 2012).

88. Press Release, Nat’l Labor Relations Bd., Eleanor Laws Appointed NLRB Administrative Law Judge (Sept. 26, 2011), *available at* <https://www.nlr.gov/news/eleanor-laws-appointed-nlr-administrative-law-judge> (last visited Feb. 5, 2012).

89. *E.g., id.*

90. *Who Are ALJs, and How Are They Appointed?*, U.S. DEP’T OF LABOR, <http://www.oalj.dol.gov/FAQ4.HTM> (last visited Feb. 5, 2012).

91. *Decide Cases*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/what-we-do/decide-cases> (last visited Feb. 5, 2012).

92. OFFICE OF THE EXECUTIVE SECRETARY, *supra* note 35, at 2, 24.

93. *Who Are ALJs, and How Are They Appointed?*, *supra* note 90.

94. *Enforce Orders*, *supra* note 87.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Employees or unions primarily file social media cases against an employer under Section 8(a)(1) and (a)(3) of the NLRA.⁹⁹ Section 8(a)(1) makes it illegal for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”¹⁰⁰ Employees or employers can also bring unfair labor practice charges against unions.¹⁰¹ To assess whether an employer’s rules violate Section 8, the NLRB requires an inquiry into “whether the rules would reasonably tend to chill employees in the exercise” of their Section 7 rights.¹⁰² These rights, which protect concerted activity, extend to employees regardless of whether or not they are part of a union.¹⁰³

II. SOCIAL NETWORKING AND THE WORKPLACE

Beyond complying with the NLRA, allowing certain employee speech to transpire through social media may prove beneficial to society at large.¹⁰⁴ Online social networking can facilitate collective action¹⁰⁵ at a time of low employee cohesion due to declining unionization¹⁰⁶ and high employee turnover.¹⁰⁷ Particularly in non-unionized settings and large or otherwise fragmented workplaces, employees have little incentive to act together, since they may free ride off of others’ efforts.¹⁰⁸ According to one scholar, “If the employees could effectively discuss their strategy and gain enough trust so that most of them participate, this collective-action problem could be

99. See General Counsel 2011 Memorandum, *supra* note 9 (presenting examples of cases where employees or unions have claimed that employers violated Sections 8(a)(1) and (a)(3)).

100. The National Labor Relations Act, 29 U.S.C. § 158 (2006).

101. NAT’L LABOR RELATIONS BD., *supra* note 33.

102. Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

103. 29 U.S.C. § 157; see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805, (1945).

104. See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2009).

105. See *id.*

106. Hirsch, *supra* note 18.

107. *MetLife 9th Annual Study of Employee Benefits Trends: A Blueprint for the New Benefits Economy*, METLIFE 9 (Mar. 2011), available at <http://www.metlife.com/assets/institutional/services/insights-and-tools/ebts/Employee-Benefits-Trends-Study.pdf> (“[W]hile employers were focused on dealing with a difficult business climate, the recession has taken a toll on employees. The Study has reported a decline in employee loyalty year over year and that loyalty has now reached a three-year low. But what is disturbing is that employers seem unaware of this downward trend. Employer responses show that they assume employees feel as loyal today as they did three years ago.”).

108. See Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1095 (discussing how not acting may nonetheless enable employees to reap rewards if a select group acts on behalf of the whole).

overcome. Without substantial discussions, however, group action is unlikely to occur.”¹⁰⁹ Psychological research shows that communication can make groups more productive, improving the quality of group action.¹¹⁰ Indeed, the fact that the vast majority of non-social networking cases brought to the attention of the NLRB involve unions suggests that nonunionized employees often do not know the full extent of their rights¹¹¹ and are therefore less productive as a group. Social media democratizes; it allows otherwise voiceless employees to engage with colleagues and the public to discuss workplace concerns.

A. CONTOURS OF EMPLOYERS’ RIGHTS TO REGULATE SOCIAL MEDIA USE

The prevalence of social media sometimes puts employers in an uncomfortable position.¹¹² What their employees post on social networks could shape their business relationships with customers and other businesses and could affect sales, shareholder confidence, and employee morale.¹¹³ Further, employee posts could reveal trade secrets and expose both employees and employers to litigation.¹¹⁴ Employee posts may also violate privacy laws, including those that prevent disclosure of certain personal

109. *Id.* at 1097.

110. *Id.* at 1100 (“[T]he benefit of communication is not merely as a determinant in whether group action of any kind will exist; communication also influences the amount and quality of group action. In particular, studies have shown that as group members share more of certain types of information, the group becomes more productive.”).

111. *Id.* at 1147 (“[A]lthough no data exist on nonunion employees’ knowledge of their labor rights, it is safe to assume that most are completely unaware of their right to engage in collective action. A rudimentary analysis of the NLRB’s intake data supports the notion that the NLRA is little known outside of the union context. For instance, in Fiscal Year 2008, over 16,000 allegations of employer unfair labor practices were filed with the Board. Of these charges, only 2,781 (17%) did not make allegations that clearly involved a labor organization of some kind, and the actual number of nonunion cases is much smaller because many of these charges still had a union on the scene. Indeed, a search of NLRB decisions during the same period found only two out 389 (0.5%) unfair labor practice cases that did not identify a union. Although the exact number is unclear, these data show that a large majority of charges filed with the NLRB involve employees proximate to a union.”).

112. See Christine Neylon O’Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK U. L. REV. 29, 61, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1967637 (noting that “employers and the legal environment need to catch up to the current technological setting of work and socializing on various forms of user-generated content networks”).

113. See, e.g., John L. Hines Jr. et al., *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. L.J. 97 (2003).

114. See, e.g., DVD Copy Control Ass’n v. Bunner, 116 Cal. App. 4th 241, 255 (2004).

medical information.¹¹⁵ Employers must be vigilant when it comes to social media; if an employer does not take action against posts deemed to create a hostile work environment, for example, the employer could become liable for its inaction or for breaching a duty to prevent discriminatory content or defamation.¹¹⁶ Thus, employers confront great risk around employee social media use.¹¹⁷

Meanwhile, studies have reported that employers increasingly express interest in encouraging employee loyalty through social media.¹¹⁸ One survey found two-thirds of company respondents more knowledgeable about using social media tools than a year earlier and about the same proportion of respondents interested in increasing their use of social media over the next twelve months.¹¹⁹ According to an employment consultant, “Companies that are reluctant to try social media may end up limiting their ability to attract, retain and motivate certain key groups of employees.”¹²⁰ Already, approximately sixty-five percent of Global Fortune 100 companies have a presence on Twitter, and fifty-four percent have a presence on Facebook.¹²¹ Additionally, seventy-four percent of chief marketing officers surveyed consider social media a top business priority.¹²² Certain employee social networking activity can prove to be a boon to employers, so it may not be in an employer’s interest to overly restrict that kind of activity.¹²³

Some start-up companies have garnered considerable venture capital backing with services that help employers enhance their social networking

115. See, e.g., *Health Information Privacy*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html> (last visited Feb. 5, 2012) (noting that “the HIPAA Privacy Rule provides federal protections for personal health information held by covered entities and gives patients an array of rights with respect to that information”).

116. See, e.g., Richard A. Paul & Lisa Hird Chung, *Brave New Cyberworld: The Employer’s Legal Guide to the Interactive Internet*, 24 LAB. L. 109, 120 (2008).

117. Further compounding the difficulty for employers in these instances, questions may arise around preemption and whether federal or state law applies to a particular employment dispute. The presence of a union may also raise preemption questions. See Henry H. Drummonds, *Beyond the Employee Free Choice Act: Unleashing the States in Labor-Management Relations Policy*, 19 CORNELL J.L. & PUB. POL’Y 83 (2009) (noting that “this judge-created preemption law stifles labor relations measures in the states, and leaves labor law smothered in federal orthodoxy”).

118. Towers Watson Press Release, *supra* note 45.

119. *Id.*

120. *Id.*

121. TAKAHASHI, *supra* note 46.

122. *Id.*

123. For example, employees posting about sales events or promoting a product may help a company, particularly if the employee has a large network of Facebook friends.

presence and train employees to assist with those efforts.¹²⁴ One such company, Hearsay Social (“Hearsay”), has raised \$21 million since 2009 and has helped major corporations increase the number of employees using social media for work purposes.¹²⁵ “I tell [companies] you already have 30,000 employees on the internet and they’re already representing you, unofficially,” the Hearsay founder told VentureBeat.¹²⁶ “The brand might be liable for anything that they say. You can change that risk into a number of digital brand representatives.”¹²⁷ Receptivity to such companies suggests that employers are interested in having employees use social media to advance company goals, even if there are risks.

But despite their hopes for social media, employers are caught in the middle legally. While policing workplace misconduct to avoid liability, they must not infringe upon workers’ rights to make certain types of criticisms.¹²⁸ Under the NLRA, overly restrictive rules that could be construed to ban protected NLRA Section 7 activity remain impermissible.¹²⁹ The First Amendment to the United States Constitution prevents Congress from abridging free speech,¹³⁰ and the Fourteenth Amendment applies the restriction to states.¹³¹ Though the First Amendment is inapplicable to private sector employment relationships, courts have interpreted the NLRA to recognize First Amendment-like rights and held that free speech rights apply on the Internet.¹³² Private employees in many jurisdictions get protection from state laws that create a civil right for citizens to exercise free speech.¹³³ Discharged employees may also make viable claims that free speech is a fundamental right, thus enabling them to sue based on the tort of wrongful termination.¹³⁴ Federal and state laws prohibiting discrimination and retaliation, as well as invasion of privacy and whistleblower laws, sometimes form the bases for claims by an employee challenging a

124. *See, e.g.*, TAKAHASHI, *supra* note 46.

125. *Id.*

126. *Id.*

127. *Id.*

128. The National Labor Relations Act, 29 U.S.C. § 158 (2006).

129. *Id.*

130. U.S. CONST. amend. I.

131. U.S. CONST. amend. XIV; *see also* Russo v. Glassner, 279 F. Supp. 2d 136, 142 (D.Conn. 2003); Merritt v. Shuttle, Inc., 13 F. Supp. 2d 371, 382 n.7 (E.D.N.Y. 1998).

132. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 851 (1997) (noting that First Amendment rights apply to communications over the Internet).

133. *See, e.g.*, CAL. CONST. art. I, § 1.

134. Paul & Chung, *supra* note 116, at 126.

termination based upon her social networking post.¹³⁵ For these reasons, employers must seriously consider their social media policies—at least to avoid costly litigation and public relations problems.

B. RIGHTS AND RESPONSIBILITIES OF EMPLOYEES USING SOCIAL MEDIA

Employees who see social networking as personal, unregulated terrain need to understand that, under the General Counsel's current framework for analysis, "mere gripes" about their places of work could cost them their jobs.¹³⁶ The General Counsel analyzes these cases in reference to "concerted activity," which means that the gripes need to emerge from, include, or incite group action in order to merit protection.¹³⁷ The General Counsel's office engages in a fact-based analysis, looking at the nature of a given conversation in order to ascertain whether or not there is concerted activity.¹³⁸ If, for example, Facebook posts do not elicit supportive comments from fellow workers engaging in conversation and there is no clear evidence of coordinated activity that led up to the posting, the General Counsel is unlikely to find concerted activity.¹³⁹ Unfortunately, the outcome of social media cases appears unpredictable, given the results in recent cases that turn on seemingly trivial factual differences.

Though employees have rights under the NLRA, they still must comply with rules surrounding workplace decorum and other restrictions.¹⁴⁰ Employees, as agents, "must loyally execute the legitimate interests of the principal [or the employer]," and this duty increases in proportion to the employee's level of responsibility.¹⁴¹ Some companies require employees to sign contracts pledging not to disclose confidential company information.¹⁴² Certain jurisdictions have statutes requiring as much, or include the obligation as part of the concept of duty.¹⁴³ Further, employees have a

135. See Robert B. Fitzpatrick, *Social Media: Employer and Employee Concerns*, AMERICAN LAW INSTITUTE (2011).

136. See *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011).

137. The National Labor Relations Act, 29 U.S.C. § 158 (2006); *City Disposal Sys., Inc. v. N.L.R.B.*, 766 F.2d 969, 973–74 (6th Cir. 1985).

138. See General Counsel 2011 Memorandum, *supra* note 9.

139. See *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011); *Wal-Mart*, NLRB Adv. Mem., Case No. 17-CA-25030 (July 19, 2011).

140. See RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

141. *Id.*

142. Paul & Chung, *supra* note at 116, at 142.

143. See CAL. LAB. CODE § 2853 (West 2008) (stating that paid employees shall perform the service for which they are hired "with ordinary care and diligence"); *Id.* § 2856 (stating

general duty not to disclose trade secrets¹⁴⁴ or defame, disparage, harass, or intimidate other employees.¹⁴⁵ Given these requirements, the NLRA goes only so far in permitting employees to post what they want.

Today, most employees without union representation are at-will employees, which means that employers can terminate these employees with or without a reason, within certain limitations and exceptions.¹⁴⁶ The primary limitations to an employer's ability to fire an at-will employee are laws prohibiting discrimination and retaliation based upon gender, race, and other similar protected classes under federal and state anti-discrimination laws.¹⁴⁷ But an employer otherwise has a right to discharge an employee at any time if the firing does not violate a contract or employment-related statute.¹⁴⁸ California is one of three states—along with Arizona and Georgia—that has codified the employment-at-will doctrine, though all states and the District of Columbia, excluding Montana, have adopted the doctrine through judicial decisions.¹⁴⁹ The courts in some states have recognized certain exceptions to the at-will doctrine.¹⁵⁰ These exceptions stem from implied contract, public policy, promissory estoppels, the covenant of good faith and fair dealing, intentional infliction of emotional distress, and privacy.¹⁵¹ Still, employees have less recourse than they would if at-will employment were not so pervasive.

Employers and employees have various competing interests when it comes to social networking. Employers seek to protect their image,¹⁵² while

that an employee “shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee”).

144. See MARK A. ROTHSTEIN & LANCE LIEBMAN, ROTHSTEIN & LIEBMAN'S EMPLOYMENT LAW CASES AND MATERIALS 1049 (4th ed. 1998).

145. See California Fair Employment and Housing Act, CAL. GOV'T CODE § 12940(j)(1), § 12940(j)(3) (West 2008).

146. Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 359 (2007).

147. See *Wage and Hour Division*, U.S. DEPARTMENT OF LABOR, <http://www.dol.gov/whd> (last visited Feb. 5, 2012); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov> (last visited Feb. 5, 2012).

148. Sprague, *supra* note 146.

149. *Id.* at 387 n. 26 (citing CAL. LAB. CODE § 2922 (West 2003) (“California’s statute provides, in part, that ‘[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other.’ . . . ‘There has been an ongoing effort to codify the employment-at-will doctrine in a uniform act through the Model Employment Termination Act, produced by the National Conference of Commissioners on Uniform State Laws. To date, no state has adopted the model act.’”).

150. *Id.* at 361.

151. *Id.*

152. See Takahashi, *supra* note 46.

employees may feel that they should be able to express their views freely.¹⁵³ Some employers want employees to help promote their brand.¹⁵⁴ However, even employees willing to tout their employer's wares online may worry about employers in any way monitoring their online activity, which they may have reason to keep separate from their workplace identity to avoid adverse workplace consequences.¹⁵⁵ At-will employment only makes employees more vulnerable,¹⁵⁶ and the NLRA, while providing protections, has limits due to other duties employees owe employers.¹⁵⁷

III. APPROACH AND ANALYSIS OF THE SOCIAL MEDIA CASES BEFORE THE NLRB

The analysis throughout this Note stems from NLRB precedent and how that precedent has been applied in case-specific Advice Memos, ALJ decisions involving social media, and the year-end Acting General Counsel's Memo.¹⁵⁸ For some of the cases considered, only the year-end Memo provided guidance; this happened if, at the time of writing, a case was still open or documents were not available. For other cases, the availability of ALJ reasoning and case-specific Memos guided discussion. None of the cases addressed in the year-end Memo was before the Board at the time of this Note's writing.

The cases considered implicate issues relating to employee privacy; when laws protect online posts, an employee's right to privacy expands. This Note does not focus on privacy law, however. Instead, it considers employee social media use and NLRB decisions as a cyberlaw and labor law issue, which has consequences for various aspects of people's virtual and actual lives. Moreover, although the rulings and analyses may prove relevant to more than

153. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997).

154. *See Takahashi*, *supra* note 46 (citing statistics from Burston-Marsteller Communications). Receptivity to such companies suggests that employers are interested in having employees use social media to advance company goals, even if there are risks.

155. *See* General Counsel 2011 Memorandum, *supra* note 9. Findings of unprotected activity suggest that employees must be wary of what they say online because employers may retaliate without violating the law.

156. Sprague, *supra* note 146, at 359.

157. *See* Restatement (Second) of Agency § 387 (1958).

158. Due to backlogs and certain NLRB policies, documents related to cases are not always posted to the NLRB website for researchers to use. In some instances, the author of this Note was able to file Freedom of Information Act (FOIA) requests to gain access to Advice Memos pertaining to particular cases. In other instances, particularly when a case remained open due to one party having filed exceptions or the settlement occurring fewer than six months prior, certain documents remained inaccessible.

social networking activities alone, this Note tailors its discussion to social networking.

A. APPROACH TO LEGAL PRINCIPLES AND PROPOSAL FOR MORE FLEXIBLE ANALYSIS

Although this Note argues that the legal standard used to decide social media cases needs to evolve, it does not suggest an expansion of current doctrine. Rather, it urges the General Counsel and ALJs to acknowledge the limitations of applying the traditional concerted activity standard in all social media cases, as concert is not necessarily expressed in the same way online as offline. Short of changing the approach taken by the NLRB attorneys, General Counsel, and ALJs, if and when a social media case gets to the Board, the Board should reject the limited approach.

Currently, the General Counsel looks to the facts of a case and will find concert “[w]hen the record evidence demonstrates group activities, whether ‘specifically authorized’ in a formal agency sense, or otherwise.”¹⁵⁹ Accordingly, individual activities that are the “logical outgrowth of concerns expressed by the employees collectively” are characterized as concerted.¹⁶⁰ Concerted activity further includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action” and where individual employees bring “truly group complaints” to management’s attention.¹⁶¹ However, activity that does not anticipate group action, and therefore does not go beyond “mere griping,” is not concerted.¹⁶²

Because an individual employee’s actions may constitute protected concerted activity if the actions stem from conversations with other employees,¹⁶³ this Note argues that the General Counsel should more systematically consider evidence of concert outside of the actual posts, even

159. *Meyers II*, 281 N.L.R.B. 882, 886 (1986), *aff’d sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir.1987), *cert. denied*, 487 U.S. 1205 (1988).

160. *See* *Five Star Transportation*, 349 N.L.R.B. 42, 43–44, 59 (2007), *enfd*, 522 F.3d 46 (1st Cir. 2008) (holding that drivers’ letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting).

161. *Meyers II*, 281 N.L.R.B. at 887.

162. *See* *Mushroom Transp. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (noting that “[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . and, if it looks forward to no action at all, it is more than likely to be mere ‘griping’ ”); *Holling Press*, 343 N.L.R.B. 301, 302 (2004) (noting that activity that involves only a speaker and a listener may be concerted “so long as what is being articulated goes beyond mere griping”).

163. *See* *Karl Knauz Motors*, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452 (Sept. 28, 2011).

in the absence of clear, organized meetings or other obvious signals. As it stands now, the General Counsel's application of the concerted activity standard seems to ignore the fact that people communicate on multiple platforms and through different media simultaneously and fluidly.¹⁶⁴ The NLRB Memo cases appear at odds, because in some instances, the General Counsel focuses mostly on a Facebook post itself and pays minimal attention to other forms of communication pertaining to the same conversation.¹⁶⁵

This Note supports the use of the "opprobrious conduct" standard,¹⁶⁶ which gives employers recourse when their employees make truly outlandish comments.¹⁶⁷ That standard provides a mechanism for ensuring that the concerted activity standard will not permit outrageous speech.¹⁶⁸ Thus, even if the General Counsel adopts a more flexible approach in line with what this Note suggests, the "opprobrious conduct" analysis will provide a check that limits protection on posts that go beyond reasonable, permissible speech.

B. CASES CONSIDERED IN THIS NOTE

The Table below lists the twelve cases considered in this Note, their status in the NLRB process, and the outcomes related to whether or not the posts constituted protected concerted activity and whether or not the social media policies were legal. The Acting General Counsel and NLRB attorneys have issued complaints, dismissed, settled, and in some instances, prosecuted these cases before an ALJ. This Note contends that the ALJ may have incorrectly decided two of the cases considered in the Memo—*JT's Porch Saloon & Eatery*¹⁶⁹ and *Wal-Mart*¹⁷⁰—because of the General Counsel's

164. See General Counsel 2011 Memorandum, *supra* note 9.

165. Compare *Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) (finding protected activity when employee Facebook posts criticizing a colleague solicit feedback from fellow employees) with *Wal-Mart*, NLRB Adv. Mem., Case No. 17-CA-2503 (July 19, 2011) (finding no protection for an employee whose post complained about a manager but did not explicitly ask Facebook friends, many of whom were colleagues, whether or not they agreed with his position). This Note contends that in order to thoroughly analyze whether or not a social media post represents concerted activity, NLRB lawyers must look for evidence of concert before the post. This is done in some cases, such as in *Hispanics United*, but not in others, such as *Wal-Mart* and *JT's Porch Saloon & Eatery*.

166. *Atl. Steel Co.*, 245 N.L.R.B. 814 (1979) (stating that "even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act"); see discussion *infra* Section III.D.

167. *Id.*

168. *Opprobrium Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/opprobrium> (last visited Feb. 5, 2012) (defining 'opprobrium' as "the disgrace or the reproach incurred by conduct considered outrageously shameful").

169. *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011).

seeming unwillingness to adapt the concerted activity standard to the nuances of social media. This Note urges the General Counsel to engage in more dexterous analysis of social media cases.

Table 1: Cases Considered

	CASE NAME	STATUS	OUTCOME
1.	<i>Hispanics United</i>	Open	Concerted activity under <i>Meyers</i>
2.	<i>American Medical Response</i>	Closed	Concerted activity under <i>Meyers</i>
3.	<i>Karl Knauz Motors Inc.</i>	Open	NOT protected concerted activity
4.	<i>Triple Play Sports Bar</i>	Open	Concerted activity under <i>Meyers</i>
5.	<i>Arizona Daily Star</i>	Open	NOT protected concerted activity
6.	<i>JT's Porch Saloon</i>	Closed	NOT protected concerted activity <i>Note questions outcome of this case</i>
7.	<i>Rural Metro</i>	Closed	NOT protected concerted activity
8.	<i>Martin House Inc.</i>	Closed	NOT protected concerted activity
9.	<i>Wal-Mart</i>	Closed	NOT protected concerted activity <i>Note questions outcome of this case</i>
10.	<i>Flagler Hospital</i>	Closed	Overly broad social media policy
11.	<i>Parks and Sons</i>	Open	Overly broad social media policy
12.	<i>Giant Eagle Inc.</i>	Closed	Partially okay social media policy

C. CONCERTED ACTIVITY FOR MUTUAL AID OR PROTECTION

1. History of the Concerted Activity Standard

A review of the concerted activity standard's history sheds light on its current scope. The Norris-Laguardia Act of 1931, which included an early mention of "concert"¹⁷¹ without focusing on it, prevented the federal courts from enjoining labor disputes engaged in "singly or in concert."¹⁷² The Board intended Section 7(a) of the National Industrial Recovery Act of 1933 to allow laborers to associate in order to improve working conditions.¹⁷³ But it was not until the passage of Section 7 of the NLRA in 1935 that concerted

170. Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-25030 (July 19, 2011).

171. Norris-Laguardia Act, Ch. 90, § 2, 47 Stat. 70, 70 (1932).

172. *Id.*

173. *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493 (1984).

activity became a protected right.¹⁷⁴ According to one scholar's analysis, however, until 1967, the circuit courts and the NLRB were "reluctant to find that concerted activity existed when an individual employee, acting alone to complain about working conditions, sought protection under Section 7 of the Act."¹⁷⁵ This changed when the Board for the first time gave protection to an employee acting alone in an effort to enforce a collective bargaining agreement.¹⁷⁶ In *Interboro Contractors*, a steamfitter complained to management to furnish safe labor conditions, which the employer and the steamfitter agreed to as part of a collective bargaining agreement.¹⁷⁷ On appeal, the Second Circuit upheld the Board's decision to protect the employee.¹⁷⁸ In the years that followed, NLRB rulings adhered to the *Interboro* decision, though circuits were split during that period.¹⁷⁹

In 1975, the NLRB further expanded the scope of protection by finding that activities unrelated to collective bargaining agreements could also warrant protection.¹⁸⁰ In *Alleluia Cushion*, an employer discharged a single employee after the employee sent a letter to the Occupational Safety and Health Administration ("OSHA").¹⁸¹ The employee was dissatisfied with how the employer handled his complaint about workplace safety, and the letter the employee wrote led to an inspector's visit.¹⁸² The Board ruled in the employee's favor, without a showing that the employee had solicited support from colleagues.¹⁸³ The Board found "an implied consent" from colleagues enough for concerted activity.¹⁸⁴ In addition to acting for a group of employees' interests, activity on behalf of the public—such as raising concerns related to safety—could trigger "mutual aid or protection."¹⁸⁵

174. The National Labor Relations Act, 29 U.S.C. § 157 (2006).

175. Lori A. Ciarrocca, *The Struggle to Define Section 7 Concerted Activity: A Literal Definition Emerges*, 44 WASH. & LEE L. REV. 1277, 1283 (1987).

176. *Interboro Contractors*, 157 N.L.R.B. 1295 (1966).

177. *Id.*

178. *National Labor Relations Board v. Interboro Contractors*, 388 F.2d 495 (1967).

179. *See, e.g.*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984), *aff'g* *Interboro Contractors*, 157 N.L.R.B. 1295 (1966); Ciarrocca, *supra* note 175, at n. 51; *NLRB v. Ben Peking Corp.*, 452 F.2d 205, 207 (7th Cir. 1971); *NLRB v. Selwyn Shoe Mfg. Corp.*, 428 F.2d 217, 221 (8th Cir. 1970).

180. *See Alleluia Cushion*, 221 N.L.R.B. 999, 1007 (1975), *overruled by* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

181. *Id.* at 999.

182. *Id.*

183. *Id.* at 1007.

184. *Id.* at 1000.

185. ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* 302 (1976).

Nine years later, in 1984, the *Meyers* cases¹⁸⁶ overruled the *Alleluia Cushion* standard, which for a limited time had significantly broadened the scope of concerted activity protection. The *Meyers* cases guide the interpretation of social media cases today.¹⁸⁷ The cases involved a truck driver who complained to his employer about safety problems involving the truck he drove for the company.¹⁸⁸ When his employer failed to take action, and after he got into an accident because of malfunctioning brakes, the employee called the Public Service Commission to inspect the vehicle.¹⁸⁹ The Commission then issued a citation and put the vehicle out of service.¹⁹⁰ After the employer fired the employee,¹⁹¹ and NLRB attorneys took the case. The ALJ and the Board ruled in favor of the employer's dismissal of the employee, finding it did not violate Section 8(a)(1) of the Act because the employee acted alone in refusing to drive the vehicle and in contacting the Commission.¹⁹²

The D.C. Circuit remanded *Meyers I* in order to give the Board the chance to reconsider in light of the 1984 Supreme Court decision in *NLRB v. City Disposal Systems*,¹⁹³ which suggested that the NLRB had substantial authority to define the scope of Section 7 of the NLRA.¹⁹⁴ The D.C. Circuit Court did not disclose whether it agreed or disagreed with the ruling in *NLRB v. City Disposal Systems*.¹⁹⁵ On remand in *Meyers II*, the Board reaffirmed its rule from *Meyers I*, holding that concerted activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."¹⁹⁶ Though today the NLRA makes the distinction between concerted activity for mutual aid or protection and individual gripes, questions remain about what actually does and should constitute concerted

186. *Meyers I*, 268 N.L.R.B. 493 (1984); *Meyers II*, 281 N.L.R.B. 882 (1986) (reaffirming the rule from *Meyers I*, holding that concerted activity is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself").

187. See General Counsel 2011 Memorandum, *supra* note 9.

188. *Meyers I*, 268 N.L.R.B. 493.

189. *Id.*

190. *Id.* at 505.

191. *Id.* at 506.

192. *Id.* at 493.

193. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984).

194. *Id.* at 830 (noting that the court has "not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here").

195. See *Meyers II*, 281 N.L.R.B. 882 (1986).

196. *Id.* at 885.

activity.¹⁹⁷ The uncertainties affect employers and employees seeking predictability in an online context.¹⁹⁸ Given that courts and NLRB Board members under several administrations have not pushed for a return to the *Alleluia Cushion* standard,¹⁹⁹ this Note proposes a more feasible middle-ground that allows for consideration of social media norms.

2. Cases Considering Concerted Activity

Nine of the twelve cases discussed in this Note turned on an analysis of whether or not the employees engaged in concerted activity. In the first six cases reviewed below, the General Counsel or ALJs found no concerted activity and therefore did not need to analyze whether or not bad faith existed.²⁰⁰ In the next three cases considered, the General Counsel or ALJs found concerted activity.²⁰¹ After establishing concerted activity, the case's evaluator must find no bad faith or opprobrious conduct in order for the employee to get protection.²⁰² This Note therefore goes on to consider the analysis of Bad Faith and Opprobrious Conduct in Section III.D, *infra*. Ultimately, the decision-makers found that none of the employees' activities included bad faith or opprobrious conduct in the three concerted activity cases.

197. See Corbett, *supra* note 14, at 268 (“[I]f broadly interpreted and vigorously enforced, Section 7 could obviate the need for some additional individual rights statutes. It could give employees a far-reaching protection that individual rights laws cannot.”).

198. See General Counsel 2011 Memorandum, *supra* note 9. The rulings in the General Counsel's Memo do not seem consistent, as is argued in this Note, making it difficult to draw conclusions from NLRB case precedent.

199. *Alleluia Cushion Co.*, 221 N.L.R.B. 1099 (1975), *overruled by* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (finding “an implied consent” from colleagues enough for concerted activity).

200. *Karl Knauz Motors*, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452 (Sept. 28, 2011); *Martin House*, NLRB Adv. Mem., Case No. 34-CA-12950 (July 19, 2011); *Wal-Mart*, NLRB Adv. Mem., Case No. 17-CA-25030 (July 19, 2011); *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011); *Rural Metro*, NLRB Adv. Mem., Case No. 25-CA-31802 (June 29, 2011); *Arizona Daily Star*, NLRB Adv. Mem., Case No. 28-CA-23267 (Apr. 21, 2011).

201. *Triple Play Sports Bar & Grille*, NLRB Administrative Law Judge Decision, Case No. 34-CA-12915 (Jan. 3, 2012); *Am. Med. Response of Conn.*, Adv. Mem., Case No. 34-CA-12576 (Oct. 5, 2010); *Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011).

202. *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979) (stating at “even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act”).

In the first case under review, *Karl Knauz Motors*,²⁰³ an ALJ held that the employer appropriately terminated its employee because his posts did not reflect concert.²⁰⁴ The employee had posted on Facebook critical comments and pictures related to a car wreck that took place at a nearby car dealership that the employer also owned.²⁰⁵ The car wreck involved another salesperson and a customer during a test drive.²⁰⁶ Under a photo of the accident, the salesman wrote: “This is your car: This is your car on drugs.”²⁰⁷ Another photo of the car submerged in a pond had the caption:

This is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) 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!²⁰⁸

The complaint alleged that the employer fired the employee for different Facebook posts criticizing how his company had served cheap food to potential customers at a high-end car sales event, but the ALJ found that those particular postings did not spur the discharge.²⁰⁹ The employee removed those posts when asked to do so by management.²¹⁰ The ALJ characterized the postings related to the sales event as concerted activity, because the salesman was expressing sentiments that coworkers had vocalized during a previous staff meeting, when employees complained that the cheap refreshments could affect sales.²¹¹ The ALJ found the company

203. *Karl Knauz Motors*, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452 (Sept. 28, 2011). This case is still open, currently pending a Board decision on the ALJ decision.

204. *Id.* at 12. At the time of the Acting General Counsel’s Social Media Memo in August, this case, filed May 20, 2011, had not been before the ALJ, and the General Counsel analyzed the issues based on the case-specific Advice Memo, which argued for protecting the employee’s Facebook postings related to the car wreck and a separate sales event. The ALJ disagreed with that advice. It remains to be seen whether the Board will agree with the ALJ.

205. *Id.* at 3.

206. *Id.* at 4.

207. *Id.*

208. *Id.*

209. *Id.* at 9.

210. *Id.* at 4.

211. *Id.* at 8. Under *Meyers II*, 281 N.L.R.B. 882, 887 (1986), concerted activities included individual activity when “individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” In *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969), the court stated that the “activity of a single employee in enlisting the

policy pertaining to social media to be overbroad and ordered that it make changes, in line with recommendations described in Section III.E, *infra*.²¹² Karl Knauz Motors highlights the importance of establishing concert. Because the car wreck postings, unlike the sales event postings, did not build on group sentiment or push for something specific that a group of employees would likely endorse, the ALJ found no reason to protect the posts under Section 7 of the NLRA.²¹³

Because of a similar finding in *Arizona Daily Star*,²¹⁴ the General Counsel did not even suggest issuing a complaint; he found legal the employer's decision to fire its employee for tactless social media posts.²¹⁵ First, a reporter employee posted on Twitter criticism of another news organization's television coverage.²¹⁶ After the television station contacted the newspaper, the reporter apologized for his disparaging tweet, the term for a Twitter post.²¹⁷ He then continued to tweet disrespectfully about homicides, even though the editors had told him in a formal meeting that he was prohibited from discussing the newspaper in any public forum.²¹⁸ Over the course of several weeks, the employee tweeted:

August 27—"You stay homicidal, Tucson. See Star Net for the bloody deets."

support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." In *NLRB v. Mike Yurosek & Son*, 53 F.3d 261, 265 (9th Cir. 1995), the court stated that

[t]he fact that there was no express discussion of a group protest or 'common cause' is not dispositive . . . their individual actions were 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.

212. Karl Knauz Motors, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452, 7 (Sept. 28, 2011).

213. *Id.* at 9 ("I find that Becker's posting of the Land Rover accident on his Facebook account was neither protected nor concerted activities, and Counsel for the General Counsel does not appear to argue otherwise. It was posted solely by Becker, apparently as a lark, without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment. It is so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting further affects the nature of the posting.").

214. *Arizona Daily Star*, NLRB Adv. Mem., Case No. 28-CA-23267 (Apr. 21, 2011). In this case, a special Appeal to the Board on November 22, 2011 was dismissed for Non-Merit on April 28, 2011.

215. *Id.* at 1.

216. *Id.* at 4.

217. *Id.*

218. *Id.* at 6.

August 30—“What?!?!? No overnight homicide? WTF? You’re slacking Tucson.”

September 10—“Suggestion for new Tucson-area theme song: Droening [sic] pool’s ‘let the bodies hit the floor.’”

September 10—“I’d root for daily death if it always happened in close proximity to Gus Balon’s.”

September 10—“Hope everyone’s having a good Homicide Friday, as one Tucson police officer called it.”²¹⁹

The General Counsel did not find concert because the tweets did not relate to the terms and conditions of employment, and the employee did not attempt to involve other employees.²²⁰ Had he in his tweets, or prior to his tweets, asked colleagues whether they wanted to join him in making criticisms, and had the General Counsel found enough evidence of group sentiment, he may have had protection. To get coverage from the NLRA, he may have needed to more clearly criticize his employer, instead of making somewhat random observations and criticisms about his city. This case seems to have come out correctly in that Section 7 of the NLRA²²¹ does not protect comments that harm an employer’s reputation and do not express a commonly felt workplace gripe.²²²

In *Martin House, Inc.*, the NLRB’s Division of Advice in Washington opined that there was no protection for an employee who posted insensitively about the mental patients she oversaw.²²³ She made the posts while at work,²²⁴ so her employer had more leeway in setting limits on what she could express while on the job.²²⁵ The employee, a full-time recovery specialist working for Martin House, a nonprofit residential facility for

219. *Id.* at 3.

220. *Id.* at 6.

221. The National Labor Relations Act, 29 U.S.C. § 157 (2006).

222. *See Meyers II*, 281 N.L.R.B. 882 (1986).

223. *Martin House*, NLRB Adv. Mem., Case No. 34-CA-12950, 1 (July 19, 2011). The General Counsel dismissed the case on Non-Merit on Jul. 8, 2011, and the case was closed on Jul. 26, 2011.

224. *Id.*

225. *Id.* at 2. This notion that employers can regulate work time more than leisure time is a principle of labor law. *See, e.g.*, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945) (noting that “the Board has held that, while it was ‘within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,’ it was ‘not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,’ the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization”).

homeless people, many of whom suffered from mental illness and substance abuse, wrote on her Facebook wall:

Charging Party: Spooky is overnight, third floor, alone in a mental institution, btw Im not a client, not yet anyway.

Friend 1: Then who will you tell when you hear the voices?

Charging Party: me, myself and I, one of us had to be right, either way we'll just pop meds until they go away! Ya baby!

Charging Party: My dear client ms 1 is cracking up at my post, I don't know if shes laughing at me, with me or at her voices, not that it matters, good to laugh

Friend 1: That's right but, if she gets out of hand, restrain her.

Charging Party: I don't need to restrain anyone, we have a great rapport, im beginning to detect when people start to decompensate and she is the sweetest, most of our peeps are angels, just a couple got some issues, Im on guard don't worry bout a thing!

Friend 2: I think you'd look cute in a straitjacket, heh heh heh.²²⁶

The employee did not discuss her posts with colleagues, no colleagues responded, and no evidence existed of preparation for group action or a response to collective concerns.²²⁷ A Facebook friend of the employee, a former client of Martin House, reported the postings to Martin House.²²⁸ The termination letter cited a confidentiality breach and the fact that the posts were made at work, when the employee should have been working.²²⁹ Had the employee expressed legitimate complaints about her working environment, complaints that others shared, she may have had recourse. However, the details of the case led the NLRB Washington D.C. attorneys to correctly conclude that Section 7 did not provide protection.

The Division of Advice also recommended dismissal in *Rural Metro* for non-merit because an employee's posts did not ask for particular relief and did not clearly show concert.²³⁰ In this case, an employee medical transportation and fire protection dispatcher, whose husband was an Emergency Medical Technician, posted a comment on a senator's Facebook

226. Martin House, NLRB Adv. Mem., Case No. 34-CA-12950, 1–2.

227. *Id.* at 3.

228. *Id.* at 2.

229. *Id.*

230. *Rural Metro*, NLRB Adv. Mem., Case No. 25-CA-31802, 1 (June 29, 2011). The General Counsel dismissed on Non-Merit on July 8, 2011, and the case was closed on July 28, 2011.

wall.²³¹ The senator had just announced that four Indiana fire departments had received grants.²³² The employee's post read:

My husband and I work for Rural Metro, me as a [redacted] and he as an [redacted]. Rural Metro has contracts w/several fire departments to provide EMS. The reason they contract out to us? BECAUSE WE'RE THE CHEAPEST SERVICE IN TOWN! How do we manage that? BY PAYING OUR EMPLOYEES \$2 LESS THAN THE NATIONAL AVERAGE! We both make less than \$10 an hr. And he's worked for them 3.5 yrs! . . . the fact that we're employees of a cheap contract company instead of government employees hurts us. Maybe some of that grant money could be used toward hiring personnel to run the new equipment too. Unfortunately the state is going the other way and looking for more cheap companies to farm the jobs out to. Privatization hard at work

And the 20 year old that died in township, he was a friend of mines family member. Rural Metro provides coverage for that area, but we only have 2 trucks for all of county and they're stationed near Hospital nearly 15–20 minutes from township driving emergen[cy]. Furthermore one of our crews showed up on a scene of a cardiac arrest where the volunteer fire fighters/first responders didn't even know how to perform CPR! I get that it only saves 1–2% of people, but we'll never know in this case if it would have helped. It's going to take a lot more grant money to fix all of the problems w/IN's EMS!²³³

Rural Metro discharged the employee based on the disparaging remarks she made about her employer, the fact that she shared confidential information, and her violation of the company's Code of Ethics and Business Conduct policy.²³⁴ The Division of Advice found no possible concerted activity, claiming that the dispatcher did not talk about her posts with colleagues and that the post did not seek relief for employment circumstances.²³⁵

Given that concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where individual employees bring "truly group complaints" to management's attention,²³⁶ it seems feasible that a judge could find concert based on this

231. *Id.*

232. *Id.*

233. *Id.* at 1–2.

234. *Id.* at 2.

235. *Id.* at 3.

236. *Meyers II*, 281 N.L.R.B. 882, 887 (1986).

employee's post. In *Rural Metro*, as in *JT's Porch Saloon & Eatery*,²³⁷ the Washington NLRB attorneys deemed the employee's earlier related conversations—lamenting wages with colleagues—as separate from the post.²³⁸ This approach seems too limited; evidence of concert from earlier offline situations deserves more weight. Though the facts could cut either way, the NLRB agent may have failed to fully investigate the implications of the circumstances leading up to the post in *Rural Metro*.

The outcomes in the first three cases—*Karl Knauz Motors*, *Arizona Daily Star*, and *Martin House*²³⁹—seem reasonable; however, the employee in *Rural Metro* may have deserved a chance to make her case. The next two cases under consideration more seriously call into question the NLRB's current usage of the concerted activity standard.

3. *Limitations of the Concerted Activity Standard*

The narrowly applied concerted activity standard led to unfair outcomes in *JT's Porch Saloon & Eatery*²⁴⁰ and *Wal-Mart*.²⁴¹ In looking for proof of concerted activity, the NLRB attorneys and the General Counsel relied too much on actual online responses from Facebook friends, which were either lacking or phrased in a way that did not explicitly show concert.²⁴² Most Facebook posts are by their nature directed towards a community.²⁴³ Unless an individual sets her privacy settings to be unusually restrictive, the individual who posts is “speaking” to a group of people. Whether or not colleagues reply to Facebook threads may depend mostly on the time of the

237. *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011).

238. *Rural Metro*, NLRB Adv. Mem., Case No. 25-CA-31802, 2 (June 29, 2011).

239. *Karl Knauz Motors*, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452 (Sept. 28, 2011); *Martin House*, NLRB Adv. Mem., Case No. 34-CA-12950 (July 19, 2011); *Arizona Daily Star*, NLRB Adv. Mem., Case No. 28-CA-23267 (Apr. 21, 2011).

240. *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011).

241. *Wal-Mart*, NLRB Adv. Mem., Case No. 17-CA-25030 (July 19, 2011).

242. *Compare* *Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) (finding protected activity when employee Facebook posts criticizing a colleague solicit feedback from fellow employees) *with* *Wal-Mart*, NLRB Adv. Mem., Case No. 17-CA-2503 (July 19, 2011) (finding no protection for an employee whose post complained about a manager but did not explicitly ask Facebook friends, many of whom were colleagues, whether or not they agreed with his position) *and* *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011) (finding no protection for an employee whose previous, related offline conversation were deemed separate from his Facebook postings).

243. *How to Post and Share*, FACEBOOK HELP CENTER, <https://www.facebook.com/help/sharing> (explaining how to share status updates to make statements, in various forms, visible to Facebook friends or a designated community).

posting or other matters that seem too dependent on contingency²⁴⁴ for them to reasonably drive the outcome of the case. It is the intent of the “speaker” that should matter. For these reasons and others, social media posts merit a unique, tailored analysis.

In *JT's Porch Saloon & Eatery*, the Division of Advice dismissed an employee's charge that his firing violated Section 7 of the NLRA.²⁴⁵ The employee's Facebook post complained about the restaurant and bar's unwritten policy wherein waitresses kept all of a table's tips, despite the serving help they received from bartenders.²⁴⁶ He also complained that his employer had not given him a raise in five years and called the restaurant's customers “rednecks,” writing that he hoped they would choke on glass when they drove home drunk.²⁴⁷ None of his colleagues responded to his post.²⁴⁸ When the employee had earlier complained about the tipping policy offline, a fellow bartender agreed that it “sucked,” but they did not raise the issue with management.²⁴⁹ In other cases, including *Karl Knauz Motors*, the NLRB considered offline conversations in a sales meeting as proof of concert for those particular online posts.²⁵⁰

So why did this offline conversation not help the employee here? The Advice Memo suggested that the employee's previous offline conversation, during which he discussed the issue he later posted about with a colleague,

244. For example, whether or not someone responds to a Facebook post could have to do with whether or not she happened to check status updates close to the time her colleague posted, such that the update would appear in her feed. Alternatively, a decision to post could depend on whether a user logs in using a computer or a smartphone; some people find that it takes too long to type responses on smart phones and thus refrain from commenting on posts they would respond to were they at a computer. Additionally, whether or not someone responds could depend on her fear of legal or reputational repercussions. Were the colleagues engaging in an offline, private conversation, it is possible that a colleague would express support and even agree to complain to a manager, whereas that same colleague may worry that a public Facebook post endorsing a colleague's post leaves her too exposed. Perhaps for some of the reasons discussed, the General Counsel has, in some instances, considered offline conversations relevant to an analysis of concert. When finding protection for posts related to an employee's complaints about a work sales event, it mattered more that the individual intended to express a group lament than how Facebook friends happened to respond. *See Karl Knauz Motors*, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452, 8 (Sept. 28, 2011).

245. *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689, 1 (July 7, 2011).

246. *Id.*

247. *Id.* at 1–2.

248. *Id.* at 3.

249. *Id.* at 1.

250. *Karl Knauz Motors*, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452, 8 (Sept. 28, 2011).

was separate from his Facebook posts.²⁵¹ This seems at odds with the approach in *Karl Knauz Motors*, where the ALJ considered the sales event posts protected because of earlier offline conversations.²⁵² Here, the bartender's post directly criticized the terms and conditions of his employment, and the employee had earlier commiserated about his complaints with a colleague offline.

Whereas the lack of concert seemed clear for the car wreck posts in *Karl Knauz Motors*, the random, offensive tweets in *Arizona Daily Star*, and the insensitive posts in *Martin House*, the outcome of *Wal-Mart*, like that of *JT's Porch Saloon & Eatery*, seems less reasonable. The Division of Advice in *Wal-Mart* suggested dismissal of the case because it found that an employee's posts represented a mere "gripe" and were not intended to induce group action.²⁵³ The Wal-Mart employee wrote: "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!"²⁵⁴ Responses ensued:

[Employee 1]: bahaha like! :)

[Employee 2]: What the hell happens after four that gets u so wound up??? Lol

[Charging Party]: You have no clue [Employee 1] . . . [Assistant Manager] is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price . . . that's false advertisement if you don't sell it for that price . . . I'm talking to [Store Manager] about this shit cuz if it don't change Wal-Mart can kiss my royal white ass!²⁵⁵

After a meeting with the Store Manager, who received a printout of the posts, the employee removed the thread.²⁵⁶ Most of the employee's Facebook friends were colleagues,²⁵⁷ but this did not help because of the way he phrased his post and the words his friends used to respond. The employee claimed that two other coworkers posted comments of support; one of those

251. JT's Porch Saloon & Eatery, NLRB Adv. Mem., Case No. 13-CA-46689, 3 (July 7, 2011).

252. Karl Knauz Motors, NLRB Administrative Law Judge Decision, Case No. 13-CA-46452, 8 (Sept. 28, 2011).

253. Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-25030, 3 (July 19, 2011). Case Closed Jul. 25, 2011.

254. *Id.* at 1.

255. *Id.* at 1–2.

256. *Id.* at 2.

257. *Id.* at 1.

coworkers said that she made a “hang in there” sort of remark.²⁵⁸ Given that the post in this case specifically addressed working conditions and that the employee got support from Facebook friends who were colleagues, his disciplining does not seem fair when compared with the other cases. This Note contends that the case should have at least proceeded to an ALJ for a more comprehensive review.

In some instances, the concerted activity standard gives employees more protection than employees might imagine the concerted activity standard would have. But in other cases, interpreting it rigidly in social networking cases prevents it from providing protection in a uniform way, because trivial factors could remove certain activity from the realm of protection. The NLRB’s approach of using the existing concerted activity standard for social media cases, without taking into account how social media is used, leads to some problematic outcomes.

D. BAD FAITH AND OPPROBRIOUS CONDUCT

1. *The Standard for Bad Faith and Opprobrious Conduct*

Even where concerted activity exists, when the Board finds activity to be in bad faith and opprobrious because of its nature or purpose, the activity may not warrant protection under Section 7 of the NLRA.²⁵⁹ Opprobrium is defined as “the disgrace or the reproach incurred by conduct considered outrageously shameful.”²⁶⁰ However, perhaps because the United States has from the start been committed to supporting expression of diverse viewpoints,²⁶¹ the Board has not considered all offensive speech opprobrious.²⁶² In one case, the Board found that calling a supervisor a “liar and a bitch” and a “fucking son of a bitch” was not so opprobrious as to cost the employee the protection of the Act.²⁶³ In another case, when an employee called a supervisor an “egotistical fuck,” the employee did not lose Section 7 protection.²⁶⁴ Meanwhile, the Board has held that communication

258. *Id.* at 2.

259. *Atl. Steel*, 245 NLRB 814, 816 (1979) (stating at “even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act”).

260. *Opprobrium definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/opprobrium> (last visited Feb. 5, 2012).

261. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances”).

262. *See* General Counsel 2011 Memorandum, *supra* note 9.

263. *See* *Stanford Hotel*, 344 N.L.R.B. 558, 564 (2005).

264. *See* *Alcoa*, 352 N.L.R.B. 1222, 1226 (2008).

“so disloyal, reckless or maliciously untrue” can lose the Act’s protection and justify terminating an employee for cause.²⁶⁵ Case law suggests that findings of opprobrious conduct depend more on the nature, content, and veracity of the communication than on whether or not employees use epithets.²⁶⁶

NLRB attorneys and judges use a test for opprobrious conduct that comes from the Supreme Court ruling in *Jefferson Broadcasting*.²⁶⁷ In that case, the Supreme Court remanded to a court of appeals with instructions to reinstate the Board’s decision that the employees’ activity did not merit Section 7 protection.²⁶⁸ The case involved striking television technicians.²⁶⁹ Their peaceful picketing turned into a series of “vitriolic attacks on the quality of the company’s television broadcasts” and then technicians distributed thousands of handbills at local businesses impugning the television station.²⁷⁰ The technicians distributed on the picket line, on the public square several blocks from the company’s premises, on buses, and in barber shops and restaurants.²⁷¹ They mailed handbills to local business people.²⁷² The handbills read:

Is Charlotte A Second-Class City?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn’t the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be

265. *Endicott Interconnect Tech. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (citing *Am. Golf Corp.*, 330 N.L.R.B. 1238, 1240 (2000); *see also Cincinnati Suburban Press*, 289 N.L.R.B. 966, 967–68 (1988); *Emarco, Inc.*, 284 N.L.R.B. 832, 833 (1987); *Richboro Cmty. Mental Health Council*, 242 N.L.R.B. 1267 (1979)).

266. *Id.*; *see Stanford Hotel*, 344 N.L.R.B. 558, 564 (2005); *Alcoa*, 352 N.L.R.B. 1222, 1226 (2008).

267. *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464 (1953).

268. *Id.* at 477–78.

269. *Id.* at 464.

270. *Id.* at 468–71.

271. *Id.* at 468.

272. *Id.*

that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?²⁷³

Jefferson Standard fired the ten technicians who sponsored or distributed the handbills.²⁷⁴

The Court in *Jefferson* clarified the link between opprobrious conduct and disloyalty.²⁷⁵ If concerted activity is significantly disloyal, and therefore opprobrious, it loses protection.²⁷⁶ The technicians' decision not to refer to the collective action activity in its handbills could have misled the handbill's recipients and seemed to make the Court less willing to protect the activity based on concert.²⁷⁷ Indeed, the Court noted that the attack

related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. The attack asked for no public sympathy or support. It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop.²⁷⁸

The *Jefferson* Court employed a now commonly used test for determining when conduct by an employee reaches this threshold of disloyal opprobrium.²⁷⁹ It requires that the Board look at whether communication is (1) related to an ongoing labor dispute and (2) not so disloyal, reckless, or maliciously untrue to make it lose the Act's protection.²⁸⁰ In *Jefferson*, the Court looked for additional evidence of disloyalty.²⁸¹ It noted that the technicians distributed the handbills at a "critical time" in the company's business and that the handbills reflected a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."²⁸² A finding of opprobrium requires consideration of context because disloyalty depends on the specifics surrounding the activity.

273. *Id.*

274. *Id.*

275. *Id.* at 472.

276. *Id.*

277. *Id.* at 468.

278. *Id.* at 476.

279. *Id.* at 477-78.

280. *Id.*

281. *See id.*

282. *Id.* at 464.

Building upon the *Jefferson* standard, a quarter century later the Board articulated more factors to consider before finding opprobrium.²⁸³ In *Atlantic Steel*, the Board agreed with an arbiter's initial finding that an employer lawfully discharged a foreman for inappropriate conduct, which included poor work performance and cursing.²⁸⁴ Upholding precedent,²⁸⁵ the Board decided that even concerted activity loses protection if it is deemed opprobrious.²⁸⁶ Adjudicators must balance the following factors: (1) the place of the 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.²⁸⁷ The Acting General Counsel's Social Media Memo includes various mentions of the *Atlantic Steel* test, showing its continued importance in NLRB decision-making.²⁸⁸

2. Cases Considering Opprobrious Conduct

In the three Memo cases in which the Division of Advice found concerted activity, it had to consider whether the social networking activity lost protection due to opprobrium.²⁸⁹ In all three of these cases, the NLRB attorneys found that the conduct did not lose protection and that the employers inappropriately punished the employees.²⁹⁰ None of the three cases showed sufficient disloyalty on the part of employees in proportions close to *Jefferson* disloyalty. Further, in all of the cases, the subject matter affected the terms and conditions of employment. In addition, employer practices, or practices by employees for whom the employer was responsible, provoked the posts—an *Atlantic Steel* factor that cuts in favor of a discharged employee.

In *American Medical Response of Connecticut*, a terminated employee accepted a settlement agreement that had the employer agreeing to change its rules so that it did not overly restrict employee conversations about working conditions.²⁹¹ The employee of the emergency medical services provider

283. See *Atl. Steel*, 245 N.L.R.B. 814 (1979).

284. *Id.* at 814.

285. See *Hawaiian Hauling Service, Ltd.*, 219 N.L.R.B. 765, 766 (1975).

286. *Atl. Steel*, 245 N.L.R.B. at 816.

287. *Id.*

288. See General Counsel 2011 Memorandum, *supra* note 9.

289. See *Triple Play Sports Bar & Grille*, NLRB Administrative Law Judge Decision, Case No. 34-CA-12915 (Jan. 3, 2012); *Am. Med. Response of Conn., Adv. Mem.*, Case No. 34-CA-12576 (Oct. 5, 2010); *Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011).

290. See *id.*

291. NLRB complaint based upon Facebook posts as 'concerted activity' is settled prior to hearing, EMPLOYMENT LAW MATTERS (Feb 8, 2011), <http://www.employmentlawmatters.net/2011/>

belonged to a union and had served the company for eleven years as a paramedic.²⁹² She demanded union representation before filling out an incident report ordered by her boss; he had received a client complaint about her handling of a medical situation.²⁹³ When the boss denied her request for union representation, she referred to him on Facebook as a “17” (AMR code for psychiatric patient), “dick,” and “scumbag.”²⁹⁴ Despite her harsh language, however, the case’s Advice Memo stated that the opprobrium standard does not necessarily forbid distasteful speech.²⁹⁵

The Advice Memo, which came out before the settlement, found that the employee engaged in protected activity that did not reach opprobrious proportions.²⁹⁶ It found that the employer violated Section 8(a)(1) of the Act by denying the employee a union representative and by threatening to discipline her for invoking her rights.²⁹⁷ The employer violated Section 8(a)(1) and (3) of the Act by firing her for engaging in such activity and violated Section 8(a)(1) of the Act by maintaining a blogging and Internet posting and standards-of-conduct policies that could chill Section 7 protected activity.²⁹⁸

The NLRB attorneys used the *Atlantic Steel* factors to show that the employer erred in firing the employee. Under factor (1) of *Atlantic Steel*, the place of the posting gave her more protection because the employee posted outside the workplace and the posts did not interrupt the work of other employees.²⁹⁹ Under factor (2), subject matter, the posts dealt with supervisory action, which constitutes protected subject matter.³⁰⁰ As to factor (3), the nature of the outburst, no verbal or physical threats accompanied the name-calling, and the Board protects more egregious name-calling than was present here.³⁰¹ Factor (4), whether the employer provoked the outburst,

02/articles/nlra/nlrb-complaint-based-upon-facebook-posts-as-concerted-activity-is-settled-prior-to-hearing (“[T]he company’s position throughout this matter has been that the individual who authored the Facebook postings was fired ‘based on multiple, serious complaints about her behavior,’ and not simply because of the postings. The settlement of this matter includes a separate, private settlement between the company and the individual employee, the terms of which have not been made public.”).

292. Am. Med. Response of Conn., Adv. Mem., Case No. 34-CA-12576, 3 (Oct. 5, 2010). Case closed July 7, 2011.

293. *Id.* at 3.

294. *Id.* at 3–4.

295. *Id.* at 3.

296. *Id.* at 9.

297. *Id.* at 8.

298. *Id.* at 6.

299. *Id.* at 9.

300. *Id.* at 10.

301. *Id.*

avored the employee, who responded directly to an employer's inappropriate threat.³⁰²

American Medical Response of Connecticut proved significant because it spawned considerable press attention in marking the first case in which the General Counsel claimed that an employee's Facebook posts should be protected.³⁰³ A November 2010 *New York Times* article generated buzz about the case³⁰⁴ and may have contributed to the considerable increase in the number of charges filed by employees fired for similar actions, as employees became aware that legal protections for social media posts existed.³⁰⁵

Using similar reasoning as the NLRB attorneys used in *American Medical Response of Connecticut*, an ALJ, in *Hispanics United of Buffalo*, held that a nonprofit organization inappropriately discharged five employees for complaining on Facebook about working conditions.³⁰⁶ The General Counsel's year-end Memo called it a "textbook example of concerted activity" and found no opprobrium.³⁰⁷ Anticipating a meeting with management, an employee named Mariana Cole-Rivera posted on her Facebook page about a coworker's criticisms of Cole-Rivera's work.³⁰⁸ Other employees responded, defending Cole-Rivera and themselves against what they described as unfair criticism from their colleague.³⁰⁹ Below is the contested Facebook thread:

Mariana Cole-Rivera: Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?

302. *Id.*

303. *E.g.*, Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES (Nov. 8, 2010), <http://www.nytimes.com/2010/11/09/business/09facebook.html> (reporting that "in what labor officials and lawyers view as a ground-breaking case involving workers and social media, the National Labor Relations Board has accused a company of illegally firing an employee after she criticized her supervisor on her Facebook page"); Sam Hananel, *Facebook Post Firing of Conn. Woman Illegal: Feds*, CHRISTIAN SCIENCE MONITOR, Nov. 10, 2010, available at <http://www.csmonitor.com/USA/Latest-News-Wires/2010/1110/Facebook-post-firing-of-Conn.-woman-illegal-Feds>.

304. Greenhouse, *supra* note 303.

305. Lafe Solomon Interview, *supra* note 73.

306. Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872, 7 (Sept. 6, 2011). Currently pending a Board decision on the ALJ Decision. The case is open as of February 5, 2012.

307. General Counsel 2011 Memorandum, *supra* note 9, at 4.

308. Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872, 4 (Sept. 6, 2011).

309. *Id.* at 4-6.

Damicela Rodriguez: What the f. . . Try doing my job I have 5 programs

Ludimar Rodriguez: What the Hell, we don't have a life as is, What else can we do???

Yaritza (M Ntal) Campos: Tell her to come do [my] fucking job n c if I don't do enough, this is just dum

Carlos Ortiz de Jesus: I think we should give our paychecks to our clients so they can "pay" the rent, also we can take them to their Dr's appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching tv, and also we can go to do their grocery shop and organized the food in their house pantries . . . (insert sarcasm here now)

Mariana Cole-Rivera again: Lol. I know! I think it is difficult for someone that its not at HUB 24-7 to really grasp and understand what we do. . . I will give her that. Clients will complain especially when they ask for services we don't provide, like washer, dryers stove and refrigerators, I'm proud to work at HUB and you are all my family and I see what you do and yes, some things may fall thru the cracks, but we are all human :) love ya guys

Nannette Dorrios, a member of the Board of Directors: Who is Lydia Cruz?

Yaritza Campos again: Luv ya too boo

Mariana Cole-Rivera: She's from the dv program works at the FJC [Family Justice Center] at hub once a week.

Jessica Rivera, the Secretary to HUD Director Iglesias: Is it not overwhelming enough over there?

Lydia Cruz-Moore: Marianna stop with ur lies about me. I'll b at HUB Tuesday..

Cole-Rivera: Lies? Ok. In any case Lydia, Magalie [Lomax, HUB'S Business Manager] is inviting us over to her house today after 6:00 pm and wanted to invite you but does not have your number i'll inbox you her phone number if you wish.

Carlos Ortiz: Bueno el martes llevo el pop corn [Good, Tuesday, I'll bring the popcorn].³¹⁰

Management, which the opinion suggests may have been keen on finding an excuse to reduce staff, termed the behavior online harassment against the other employee and used it to justify the firing of all five Facebook posters.³¹¹

Ultimately, the employees got their jobs back because the judge found concerted activity under the *Meyers* cases and no opprobrium.³¹² According to the General Counsel's Memo, the activity was deemed concerted because:

The discussion was initiated by the one coworker in an appeal to her coworkers for assistance. Through Facebook, she surveyed her coworkers on the issue of job performance to prepare for an anticipated meeting with the Executive Director, planned at the suggestion of another employee. The resulting conversation among coworkers about job performance and staffing level issues was therefore concerted activity.³¹³

The ALJ concluded that a single employee can be considered to be engaging in concerted activity if she is enlisting support from colleagues for mutual aid and protection with the goal of initiating or inducing group action.³¹⁴ Had the employee in *Wal-Mart*³¹⁵ used language that more explicitly suggested this motive, he may have received protection. The ALJ found for the employees despite finding that the employees were not necessarily trying to change their working conditions.³¹⁶ Though attempts to change working conditions are more likely to be protected activity, other activity can also be protected, especially if it clearly calls for colleagues' participation.³¹⁷

Upon finding concert and no violation of the employer's zero tolerance or discrimination policy, the ALJ applied the *Atlantic Steel* factors to show that the employees did not lose protection based on opprobrious conduct.³¹⁸ With regard to factor (1), place, the Facebook posts were not made at work and were not made during working hours.³¹⁹ As to (2), the subject matter, the Facebook posts had to do with a coworker's criticisms of employee job

311. *Id.* at 10.

312. *Id.* at 7, 9, 10.

313. General Counsel 2011 Memorandum, *supra* note 9, at 4.

314. Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872, 7 (Sept. 6, 2011); *see* NLRB v. Mushroom Transportation Co., 330 F.2d 683, 685 (3d Cir. 1964) (noting that "the object of inducing group action need not be express"); Whittaker Corp., 289 N.L.R.B. 933 (1988).

315. Wal-Mart, NLRB Adv. Mem., Case No. 17-CA-25030 (July 19, 2011).

316. Hispanics United of Buffalo, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872, 8 (Sept. 6, 2011);

317. *Id.*

318. *Id.* at 9.

319. *Id.*

performance, which the employees had a protected right to discuss.³²⁰ As to factor (3), there were no “outbursts” against the nonprofit and several posts did not even mention Cruz-Moore, the coworker who criticized Cole-Rivera’s work; none of the employees criticized the employer in their posts.³²¹ With regard to factor (4), the ALJ found irrelevant the fact that the employer did not provoke the Facebook comments.³²² *Hispanics United of Buffalo* provides an example against which to measure *JT’s Porch Saloon & Eatery* and *Wal-Mart* and highlights inconsistencies as to how the General Counsel analyzes social media posts.

In *Triple Play Sports Bar & Grille*, an ALJ found protected concerted activity with no opprobrious conduct.³²³ After several of the employer’s former and current employees discovered that they owed additional state income taxes related to the employer’s earnings, the employer arranged a staff meeting with the accountant and payroll company to discuss concerns.³²⁴ A former employee subsequently posted on her Facebook page a comment expressing dissatisfaction with the fact that she owed more money.³²⁵ Her wall post and the responses it generated read as follows:

LaFrance (former employee): Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!!

Ken DeSantis (customer): You owe them money . . . that’s fucked up.

Danielle Marie Parent (employee): I FUCKING OWE MONEY TOO!

LaFrance: The state. Not Triple Play. I would never give that place a penny of my money. Ralph fucked up the paperwork . . . as per usual.

De Santis: Yeah I really don’t go to that place anymore.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Triple Play Sports Bar & Grille*, NLRB Administrative Law Judge Decision, Case No. 34-CA-12915, 22 (Jan. 3, 2012). Currently pending whether Board will grant review. At the time of the General Counsel’s year-end Memo, the ALJ had not issued a decision. No case-specific Advice Memo was available at the time of this Note’s writing.

324. *Id.* at 3.

325. *Id.*

LaFrance: It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it because he still owes me about 2000 in paychecks.

LaFrance: We shouldn't have to pay it. It's every employee there that it's happening to.

DeSantis: You better get that money . . . that's bullshit if that's the case I'm sure he did it to other people too.

Parent: Let me know what the board says because I owe \$323 and I've never owed.

LaFrance: I'm already getting my 2000 after writing to the labor board and them [sic] investigating but now I find out he fucked up my taxes and I owe the state a bunch. Grrr.

Parent: I mentioned it to him and he said that we should want to owe.

LaFrance: Hahahaha he's such a shady little man. He probably pocketed it all from all our paychecks. I've never owed a penny in my life till I worked for him. That [sic] goodness I got outta there.

Sanzone: I owe too. Such an asshole.

Parent: Yeah me neither, I told him we will be discussing it at the meeting.

Sarah Baumbach (employee): I have never had to owe money at any jobs . . . I hope I won't have to at TP . . . probably will have to seeing as everyone else does!

LaFrance: Well discuss good because I won't be there to hear it. And let me know what his excuse is.

Jonathan Feeley (customer): And they're way too expensive.³²⁶

According to the ALJ, the comments were protected under Section 7, in part because the discussion was part of a "sequences of events" that included face-to-face conversations lamenting the tax problems.³²⁷

In finding that the employer violated Section 8, the ALJ cited precedent stating that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action."³²⁸ Applying *Atlantic Steel*, the ALJ found that the employees'

326. *Id.* at 3–4.

327. *Id.* at 8.

328. *Id.* (quoting *Meyers II*, 281 N.L.R.B. 883, 887 (1986); *see also* *KNTV, Inc.*, 319 N.L.R.B. 447, 450 (1995) (noting that "concerted activity encompasses activity which begins

concerted activity did not lose protection for opprobrium.³²⁹ The place of the comments, under factor (1), did not interfere with the workplace because the employees commented outside the workplace during nonworking time so did not disrupt the work environment.³³⁰ The subject, under factor (2), had to do with a core concern that Section 7 protected.³³¹ Under factor (3), the outbursts did not include offensive language worthy of removing protection and did not include “threats, insubordination, or physically intimidating conduct.”³³² The ALJ found that it did not matter that comments were not provoked, under factor (4), by unlawful tax practices on the part of the employer.³³³ The employer alleged defamation, but that failed because the comments were not made with a “malicious motive.”³³⁴ Had the comments been less clearly supportive of the original post, it is possible that this case could have come out like *JT’s Porch Saloon & Eatery*³³⁵ and *Wal-Mart*.³³⁶ Fortunately for the employees, however, they used language that made concert clear.

In *American Medical Response of Connecticut*,³³⁷ *Hispanics United of Buffalo*,³³⁸ and *Triple Play Sports Bar & Grille*,³³⁹ applying the *Atlantic Steel* test to the facts of each case enabled the employees to get the protections that concerted activity provided.³⁴⁰ As the *Jefferson* standard shows, opprobrious conduct includes evidence of malice and disloyalty, but the NLRB attorneys did not find such behavior in the three concerted activity cases considered in the Social Media Memo.³⁴¹ Thus, the employees in those cases prevailed.³⁴²

with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action”).

329. *Triple Play Sports Bar & Grille*, NLRB Administrative Law Judge Decision, Case No. 34-CA-12915, 9–13 (Jan. 3, 2012).

330. *Id.* at 10.

331. *Id.* at 10–11.

332. *Id.* at 11.

333. *Id.* at 14.

334. *Id.* at 11.

335. *JT’s Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689 (July 7, 2011).

336. *Wal-Mart*, NLRB Adv. Mem, Case No. 17-CA-25030 (July 19, 2011).

337. *Am. Med. Response of Conn.*, Adv. Mem., Case No. 34-CA-12576 (Oct. 5, 2010).

338. *Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011).

339. *Triple Play Sports Bar and Grille*, NLRB Administrative Law Judge Decision, Case No. 34-CA-12915 (Jan. 3, 2012).

340. *See* General Counsel 2011 Memorandum, *supra* note 9.

341. *See id.*

342. *See id.*

E. LEGALITY OF SOCIAL MEDIA POLICIES

If Field Examiners, the Division of Advice attorneys, the General Counsel, the ALJ, and the Board would acknowledge the unique ways in which people engage with social networking, both employers and employees would benefit from more predictable rulings that could also enable employers to write better social media policies. These policies should go beyond merely quoting the NLRA and should have examples that employees can understand, such that they can reasonably interpret the limitations described. The policies should spell out, for example, that people can be critical and talk to fellow employees about confidential information and wages offline and online. Employers have some flexibility as to what they want to permit, but they must not forbid activities that are protected by the NLRA.

1. *The Standards for Evaluating Employers' Social Media Policies*

In determining the outcome of cases involving social media, the General Counsel strives to ensure that employers do not have inappropriately restrictive policies.³⁴³ In addition to looking at the *Lafayette Park* standard, which asks whether an employer's "rules would reasonably tend to chill employees in the exercise of their Section 7 rights,"³⁴⁴ the General Counsel uses *Lutheran Heritage*.³⁴⁵ The standard that emerged from that case states that a rule is unlawful if it explicitly restricts Section 7 activities, or if it is shown 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.³⁴⁶ The *Lafayette Park* and *Lutheran Heritage* standards together give employees additional protection.

2. *Cases Considering Social Media Policies*

Three of the cases analyzed in the General Counsel's Social Media Memo focus on the legality of an employer's social media policy. In all three, the General Counsel found overly broad policies. In *Flagler Hospital*, the NLRB attorneys advocated protecting an employee's Facebook criticisms of a fellow nurse and finding the hospital's social media policy too broad.³⁴⁷ Prior to the

343. Lafe Solomon Interview, *supra* note 73.

344. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

345. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004).

346. *Id.* at 647.

347. *Flagler Hospital*, Adv. Mem., Case No. 12-CA-27031, 1 (Oct. 19, 2011). Case was closed on August 24, 2011.

posting, several nurses had complained to the manager about their colleague's frequent absences.³⁴⁸ The post, written several days after the nurse had again called in sick, discussed the nurse's "history" of absences, which "totally disrupted" and "really screwed" the operating room.³⁴⁹ The policy, which the Memo found violated Section 8(a)(1) by potentially chilling Section 7 protected activity,³⁵⁰ included the following provisions:

4. No 'tweet,' blog or social networking page or site may in any way violate, compromise, or disregard the privacy or confidentiality rights or privileges of any Hospital patient; the confidentiality or protections granted or provided to personal health information or other protected information or data; or rights and reasonable expectations as to privacy or confidentiality of any person or entity.

5. Any communication or post which constitutes embarrassment, harassment or defamation of the Hospital or of any Hospital employee, officer, board member, representative or staff member, including members of the medical staff, is strictly prohibited.

6. Any conduct, behavior or form of expression which, under the law, is or may be impermissible if expressed in another form or forum is likewise impermissible if expressed through any social networking media, blog or social networking site or page. This includes any statements which lack or are reckless as to truthfulness or which might cause damage to or does damage the reputation or goodwill of the Hospital, its staff or employees in the community or otherwise.³⁵¹

The NLRB attorneys found the policy unlawful³⁵² under the second part of the *Lutheran Heritage* test—which prohibits promulgating a rule in response to union activity.³⁵³ The policy did not contain guidance as to what the employer meant by "private" and could lead employees to believe that they could not discuss wages or other legally permissible topics.³⁵⁴

Further, the General Counsel explicitly criticized the inclusion in the Flagler Hospital policy of a deceptive "savings clause" in Rule 6, which used the phrase "under the law" to avoid liability.³⁵⁵ Citing *McDonnell Douglas Corp.*,

348. *Id.* at 2.

349. *Id.*

350. *Id.* at 1.

351. *Id.* at 1–2.

352. *Id.* at 3.

353. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004).

354. *Flagler Hospital*, Adv. Mem., Case No. 12-CA-27031, 3 (Oct. 19, 2011). Case was closed on August 24, 2011.

355. *Id.* at 5.

the General Counsel explained the rationale for criticizing such clauses: “[I]t can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act.”³⁵⁶ The NLRB does not look highly upon savings clauses intended to prevent employees from questioning unlawful policies.³⁵⁷

Similarly, in *Parks & Sons of Sun City*, the General Counsel viewed the employer’s social media policy as overly broad.³⁵⁸ The policy forbade employees from discussing company business online and from posting content that they would not show their supervisors or that could be deemed inappropriate.³⁵⁹ It went so far as to prohibit employees from using the company name or other identifying information on personal profile pages.³⁶⁰ Here, too, the NLRB relied on the *Lutheran Heritage* factors in finding that the policy could reasonably be construed to prohibit Section 7 protected behavior, such as discussing wages or other terms and conditions of employment and that the employer provided no rationale for prohibiting listing the company name on a person’s social networking profile page.³⁶¹ Some sort of rationale related to confidentiality and safety seems reasonable, but absent that, employees should have a right to display their employer’s name.

In *Giant Eagle Inc.*, the regional office attorneys found two parts of a supermarket chain’s social media policy too broad.³⁶² The Advice Memo accepted the first of three parts under review but not the remaining parts.³⁶³ The sections at issue included:

3. No Team Member is required to participate in any social media or social networking site (unless required as a part of the job), and no Team Member should ever be pressured to ‘friend,’ ‘connect,’

356. *Id.* (citing McDonnell Douglas Corp., 240 N.L.R.B. 794, 802 (1979)).

357. McDonnell Douglas Corp., 240 N.L.R.B. 794, 802 (1979).

358. General Counsel 2011 Memorandum, *supra* note 9, at 20-1. The General Counsel’s Memo does not include the name of the case, but through conversations with NLRB staff, the author was able to find the name of the case: *Parks & Sons of Sun City, Inc.*, Case No. 28-CA-23350 (filed Jan. 28, 2011), no documents available due to open status of case and the protocol/decision of NLRB personnel.

359. *Id.* at 21.

360. *Id.*

361. *Id.*

362. Giant Eagle Inc., Case No. 6-CA-37260, Adv. Mem., 1 (Oct. 19, 2011). Case was closed on July 28, 2011.

363. *Id.*

or otherwise communicate with another Team Member via a social media outlet.

....

5. Team Members may not reference (including through use of photographs), cite, or reveal personal information regarding fellow Team Members, company clients, partners, or customers without their express consent.

6. Use of Company logos, photographs of any Company store, brand, or product, or use of any other intellectual property is not permitted without written proper authorization from the Company.³⁶⁴

The General Counsel agreed that the rule against pressuring was sufficiently narrowly tailored in its attempts to prevent harassment.³⁶⁵ However, the rule against revealing personal information could squelch discussion of wages, and the rule against using company logos or photographs could unlawfully prohibit posting pictures of peaceful union organizing or other work protests.³⁶⁶

This Note commends the NLRB attorneys and the General Counsel for pushing employers to draft more specific social media policies. Going forward, the more precise the General Counsel can be about what does not pass muster and why, the more likely employers will have the ability to comply. The General Counsel has more steps to take in order to communicate the limits of protection with greater clarity. The *Lafayette Park* standard, prohibiting policies with a tendency to “chill employees in the exercise of their Section 7 rights,”³⁶⁷ provides a useful floor for scrutiny. The *Lutheran Heritage* standard, which adds steps to the inquiry, looking at the origin of the policy and its actual application,³⁶⁸ can further guide employers. The Board should encourage employers to draft model guidelines for employees. Since these can help employers avoid lawsuits, employers have an interest in directing resources and consideration towards such efforts.

364. *Id.* at 2.

365. *Id.* at 3.

366. *Id.* at 3–4.

367. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

368. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004).

IV. RECOMMENDATIONS FOR ADDRESSING SOCIAL MEDIA CASES

Whether through future rulemaking or through new approaches to social media cases, NLRB attorneys, the General Counsel, ALJs, and the Board should adopt an approach that is flexible enough to adequately address social media cases instead of operating under the false assumption that online activity mirrors offline activity. Further, the General Counsel should provide guidelines and a range of sample social media policies—targeted at various types of businesses—to assist employers. The General Counsel should directly address the issue of whether Facebook friends’ responses, and the subtleties in diction of a particular post, should actually be the basis for determining protection.

Because employees often do not know that they have rights under the NLRA,³⁶⁹ the NLRB’s recent decision to require employers to post NLRA rights marks a step in the right direction.³⁷⁰ Next, the NLRB must confront the challenge of seeing this policy through and making sure the notice actually reaches employees. Employers could avoid costs associated with complaints and litigation by crafting specific social media policies that are not too limiting, and the NLRB should make templates readily available. As rules become further delineated, employees will be more likely to comply and also to accept discharges when the law permits them. But policies alone are generally not sufficient. Workplace training would likely help.

To avoid misleading employees, some scholars suggest that employers should add the following language to their policies: “Nothing in this policy should be interpreted to prevent, interfere with, or otherwise restrain an individual’s legitimate exercise of his or her Section 7 activities under the National Labor Relations Act.”³⁷¹ This approach appears to protect the

369. Corbett, *supra* note 14, at 297–98.

370. *Employee Rights Notice Posting*, *supra* note 17 (“[T]he notice should be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted. Employers also should publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there.”); Press Release, American Rights at Work, Statement on Rule to Improve Awareness of NLRA Workplace Rights (Aug. 25, 2011), available at <http://www.americanrightsatwork.org/press-center/2011-press-releases/statement-on-rule-to-improveawareness-of-nlra-workplace-rights-20110825-1036-416.html> (mentioning that American Rights at Work Executive Director Kimberly Freeman Brown issued a statement including the following endorsement: “This rule is a step in the right direction toward giving more men and women a fair vote in the workplace to help rebalance our economy, and rebuild the middle class”).

371. Jeffrey S. Klein & Nicholas J. Pappas, *Do Social Media Policies Violate NLRA Section 7 Rights?*, NEW YORK L.J. (Oct. 11, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202518441906&slreturn=1>.

employer from possible claims that its policy is overbroad. But as the General Counsel articulated in *Flagler Hospital*, a savings clause alone cannot shield an employer from liability.³⁷² Further, the law should do more than encourage litigation avoidance. That clause should be accompanied by a clear explanation of the NLRA, with examples of its common applications, tailored to the particular workplace. That will make it much more useful to employees.

Of the cases considered in this Note, *JT's Porch Saloon & Eatery* and *Wal-Mart* are the most troubling because employee posts that appear just as concerted as protected posts in other cases did not receive protection—mostly because of the NLRB's unwillingness to consider the realities of social networking. In *JT's Porch Saloon & Eatery*, the employee had discussed his discontent with terms and conditions of work prior to posting his Facebook grievance.³⁷³ If he had more colleagues as Facebook friends, it is possible that somebody would have responded and agreed with him. And had he been more explicit about asking others to join him, he may have fared better. Considering reasoning employed in the other cases, it is likely that NLRB attorneys or an ALJ could have found concert in this situation. It seems unjust that this sort of contingency is the *sine qua non* of whether or not behavior is deemed protected.

Clarifying what types of posts will give the employee protection could enable employees to act more strategically. For example, in the offline world, the Board overruled an ALJ decision in a case in which nurses called a hotline to complain about the high temperature of a nursing home and how it affected patients.³⁷⁴ The Board ruled that because the nurses only mentioned the well-being of patients in their phone call—not their own well-being—this did not constitute a complaint about the terms and conditions of employment and therefore did not merit Section 7 protection.³⁷⁵ Had the nurses instead stated that they were worried about their patients' health and their own health, it is likely that they would have been able to keep their jobs.³⁷⁶ This example illustrates how, with more information, employees could tailor their gripes in a way that would give them legal recourse.

372. *Flagler Hospital*, Adv. Mem., Case No. 12-CA-27031, 5 (Oct. 19, 2011).

373. *JT's Porch Saloon & Eatery*, NLRB Adv. Mem., Case No. 13-CA-46689, 1 (July 7, 2011).

374. Chairman Battista, Decisions and Orders of the NLRB, Case 3-CA-23704 (Apr. 30, 2004).

375. *Id.* at 645.

376. *See id.*

On the flip side, in the social media context, there may be a downside to giving employees too much information. Perhaps one could imagine that if an employee knows that her Facebook post will be permissible if it encourages group action, she will carefully craft a gripe that disparages the employer considerably, without going so far as to be considered opprobrious. If she adds a line asking for her colleagues to support her in complaining about a manager, whom she has harshly criticized, she may find that she is protected. The employee in *Wal-Mart*,³⁷⁷ had he known more about the NLRA, probably could have done this and kept his job. But do we as a society want to encourage these sorts of workarounds? Would this dilute the concerted activity standard, rendering it easily manipulated?

In *Wal-Mart*, a case in which the employee did have Facebook friend colleagues responding to his post, the nature of the responses—specifically, the wording used—informed the outcome of the case.³⁷⁸ Given how casually people engage on Facebook, this result also seems arbitrary.³⁷⁹ Had a colleague written something in a different way, showing just a touch more “concert,” Section 7 of the NLRA may have protected this employee’s postings. Fact patterns matter and should determine how law gets applied, online and offline. But the slight variations in facts in the above cases should not lead to such different outcomes. Because the NLRB attorneys had to comply with the strict *Meyers* standard and did not take into account the unique characteristics of Facebook, these holdings inappropriately punished employees. In an age of at-will employment and decreasing unionization, when an employee loses her job, she may find herself unable to find another one quickly.

Accordingly, the General Counsel should rethink the NLRB’s approach to social networking cases in order to create fairness and standardization. A just society demands at least that much.

377. *Wal-Mart*, NLRB Adv. Mem, Case No. 17-CA-25030 (July 19, 2011).

378. *Id.* at 3 (“[T]he Charging Party’s Facebook postings were an expression of an individual gripe. They contain no language suggesting the Charging Party 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 over mispriced or misplaced sale items. Moreover, none of the coworkers’ Facebook responses indicate that they otherwise interpreted the Charging Party’s postings.”).

379. The standard analysis employed by the NLRB now does not seem to take into account norms surrounding social media. One of the few scholars to look at the recent social media cases before the NLRB concluded that social networking does not change the analysis at all. Sprague, *supra* note 39 (noting that “the fact that employees are using Facebook and other social media tools to discuss work does not alter the basic analysis of what does and does not constitute protected concerted activity”).

V. CONCLUSION

Many employees are not aware that the NLRA gives them important rights that extend to social networking posts.³⁸⁰ It allows them to complain, so long as their complaints are of a certain nature and do not violate other laws.³⁸¹ Knowing the details of these rights can help employees keep their jobs. Ideally, employees would think before they post, but the nature of social networking and the casual way in which many people utilize it suggest that future cases will continue to push the limits of protected online activity. If we accept that younger generations, who are growing up with pervasive technology, are particularly accustomed to digitally sharing many aspects of their lives,³⁸² then it seems appropriate for the General Counsel and the Board to develop standards that can provide guidance for current and future generations. Employees should push their employers to craft social media policies and should make sure to consult these policies. Employees should also consult their NLRA rights so that when they casually post, they have a sense, at least in the back of their minds, as to what sort of behavior is protected against an employer's retaliation.

The Board, in turn, should push for successful implementation of the newly mandated notification system³⁸³ through which employers must inform employees of their NLRA rights. Meanwhile, the General Counsel should allow NLRB attorneys more leeway in interpreting when online speech is protected on social networks. Precedent based on standards of concerted activity and opprobrious behavior serve in some cases, but in others, the attorneys should display more agility in considering the context of social networking posts. If the aim is to offer timely guidance and rulings, the

380. Press Release, American Rights at Work, Statement on Rule to Improve Awareness of NLRA Workplace Rights, (Aug. 25, 2011), *available at* <http://www.americanrightsatwork.org/press-center/2011-press-releases/statement-on-rule-to-improve-awareness-of-nlra-workplace-rights-20110825-1036-416.html>. (“[Kimberly Freeman Brown stated:] Studies show that many employees are unaware of their rights under the NLRA, which protects union and non-union works. Employers, even those who strive to act lawfully, are similarly uninformed.”).

381. The National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

382. See JOHN PALFREY, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 1–2 (2010) (“You see [Digital Natives] everywhere. . . . They were all born after 1980, when social digital technologies, such as Usenet and bulletin board systems, came online. They all have access to networked digital technologies. . . . Major aspects of their lives—social interactions, friendships, civic activities—are mediated by digital technologies. And they’ve never known any other way of life.”).

383. *Employee Rights Notice Posting*, *supra* note 17 (noting that the date the notice requirement goes into effect was postponed to April 30, 2012).

General Counsel must develop a more technologically cognizant approach to social networking cases.

