



# Words Mean Everything: The National Labor Relations Act and Employer Social Media Policies

*By Jon D. Bible*

**W**hen she learned that she owed more in state income taxes than she expected, Sanzone, a waitress at the Triple Play Sports Bar and Grille, got mad. After she told co-workers, several complained to the owners, DelBuono and Daddona, who arranged a meeting with their payroll provider. Meanwhile, LaFrance, who no longer worked there but also owed money, posted this update on Facebook: “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paper work correctly!!! Now I OWE money . . . Wtf!!!” Her “friends” quickly chimed in. Spinella, a cook at the bar, “liked” her update. Several co-workers posted that they too owed money, most likely, said LaFrance, because DelBuono, who handled the books, “fucked up the paperwork.” LaFrance then posted that DelBuono probably pocketed money from the employees’ paychecks. Sanzone called him an “asshole.”<sup>1</sup>

When Sanzone came to work the next day she discovered that Daddona knew about the Facebook rant, and he fired her for disloyalty. Spinella met the same fate a day later; after the owners quizzed him about the Facebook discussion, they said that his “like” meant that he stood behind the disparaging remarks and apparently no longer wanted to work at the bar.<sup>2</sup>

In firing them, the owners obviously thought they were on safe ground. To protect their brand, employers have long regulated what employees can say and do and courts have largely given them free rein to do so. Like most employees, moreover, these two worked at-will and thus could be fired for any reason not based on a protected class or in violation of an exception to the at-will doctrine.<sup>3</sup> What the owners overlooked was the fact that the National Labor Relations Act [NLRA or Act]<sup>4</sup> applies to non-union employers like Triple Play; in this respect, they had a lot of company, for many employers are unaware of this.<sup>5</sup> Since it got involved in this area a few years ago, moreover, the National Labor Relations Board [NLRB or Board] has aggressively enforced the right of employees to use social media to discuss, and try to change, their working conditions. Had they known all of this, the owners might have considered whether the Facebook colloquy in which the two employees engaged was protected by the Act, so that discharging them was illegal.

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In August, 2014, the Board set them straight. It reversed the firings, holding that they were the product of the employees' involvement in concerted activity under section 7 of the Act; in so doing it erected a high bar for employers to fire employees for off-duty, off-site social media postings. That Sanzone used an obscenity to refer to DelBuono did not eliminate the protection of section 7. The Board also held that "liking" a post can be protected activity, and it voided a key part of the bar's social media policy as facially overbroad.

One of the Depression-era acts of Congress, the NLRA was passed to stabilize employer-employee bargaining and union relationships on a national level.<sup>6</sup> While its primary focus is on the relationship between employers and employees in a unionized workplace (or in which a union is organizing), the Act has always applied to non-union employers. In general terms, it applies in virtually all private workplaces.<sup>7</sup>

Section 7 empowers employees "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for . . . their mutual aid or protection."<sup>8</sup> Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain or coerce" employees in the exercise of section 7 rights.<sup>9</sup> Today, with over a billion people using Facebook, Twitter, LinkedIn, and myriad other social media platforms,<sup>10</sup> people are struggling with how to apply this language in a technological age that the drafters never foresaw. In recent years the NLRB, all five of whose members are appointees of President Obama,<sup>11</sup> has read these sections broadly. The questions are whether a post is entitled to section 7 protection and, if so, whether it forfeits that protection because it involves, e.g., harassment or intimidation.<sup>12</sup>

The Labor Law Journal recently published two articles discussing how these sections apply to different parts of an employer's operations. Christine Neylon O'Brien focused on when employers may restrict employee access to company email systems.<sup>13</sup> Henry H. Robinson dealt with company handbooks.<sup>14</sup> This article completes a trilogy by examining how these sections apply when employers try to prevent employees from using social media to discuss (or gripe about) workplace goings-on, an increasingly prevalent practice today.

Both authors reviewed how these sections have generally been interpreted over the years. I will not plow over the same turf, but instead will focus on principles involved in social media cases; readers wanting more background, including coverage of remedies the NLRB may order for violations of the Act, may consult those articles and the "Rights We Protect" link on the NLRB website.<sup>15</sup> I will then look at early social-media decisions. From many

candidates, I chose a handful that established important principles and showed how different adjudicators – Office of the General Counsel [OGC], Administrative Law Judge [ALJ], and Board – could apply the same standards but reach divergent outcomes.<sup>16</sup> Next I will discuss *Triple Play* and two later rulings; because they were decided in the last year, they show the current Board's mindset. Finally, I will examine a March, 2015 OGC Report which explains what employer policies have and have not passed muster and why.<sup>17</sup> My goal is to provide some guidance on what the NLRB is doing in the social media realm and what its rulings portend – if, of course, they survive judicial scrutiny.<sup>18</sup>

Even if one stays current on the law, however, it is easy to be perplexed, for it can be difficult to know when a post, or series (thread), will be deemed to involve concerted activity. Indeed, one theme of this article is that decisions can be hard to reconcile, for the cases are fact-intensive and turn on the meaning ascribed to the words of a post and any replies to it. A related theme is that there are aspects of internet posting that make it sufficiently unlike face-to-face talk as to raise the question – as some have<sup>19</sup> – whether the Board should adapt its concerted-activity standard to account for these differences. My final theme is that the Board seems to have been even more pro-employee since 2013 when it acquired a 3-2 Democratic majority. Three-member panels often decide cases, and if at least two Democratic members are on a panel, which the odds favor, one can expect a ruling giving an expansive reading to sections 7 and 8(a)(1).

## I. Background

### A. Employer and employee interests re: social media.

Employers have many incentives to monitor employee social media use. To name a few, they are not keen about seeing posts that disparage them or their managers. The content of posts may shape their relationships with customers and other businesses and affect sales, shareholder confidence, and employee morale.<sup>20</sup> Posts may divulge trade secrets or violate privacy laws. If a post discriminates or creates a hostile work environment, an employer could be held liable for failing to deal with it.<sup>21</sup> For such reasons, most employers have enacted policies banning various kinds of posts and providing for the discipline of violators; many require employees to do such things as sign contracts pledging not to disclose confidential information.<sup>22</sup> Apart from such policies and contractual obligations, employees in most jurisdictions have a general duty not to disclose trade secrets or defame, disparage, harass or intimate other employees.<sup>23</sup>

For their part, many employees regard social media as a surrogate for the once-ubiquitous workplace water cooler, around which they may gossip in their free (or not) time.<sup>24</sup> With private union membership having fallen to roughly 7% of the workforce,<sup>25</sup> social media lets workers voice the kinds of gripes about working conditions that used to fill the air in union meetings. It is also common for employees to use the internet to promote an employer's goods or services.<sup>26</sup> Finally, they rely on social media to stay in touch with contacts and chase job leads. This has led employers to enact non-compete and non-solicitation policies and to negotiate agreements giving them intellectual property rights over employee social media accounts.<sup>27</sup>

Lest the water-cooler analogy be stretched too far, however, there are crucial differences between that kind of talk and social media posts. For one thing, the former involves a handful of employees who know each other and can make credibility assessments about what is said; posts, by contrast, can be widespread, are not limited to internal communications, and may damage an employer's brand. Social media allows users to share information with people in their network via posts, tweets, re-tweets, likes, and reposts, but there is often no opportunity for the reader to assess credibility since the original post can be outside that network; also, one cannot control to whom a reader may re-post, so the post may escape the confines of one's group of "friends."

Whereas chatter vanishes, moreover, posts are permanent; indeed, using internet sites both shares and preserves posts, creating a potentially incriminating record often unavailable with in-person conversations. Also, readers often miss their context and intent, which is easier to divine in real conversations in which the words are just one part of the interaction, the other part being communication cues.<sup>28</sup> Finally, the ease of posting, the cloak of anonymity that one can hide behind if one wants, and the fact that a poster's audience is virtual can make it easier for him to turn up the volume, and even be outrageous, than he likely would in a face-to-face exchange. Indeed, only a few seconds' worth of digging online will yield expletive-laced posts, possibly in all-capital letters followed by multiple exclamation marks.

## **B. The "concerted activity" standard.**

Because the Act does not define "concerted activity," the Board has fleshed out these terms.<sup>29</sup> The operative standard was stated in the 1980's in the *Meyers* cases, which held that an activity is concerted if an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>30</sup> Per the NLRB website, concerted activity "requires two or more employees acting

together to improve wages or working conditions, but the action of a single employee may be concerted if he or she involves co-workers before acting, or acts on behalf of others." A critical issue is whether "the improvements sought – whether in pay, hours, safety, workload, or other terms of employment – [will] benefit more than just the employee taking the action" or "the action [is] more along the lines of a personal gripe, which is not protected[.]" Finally, "[r]eckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets" may cause activity to lose protection.<sup>31</sup>

Stating these principles is one thing, however, and applying them is another. As has been noted, the differences between internet posting and face-to-face chatting raise issues, and they are exacerbated by the casual nature of posting. People who post sympathetic comments in reply to a colleague's post may, if asked, agree that action should be taken and may even be willing to help, but their off-the-cuff comments may not make that clear. Also, people may post hurriedly, late at night, in the course of commenting on many other posts or via their Smartphones while on the go, so their posts are not well thought out. Further compounding the problem is the fact that people who read posts may only glance at them and miss their context and underlying intent.

The problem with applying the 1980's concerted-activity standard in social media cases is that it takes none of this into account. The OGC, ALJ's and Board proceed as if posters do so thoughtfully, choosing words carefully to reflect their thinking process; furthermore, they act as if that process is a logical one. This assumption is troublesome enough in cases involving in-person discussions, but it is really questionable in disputes centering on spontaneous internet exchanges. What ends up happening is that adjudicators take words in posts, put them under a microscope, and nit-pick them to see if they seem to have been chosen with an eye toward bettering the pay, hours, safety, workload, etc. of others beside the poster. The upshot is that words that may have been haphazardly chosen and be devoid of nuance and context end up bearing a heavy load.

If words are a problem, their absence can also be. Rebecca Stang has discussed lurking, which means that only 10% of social media users contribute content while the rest passively read it; more exactly, 9% comment on posts while 1% create content.<sup>32</sup> Thus, whether activity is found to be concerted can boil down to the against-the-odds fortuitousness of whether co-worker friends reply to a post. They may not do so because they are lurkers, have not logged into their computer to check status

updates, think it would take too long to type a reply on their Smartphone, or (see Sanzone and Spinella) fear the consequences of posting. Whatever the reason, the result is that for the original poster, silence is not golden. Even if her post discusses employment terms, a lack of concerted activity may be found simply because no co-worker who read it bothered to reply.

Under NLRB case law, therefore, if an employee asks Facebook-friend colleagues to join her in a work-conditions protest, she will have a good case if she is fired in retaliation to the post, but if she does not talk about work conditions or ask for support, her case will be weaker. And if her friends sympathize with her comments but do not voice their shared support, her case will be weaker yet.<sup>33</sup> Small wonder that people not well-versed in the law in this area (and maybe even them) can find such distinctions elusive.

### C. Early NLRB social media decisions

Realizing that employers needed guidance given the proliferation of online technology tools and employees' use of them, the Acting General Counsel issued three reports in 2011-2012 that discussed developments in his office.<sup>34</sup> The first two examined 14 cases each; the third one focused on seven employer social media policies. The cases fell into two groups: discharges for concerted activity, and policies deemed overbroad because they contained language susceptible of being read as chilling employees' section 7 rights and did not clarify that this was not their intent.

The first case discussed in Report I was *Hispanics United of Buffalo, Inc.*<sup>35</sup> The OGC found that a social services provider illegally fired five employees who commented on Facebook about claims of poor job performance made by a co-worker, Cruz-Moore. She had complained to Cole-Rivera that clients did not want to seek services from the provider and had conversations with other co-workers in which she criticized the work done by the provider's employees.<sup>36</sup> After Cole-Rivera and the co-workers talked, a meeting with the Executive Director was suggested. In anticipation, Cole-Rivera commented on Facebook and a discussion ensued:

Cole-Rivera: "[A] coworker feels that we don't help our clients enough . . . I about had it! My fellow coworkers how do u feel?"

Replies: "What the f . . . Try doing my job I have 5 programs"

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

"Tell her to come do [my] fucking job n c if I don't do enough, this is just dum."

Cole-Rivera: "Lol. I know! I think it is difficult for someone that is not at [Employer] 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 [Employer] and you all are 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."<sup>37</sup>

That evening Cruz-Moore reported the conversation to the Executive Director, claiming it was cyber-bullying. After the meeting failed to occur, the Executive Director fired the posters.<sup>38</sup>

The OGC found this a textbook case of concerted activity for the employees' mutual aid and protection because Cole-Rivera was surveying her co-workers regarding job performance to prepare for the meeting and appealing for their assistance. Although the posts involved swearing and sarcasm, the OGC also found them "quite innocuous" and not "opprobrious." Under its 1979 ruling in *Atlantic Steel Co.*, if the Board finds activity to be in bad faith or opprobrious because of its nature or purpose, it may lose protection under section 7. Opprobrium is "the disgrace or the reproach incurred by conduct considered outrageously shameful."<sup>39</sup> *Atlantic Steel* articulated four factors to be balanced to decide whether section 7 activity loses its protection: (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 the employer's unfair labor practices.<sup>40</sup>

On a 3-1 vote, the Board agreed that the posts involved concerted activity. In *Meyers I*, it noted, the Board ruled that the discipline or discharge of an employee violates section 8(a)(1) if the activity engaged in was concerted, the employer knew this, and the penalty was motivated by the concerted activity. *Meyers II* held that concerted activity includes instances "where 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." Here, the posters were taking a first step toward group action to defend themselves against the accusations made against them, which could have had a negative impact on their employment. That Cole-Rivera never made clear her group-defense objective when she posted did not matter; the goal of initiating or preparing for group action does not have to be explicitly stated when employees communicate, and in this case

Cole-Rivera's mutual-aid object was "implicitly manifest from the surrounding circumstances."<sup>41</sup>

The Board also found that posts also did not violate the provider's anti-harassment policy. That Cruz-Moore subjectively perceived that she was harassed was not enough to satisfy the legal definition of that term; finally, the policy referred to harassment based on race, color, sex, religion, national origin, age, disability, or veteran status, and none of these protected traits was implicated here. The Board did not discuss the "opprobrious conduct" issue.<sup>42</sup>

Noting that not all shop talk among employees – in-person, telephonic, or on the internet – is concerted even if it focuses on a term of employment, the dissenting member thought this exchange was mere group griping and the fact that the posters shared a viewpoint did not mean they had made common cause with Y. Nothing suggested that they thought about doing anything in response to the criticism against them. Thus, this case was like *Daly Park Nursing Home*,<sup>43</sup> which held that an employee's discussion with co-workers about another employee's discharge was not concerted activity because there was no evidence that any poster contemplated doing anything about it.<sup>44</sup>

*American Medical Response (AMR)*, the second case in Report I, involved an employee who was fired after posting negative remarks about her supervisor on Facebook. This was the first case in which an unfair labor practice charge was brought against an employer because of its internet-posting policy, and the case brought the regulation of social media policies by the NLRB to the forefront of the news media. The case settled and thus did not set any legal precedent, but it alerted the public to the fact that the NLRA applies in the private sector and the NLRB meant to be aggressive in policing actions by employers that infringe on protected concerted activities.<sup>45</sup>

When Filardo asked Souza to prepare an incident report on a customer complaint about her work, she asked for a union representative but did not get one. Later, at home, she posted that Filardo was a "scumbag," which drew supportive comments from co-workers and led to more negative remarks from her. The employer fired Souza for violating its internet policy, which prohibited employees from making disparaging remarks about the employer or its supervisors and depicting the company in any media, including the internet, without company permission.<sup>46</sup>

The OGC found that the incident report was an investigatory interview for which Souza had a right to union representation. When she sought that representation and discussed actions of her supervisor with co-workers on Facebook, she engaged in activity protected by section 7. She did not, moreover, lose that protection under the *Atlantic Steel* "opprobrious" standard when she called Filardo

a "scumbag," for she did so while off-duty, the name-calling was unaccompanied by threats, and it was provoked by his refusal to grant her representation request.<sup>47</sup>

The OGC also found that the part of the internet policy which barred employees from posting pictures in any media which depict the company, including a company uniform, corporate logo, or ambulance, violated section 7. It would prevent an employee from posting a picture of employees carrying a picket sign depicting the company's name or wearing a t-shirt portraying the company logo in connection with a protest involving terms of employment. The part which prohibited employees from making disparaging remarks was unlawful because it had no limiting language clarifying that it did not apply to section 7 activity. Finally the standards-of-conduct portion, which banned inappropriate or offensive language and rude or discourteous behavior to a client or co-worker, met the same fate. Those categories would ban a broad range of conduct and nothing made it plain that they were not designed to limit protected activity.<sup>48</sup>

The Board first dealt with a Facebook firing in *Karl Knausz Motors, Inc.*<sup>49</sup> A car salesman, Becker, was fired after he posted pictures and comments on Facebook concerning two events: a promotional event at a BMW dealership at which hot dogs and chips were served, and a car accident at a Land Rover dealership that occurred when a dealer allowed a 13-year-old to drive. Introducing the sales event photographs, he said:

I was happy to see that Knausz went "All Out" for the most important launch of a new BMW in years . . . the new 5 series. A car that will generate tens in millions of dollars in revenues for Knausz over the next few years. The small 8 oz bags of chips, and the \$2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch . . . but to top it all off . . . the Hot Dog Cart. Where our clients could attain a overcooked wiener and a stale bunn.<sup>50</sup>

The caption for the post about the Land Rover incident said "This is your car: This is your car on drugs" and the post said:

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!<sup>51</sup>

Several posters, including co-workers, replied.

After it endured negative publicity, the company fired Becker. It told him that the sales event post was comical but the Land Rover issue was not, as he had made light of a bad incident and, thus, violated a policy requiring employees to have a positive attitude; to be courteous and friendly to customers and co-workers; and not to participate in interviews with, or answer inquiries about employees from, almost anybody.<sup>52</sup>

The OGC found that Becker engaged in concerted activity when he posted about the sales event. Employees had discussed their frustration with the food, and he took photos to document the event and capture that frustration. He told them that he would post them on Facebook; when he did, he expressed the group sentiment.<sup>53</sup> Thus, the Facebook activity was an outgrowth of the co-worker discussion following a meeting they had with management about the food. Although Becker posted the photos and wrote the comments himself, he was continuing the concerted activity that began at the meeting. Because the employees worked on commission, they were concerned about the impact of the food on sales, so the activity involved a term of employment.<sup>54</sup>

The ALJ agreed. Citing cases involving comments deemed protected though they used satire, irony, and vulgarities – in two cases, management was called, respectively, “assholes” and a “cheap son of a bitch” – he then ruled that the posts were not sufficiently disparaging to forfeit protection despite their mocking and sarcastic tone. The Land Rover posts, however, were not protected. They were posted “as a lark, without any discussion with any other employee . . . and had no connection to any . . . terms or conditions of employment.” Disagreeing with the OGC, the ALJ also found that Becker was fired solely because of the Land Rover incident, not the sales event posts, so the termination was legal.<sup>55</sup>

As for the company policy, the ALJ said the test is whether it would reasonably tend to chill the exercise of section 7 rights. Noting that its maintenance may be an unfair labor practice absent evidence of its enforcement, the ALJ found the prohibition on participating in interviews or answering inquiries about employees would prohibit them from discussing work conditions with union representatives, lawyers, or Board agents. The part requiring employees to be friendly and courteous, and not to be disrespectful or to use profanity or other language which injures the employer’s image or reputation was also illegal, because the terms were vague and could be read as impinging on section 7 rights. But the ALJ had no problem with the bad-attitude policy, as it would reasonably be read to protect the relationship between the employer and its

customers. Finally, the employer’s attempt to rescind the policies was untimely and unaccompanied by an explanation of why and a statement that it would not thereafter interfere with section 7 rights.<sup>56</sup>

The NLRB reached the same conclusions regarding the Land Rover posts and declined to consider the sales-event posts.<sup>57</sup> It then focused on the “Courtesy” rule, noting that the employer did not contest the ALJ’s decision that the unauthorized-interview policy was illegal, nor did the OGC challenge the ruling that the bad-attitude policy was legal. For the reasons given by the ALJ, the Board invalidated the rule. It also said that the fact that the problematic sentence was the second one and was preceded by a sentence requiring employees to be courteous, etc., was inconsequential.<sup>58</sup>

The dissenting member argued that the policy should be read as a whole and that its thrust was to promote workplace civility. He asserted that this case was a far cry from those in which rules barring “derogatory attacks” and “negative conversations about associates and/or managers” were voided. The effect of the majority approach, he said, was, in violation of precedent, to ban any policy that employees conceivably could construe to prohibit protected activity, regardless of whether they reasonably would do so.<sup>59</sup>

*Wal-Mart*<sup>60</sup> involved the discipline of an employee who became upset after an interaction with a new assistant manager and posted on Facebook:

“Wuck Falmart! I swear if this tyranny doesn’t end in this store they are about to get a wakeup call because lots are about to quit.”

Employee 1: “bahaha like! :)”

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

Poster: “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!”<sup>61</sup>

A co-worker who saw the posts gave a printout to the store manager, who deemed this slander and gave the poster a one-day suspension that precluded promotion opportunities for 12 months. She also prepared a write-up stating

that his behavior was not within company guidelines and he would be terminated if it continued. The poster then deleted the posts.<sup>62</sup>

Proving that words mean everything (hence the title of this article) the OGC found that the posts involved no concerted activity. No language suggested that the poster sought to induce group action by co-workers; instead, he was venting about his dispute with the assistant manager. Respondents indicated that they found the post humorous, asked why the poster was so wound up, or offered support, but none offered to do anything. Finally, the posts were not the outgrowth of prior activity. Thus, the case file was closed.<sup>63</sup>

This case is difficult to square with others. No doubt the poster was airing a gripe, but his post addressed work conditions; a co-worker who replied also made a “hang in there” remark.<sup>64</sup> Obviously, in the eyes of the OGC, this was overridden by the factors noted above. But because discussions about employment terms may qualify as concerted without the posters’ having clearly stated that their intent is to induce group action, it seems that this case should have at least gone to an ALJ for a comprehensive review.

## II. *Triple Play* and later rulings.

Fast-forward to 2014 and one finds the Board even more inclined to find posts protected under section 7 and employer policies to be overbroad, and less willing to find posts so profane or disparaging as to lose their concerted-activity protection.

### A. *Triple Play*.

In *Triple Play* the NLRB dealt only with Sanzone’s remark “I owe too. Such an asshole” and Spinella’s “liking” LaFrance’s status update. It noted that the bar did not dispute that the Facebook discussion about incorrect tax withholdings was protected because it related to a term of employment and was intended for the employees’ mutual aid and benefit. The parties were preparing for group action: raising the issue at a meeting and considering avenues to complain to government authorities. In the context of the ongoing dialog, Sanzone’s comment endorsed LaFrance’s complaint that she owed money due to an error by DelBuono; Spinella’s “like,” while ambiguous, also expressed agreement with LaFrance’s post.<sup>65</sup>

The real issue was whether the posts were sufficiently disparaging to lose protection. The bar argued that they were: Sanzone and Spinella adopted LaFrance’s allegedly defamatory and disparaging comments and did so in a public forum, accessible to employees and customers, thus undermining DelBuono’s authority and adversely affecting the bar’s image.<sup>66</sup>

The Board stressed that an employer has a valid interest in preventing the disparagement of its products or services and in protecting its reputation and that of its agents from defamation. Section 7 must be balanced against these interests when they are implicated. The appropriate test, however, does not come from *Atlantic Steel*, on which the ALJ relied, which requires balancing the place and subject matter of the discussion, the nature of the employee’s outburst, and whether it was provoked by unfair labor practices. That test has been typically applied to decide whether in-person workplace communications were so opprobrious as to make them unprotected. But the “place of the discussion” prong makes it clear that the test is unsuitable for off-duty, off-site communications by employees with third parties or the general public; they are controlled by the Supreme Court’s decisions in *Jefferson Standard* and *Linn*.<sup>67</sup>

*Jefferson Standard*<sup>68</sup> upheld the discharge of striking television technicians who had distributed handbills attacking the quality of their employer’s product and its business practices without relating their criticisms to a labor dispute. Because this conduct was found to involve the disloyal disparagement of the employer, it fell outside section 7. In *Linn*,<sup>69</sup> the Court limited the remedies for defamation to instances in which it is shown that statements were made with malice – knowledge of, or reckless disregard for, their falsity – and caused the employer damage. Applying these precedents, the Board has held that “employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.”<sup>70</sup>

The Board observed that LaFrance claimed that DelBuono may have pocketed employee money but that neither Sanzone nor Spinella so alleged or endorsed that post. As for Spinella’s “like,” it related only to LaFrance’s complaint about owing money, not her allegation. Assuming that the allegation was unprotected, neither Sanzone nor Spinella would have lost the protection of section 7, for they cannot be held accountable for what others post, nor do they forfeit their protection merely by participating in a discussion in which unprotected statements were made.<sup>71</sup>

Finally, the Board found that the comments were different from the disparaging remarks in *Jefferson Standard*. The Facebook discussion disclosed the existence of an ongoing labor dispute concerning the bar’s tax-withholding practices. It was posted on an individual’s personal page, not a company page offering information about its products and services, and thus was more akin to a conversation that

could be overheard by a bystander. Finally, the comments were not disloyal, as they did not mention the bar's products or services, much less disparage them, nor were they defamatory because the claim that their tax liability was DelBuono's fault was not maliciously untrue and Sanzone's characterization of him as an "asshole" was an opinion. On that point, the Board cited cases in which calling superiors a "dictator," "slave driver," and "fucked up foreman" did not forfeit section 7 protection. *Sustained*, profane, ad hominem attacks in a working area during worktime are unprotected, but Sanzone's comment did not qualify.<sup>72</sup>

The Board then turned to the bar's internet policy, which penalized employees who reveal confidential information or engage in inappropriate discussions about the company or co-workers and required communications about the company to include a disclaimer that they reflect only the speaker's beliefs. The "savings clause" provided that if state or federal law precludes this policy, it is of no force and effect.<sup>73</sup>

The Board reiterated that a rule is unlawful if it explicitly restricts section 7 activities; if it doesn't, under *Lutheran Heritage Village*, a violation requires a showing that employees would reasonably construe it to prohibit section 7 activity, it was enacted in response to union activity, or it has been applied to restrict the exercise of section 7 rights.<sup>74</sup> Here, the issue was whether the first test was met. The ALJ said no but the Board disagreed, concluding that a policy prohibiting "inappropriate" discussions about terms of employment, but offering no explanation of what that term means, is overbroad. Furthermore, that the owners fired two employees for participating in a Facebook discussion about them showed that they construed the rule to include protected activity. Finally, the savings clause was irrelevant because the firings showed employees that the rule did not shield protected activity.<sup>75</sup>

The dissenting member thought the policy was legitimately aimed at preventing the revelation of confidential company information. That it proscribed "inappropriate" behavior did not make it invalid, for this is an "understandable catchall phrase" no different from "just cause" termination provisions in collective bargaining agreements. The policy was phrased in "general commonsense terms" and the majority had ignored the fact that there are "myriad of cases which the draftsmen cannot wholly anticipate" and "too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties."<sup>76</sup>

## B. Other recent cases.

The employer won in *Richmond District Neighborhood Center*, decided in October, 2014.<sup>77</sup> Notably, the two

pro-employer Board members were part of the three-member NLRB panel. At issue was whether the Beacon Teen Center violated the NLRA in rescinding job offers to two people who engaged in this Facebook exchange:

MOORE: U gOin back or nO?

CALLAGHAN: I'll be back, but only if you and I are going to be ordering shit, having crazy events at the Beacon all the time. I don't want to ask permission. I just want it to be LIVE. You down?

MOORE: Im gOin to be a activity leader im not doin the t.c. let them figure it out and when they start loosn kids I aint helpn HAHA

CALLAGHAN: hahaha. Sweet, now you gonna be one of us. Let them do the numbers, and we'll take advantage, play music loud, get artists to come in a teach the kids how to graffiti up the walls and make it look cool, get some good food. I don't feel like bein their bitch and making it all happy-friendly-middle school campy. Let's do some cool shit, and let them figure out the money. No more Sean. Let's fuck it up. I would hate to be the person takin your old job.

MOORE: Im glad im done with that its to much and never appreciated sO we just gobe have fuN dOin activities and the best part is WE CAN LEAVE NOW hahaha I AINT GOBE NEVER BE THERE even thO shawn gone it still hella stuck up ppl there that don appreciate nothing

The conversation continued in this vein for awhile. After management got wind of it, they opted not to rehire the posters because of their apparent refusal to be cooperative.<sup>78</sup>

The Board upheld this decision. Citing cases in which it had held that mere talk about a work shutdown was protected but encouraging a slowdown was not, nor were an employee's comments that he "could not and would not work 12 nights," the panel found that the detail and magnitude of insubordinate acts advocated in the posts reasonably gave the Center concern that the posters would act on their plans. The comments were more than jokes or hyperbole divorced from any likelihood of implementation; thus, they were objectively so egregious as to lose the Act's protection and render the individuals in question unfit for service.<sup>79</sup>

*Pier Sixty, LLC*,<sup>80</sup> decided in March, 2015, is a suitable note on which to end this review. Not only did two members of the three-member panel find that extremely vulgar

language used by an employee in a Facebook exchange did not lose its protection, but it also applied a totality-of-the-circumstances approach in reaching its conclusions.

A catering service was embroiled in a union-organizing campaign that was instigated due to employee concerns about management's disrespectful treatment of them. Two days before the election, Perez worked at a fundraiser where McSweeney, an Assistant Director, kept prodding him to work harder. From his iPhone Perez posted: "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire family!!!! What a LOSER!!!! Vote YES for the Union!!!!!!!" His Facebook friends, including co-workers, saw the post and Perez was then fired for violating company policy.<sup>81</sup>

The Board found that the comments, directed at McSweeney's abuse of employees and seeking redress through the union election, were concerted activity and were not so egregious as to lose protection. In so doing the panel, citing *Triple Play*, did not apply *Atlantic Steel* because the comments were made available to other employees in a non-work setting and did not occur in a conversation with management. Unlike the *Triple Play* panel, however, the *Pier Sixty* panel did not invoke *Jefferson Standard* and *Linn*; instead, citing *Richmond District* and noting that no one had objected to the ALJ's approach, it adopted that approach, which examined the nature, location, and subject matter of the post; whether the employer had shown anti-union hostility; and whether Perez's conduct had been provoked by the employer, was impulsive or deliberate, or was outlawed by a policy or similar to other language deemed offensive by the employer; and whether the discipline imposed on Perez was typical of that imposed for similar violations.<sup>82</sup>

The company had shown its hostility toward the union activity by, among other things, enforcing a "no talk" rule to prevent discussion of the union in the weeks before the election. Perez posted his comments in response to McSweeney's disrespectful commands to him, and his impulsive reaction to those commands reflected his exasperation. He made his comments while alone, on break and outside the facility, and there was no evidence that they interrupted work. Also, the comments echoed previous employee complaints about management's disrespectful treatment of them and urged them to vote in favor of union representation.<sup>83</sup>

As for Perez's use of "fuck" and "motherfucker," the evidence showed that the company tolerated the widespread use of profanity, including those words. In that setting, the words did not lose protection, nor did his reference to McSweeney's family, which was an epithet directed to McSweeney that served to intensify Perez's criticism of

him. The company's "Other Forms of Harassment" policy, which it cited as the basis for firing Perez, was not triggered, for it did not ban vulgar language in general, nor did the company show that his comments were directed at any protected classification listed in the policy. Finally, there was no evidence that the company had ever fired an employee solely for the use of such language.<sup>84</sup>

The dissenting member claimed that the majority had mistakenly recast Perez's "gripping episode" as section 7 activity. He objected to the notion that employees may "curse, denigrate, and defy their managers with impunity, so long as they also engaged in otherwise protected conduct." Calling this "an *Atlantic Steel* test on steroids," he said that Perez's vicious attack went well beyond the kind of conduct the company had tolerated. "We live and work in a civilized society," he asserted, and "employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency." Such comments irreparably damage working relationships, and it serves no valid purpose for the Board "to stretch beyond reason to protect beyond-the-pale behavior that happens to overlap with protected activity."<sup>85</sup>

A closing comment about these cases: As has been noted, the Board has been criticized for not adapting its concerted-activity standard to allow for differences between online and off-line communication. Yet it does appear to factor in the realities of today's world in deciding if a post should lose protection for being (for example) too opprobrious. Employee internet posts are rife with the kind of cursing, screaming, and insulting language that was not as prevalent in face-to-face discussions that occurred in 1979, when *Atlantic Steel* was decided. It seems that the Board has in effect concluded that, given how ubiquitous obscenity-laced communications are today, they have lost a lot of their punch, so that it is far more difficult to apply the opprobrious label to them than it was when such talk occurred offline back in the day.

### III. NLRB General Counsel's 2015 Memorandum

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In March, 2015, NLRB General Counsel Griffin issued a report that discussed recent case developments regarding employee handbook rules.<sup>86</sup> Part I discusses policies found unlawful and lawful by the NLRB and explains the reasoning. Part II explains how, pursuant to a settlement agreement, Wendy's International LLC rewrote several of its policies after an OGC determination that they were unlawful. This section reviews some of the policies in both parts.

A few words about my approach: (1) Although some policies do not involve social media *per se*, they could come into play in that context, so I included them in the review; I omitted rules, e.g., those barring inappropriate gestures, that are outside the social media realm. (2) The Report discusses many rules – 63 in Part I; for the sake of brevity, where multiple rules are used to make a point, I included a sample. (3) Each category begins by reviewing the law in that area; because these topics have been covered, I only summarized the highlights. (4) The Report quotes policies verbatim, often substituting bracketed information, e.g., [the Employer], for actual names; in the interest of simplicity, I eliminated the brackets and cleaned up the rules, while maintaining their original substance. Rules are stated in bold; a synopsis of the objection to them follows.

Citing the Board’s “chilling” standard, the Report stressed that the vast majority of policy violations are found on the basis that employees would reasonably construe language in the policy as prohibiting section 7 activity.<sup>87</sup>

**Part I – A.** Handbook rules regarding confidentiality.

A confidentiality rule is illegal if it bans employee discussions of terms of employment, such as wages, hours, or workplace complaints, or employees would reasonably read it that way. Thus, a rule encompassing “personnel” information, without clarification, is unlawful. By contrast, bans on disclosing “confidential” information are legal if they do not reference anything that employees would consider a term of employment.

1. Unlawful Confidentiality Rules

- You must not disclose proprietary or confidential information about the Employer, or other associates if the information relating to the Employer’s associates was obtained in violation of law or lawful Company policy.

A reasonable employee would not know how the employer defines “lawful company policy.”

- Never publish or disclose the Employer’s or another’s confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to the Employer.

The broad reference to “another’s information,” without clarification, would reasonably be read to include other employees’ wages and other terms and conditions of employment.

- Sharing of overheard conversations at the work site with your co-workers, the public, or anyone outside of your immediate work area is strictly prohibited.
- Discuss work matters only with other employees who have a specific business reason to know or

have access to such information . . . Do not discuss work matters in public places.

Both statements contain broad restrictions and do not clarify, in express language or contextually, that they do not restrict section 7 communications.

- Confidential Information is: All information in which its loss, undue use or unauthorized disclosure could adversely affect the Employer’s interests, image and reputation or compromise personal and private information of its members.

Employees have the right to protest their wages and working conditions and share information about those complaints.

2. Lawful confidentiality rules.

The following rules are legal because they do not reference information about employees or terms of employment; although they use the general term “confidential,” they do not define it in an overbroad way or contain language that would reasonably be construed to prohibit section 7 activity:

- Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside Employer is cause for disciplinary action, including termination.
- Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers.

Read with other rules relating to conflicts of interest and compliance with SEC regulations and state and federal laws, these rules would be understood to encompass customer credit cards, contracts, and trade secrets.

**B.** Handbook rules regarding employee conduct toward the company and supervisors.

Employees may protest their employer’s labor policies or treatment of employees; thus, rules are overbroad if they can reasonably be read to ban concerted criticism of the employer. Absent clarification or context, a rule prohibiting employees from engaging in disrespectful, negative, inappropriate, or rude conduct toward the employer is illegal. Employee criticism of an employer does not lose its protection just because it is false or defamatory, so a rule banning false statements is overbroad unless it specifies that only maliciously false statements are prohibited. But a rule requiring employees to be professional to co-workers, clients, or competitors, but not the employer or management, is lawful. Rules banning conduct that amounts to

insubordination are acceptable because they would not be construed as limiting protected activities.

1. Unlawful rules.

- No defamatory, libelous, slanderous or discriminatory comments about the Company, its customers and/or competitors, its employees or management.

Employees would reasonably construe this to ban protected criticism or protest regarding their supervisors, management, or the employer in general.

- Chronic resistance to proper work-related orders or discipline, even though not overt insubordination, will result in discipline.

Besides insubordination, the rule prohibits conduct that does not rise to that level, which could be understood to include protected concerted activity.

- It is important that employees practice caution and discretion when posting content on social media that could affect the Employer's business operation or reputation.

An employee has the right to criticize labor policies in a public forum. The act does not protect conduct aimed at disparaging an employer's product, but this rule provides insufficient context or examples to illustrate that it is aimed only at unprotected conduct.

2. Lawful rules

Rules may require employees to be respectful to customers, competitors, etc., but may not mention the company or its management:

- Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business.

Rules requiring employees to cooperate with each other and the employer in the performance of their work usually do not implicate section 7 rights:

- Each employee is expected to work in a cooperative manner with management/ supervision, coworkers, customers and vendors.

Employees would reasonably interpret this to apply to employer investigations of workplace misconduct rather than to unfair labor practices or preparations for arbitration:

- Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake.

Rules will not be read in isolation; even if a rule includes phrases or words that reasonably would be interpreted to ban protected criticism of the employer, if the context makes it plain that only serious misconduct is banned, the rule is lawful.

C. Handbook rules regulating conduct toward fellow employees.

Employees may debate unions, management, and their terms of employment, even if they do so in a contentious, abusive or inaccurate manner. Thus, without clarification, a rule may not ban "negative" or "inappropriate" discussions among employees. Although employers have a valid interest in maintaining a harassment-free workplace, anti-harassment rules cannot be so broad that employees would read them as prohibiting vigorous debate or intemperate comments about subjects protected by section 7.

1. Unlawful rules.

- Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online, and avoid the use of offensive, derogatory, or prejudicial comments.

Employees might read a rule banning these kinds of comments as limiting their ability to honestly discuss such subjects; these terms also might be construed to limit criticism of supervisors.

- Material that is fraudulent, harassing, embarrassing, sexually explicit, profane, obscene, intimidating, defamatory, or otherwise unlawful or inappropriate may not be sent by e-mail.

Terms such as "embarrassing," "defamatory," and "otherwise . . . inappropriate" are ambiguous and might be construed as covering section 7 activity.

2. Lawful rules.

A rule is legal if it directs employees not to engage in unprofessional conduct and does not mention the company or its management, since it would not be read as prohibiting protected criticism of the company:

- Threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors is prohibited.
- No use of racial slurs, derogatory comments, or insults.

D. Rules regarding employee interaction with third parties.

Employees may communicate with the news media, government agencies, and other third parties about wages, benefits, and other terms of employment, and rules that might be read as restricting such communications are

overbroad. Although employers may lawfully control who makes official statements for the company, they must ensure that their rules might not be read to ban employees from speaking to the media or other third parties on their own.

1. Unlawful rules.

- Associates are not authorized to answer questions from the news media . . . When approached for information, you should refer the person to the Media Relations Department.

2. Lawful rules.

- The Company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner only through the designated spokesperson.

Employees would reasonably interpret this to mean that they should not speak on behalf of the company, not that they cannot speak to outsiders on their own.

**Part II** – The settlement with Wendy’s.

Under its settlement agreement with the OGC, Wendy’s rewrote policies found overbroad because they went beyond preventing employees from speaking in the name of Wendy’s and could be read to prohibit them from commenting about company business, policies, or employees without prior authorization, particularly when the comments might reflect badly on the company. Although the Board has not signed off on the new policies, that the OGC deems them valid is important. Following are a few of the rewritten policies, with the changes in *italics*:

- Do not comment on trade secrets and proprietary Company information (business, financial, and marketing strategies) without the advance approval of your supervisor, Human Resources and Communications Departments.
- Do not make negative comments about our customers in any social media.
- Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature and content of your message with your supervisor and Human Resources. Obtain their approval prior to such use.
- Be thoughtful in all of your communication and dealings with others, including email and social media. Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else. In

general, it is always wise to remember that what you say in social media can often be seen by anyone. Accordingly, harassing comments, obscenities or similar conduct that would violate Company policies is discouraged in general and is never allowed while using Wendy’s equipment or during your working time.

- All employees are expected to know and follow this policy. Nothing in this policy is, however, intended to prevent employees from engaging in concerted activity protected by law. If you have any questions regarding this policy, please ask your supervisor and Human Resources before acting. Any violations of this policy are grounds for disciplinary action, up to and including immediate termination of employment.

Certainly the guidance given by this Report is useful. The fact remains, however, that explanations notwithstanding, one can look at the language of policies found lawful and unlawful and not be able, in all instances, to fully appreciate what differentiates the two.

## IV. Conclusion.

Since the OGC issued the first Facebook complaint in 2010, many unfair labor practice charges involving social media have been filed, the ALJ’s and Board have issued a lot of rulings, and tons of electronic ink have been spilled by commentators and the OGC itself, trying to help employers make sense of it all. The law is still developing, but so far the NLRB has decided cases based on established rules and has given no hint that it will adapt them to meet the realities of the digital world. Under these rules, great emphasis is put on the wording of posts, and one can sometimes stand two threads side by side and be hard-pressed to understand why one thread was deemed to involve concerted activity and the other wasn’t. Some of this confusion might be eliminated and more consistency in outcomes might be achieved if, for example, the Board were to recognize that concert is not necessarily expressed the same way online as it is offline and if more attention were given to evidence of concert outside of actual posts.

Although it has left the door open to the possibility that off-duty, off-site employee posts might affect workplace discipline and order in the same manner that a face-to-face confrontation with a supervisor does, the Board has generally viewed these situations as sufficiently different to merit giving posters more leeway in what they can say. It has, moreover, been willing, indeed almost eager, to find that such posts involve protected concerted activity because they go beyond mere griping and involve two or more employees acting together to improve their wages or other working conditions.

A controversial aspect of Board decision-making involves the issue of when a post is too profane or vitriolic to retain its protection. While no one expects all employee complaints about their terms of employment to be suitable for airing at a church picnic, some contend that the Board has been too solicitous of employees, and it will be interesting to see what the Second Circuit does with the “asshole” comment made in *Triple Play*. Also problematic is the fact that the standard by which this issue should be decided is unclear, as adjudicators have, at different times, used an “egregious,” “opprobrious,” “disloyal, reckless, or maliciously untrue,” or totality-of-circumstances test.

The Board’s handling of social media policies has also come under fire. Time after time it has voided policies

with catch-all terms that employers have used for years, e.g. “inappropriate” and “disrespectful,” because they might be read as chilling section 7 activity. In so doing, it has opened itself to the criticism that it is *de facto* asking whether employees *could* read such language that way rather than whether they reasonably *would* do so.

At some point, courts may call a halt to the NLRB’s approach in this area. Unless and until that happens, however, employers must take the approach that the old ways of doing things no longer work, they must develop a new mindset, and they need to be guided by it as they review the language of their policies and how they should handle employee-posting cases when they arise.

## ENDNOTES

<sup>1</sup> NLRB v. Three D, LLC d/b/a/ Triple Play Sports Bar and Grille, 361 NLRB No. 31 (2014) at \*1-2.

<sup>2</sup> *Id.* at \*3.

<sup>3</sup> See generally Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?* 9 U. PA. J. LAB. & EMP. L. 355 (2007).

<sup>4</sup> 29 U.S.C. §§151-169.

<sup>5</sup> See, e.g., Henry H. Robinson, *Applying NLRA Section 7 to Company Policies and Related Discipline*, 66 LAB. L.J.2 (2015); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259 (2002).

<sup>6</sup> 29 U.S.C. §151.

<sup>7</sup> The Act covers most employees of employers whose business affects interstate commerce. 29 U.S.C. §152. The Board has established a low threshold for meeting that standard. See <https://www.nlr.gov/resources/faq/nlr#t38n3208> (last visited July 4, 2015).

<sup>8</sup> 29 U.S.C. §157.

<sup>9</sup> 29 U.S.C. §158(a)(1).

<sup>10</sup> Social media technology takes on many forms including blogs; business and enterprise social networks; forums; microblogs; photo sharing; products/services review; social bookmarking, gaming, and networks; video sharing; and virtual worlds. See, e.g., Thomas Aichner and Frank Jacob, *Measuring the Degree of Corporate Social Media Use*, 57 JOURNAL OF MARKET RESEARCH 257 (2015). For statistics on social media use, see, e.g., Facebook Newsroom, <http://newsroom.fb.com/company-info/> (last checked June 26, 2015) and Social Networking Fact Sheet, <http://pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited June 26, 2015).

<sup>11</sup> Members, appointed by the President and confirmed by the Senate, serve five-year terms, with a new one cycling in every year. From 2009-2014, due to friction between Congressional Republicans and President Obama, it was difficult to constitute a full Board; for a time it functioned with two members. This subject is beyond the scope of this article, except to say that on July 30, 2013 the Senate

finally confirmed Mark Pearce (Chair) (term ends 2018), Phillip Miscimarra (2017), Kent Hirozawa (2016), Harry Johnson (2015), and Nancy Schiffer, whose term ended in 2014. She was replaced by Lauren McFerran (2019). Pearce, Hirozawa, and McFerran are usually pro-labor; Miscimarra and Johnson usually support employers.

<sup>12</sup> See, e.g., NLRB v. Arkema, Inc., 710 F.3d 308, 316 (5<sup>th</sup> Cir. 2013).

<sup>13</sup> Christine Neylon O’Brien, *Am I Blue or Seeing Red? The NLRB Sees Purple When Employer Communication Policies Unduly Restrict Section 7 Activities*, 66 LAB. L.J. 2 (2015).

<sup>14</sup> Robinson, *supra* n. 5.

<sup>15</sup> <http://www.nlr.gov/rights-we-protect/> (last visited July 2, 2015). See also DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW: TEXT & CASES (15<sup>th</sup> ed. 2013) (discussing the NLRB’s expansive remedial powers).

<sup>16</sup> See Ariana C. Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837 (2012), for a discussion of how the NLRB operates, including its structure, history, and functions.

<sup>17</sup> Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04, (March 18, 2015).

<sup>18</sup> The parties may appeal a Board decision to a federal circuit court of appeals. See Green, *supra* n. 16 for a discussion of the role of the circuit courts in the NLRB decision-making process. The Triple Play Bar and Grille recently appealed the adverse Board ruling to the Second Circuit Court of Appeals, arguing that it flies in the face of NLRB v. Starbucks, 679 F.3d 70 (2<sup>nd</sup> Cir. 2012), which involved an employee’s obscenity-laced outburst in front of customers during a protest. The Board has countered that Starbucks involved an on-premises work confrontation, not statements made off-site in a social media discussion. Case No. 14-3284.

<sup>19</sup> See, e.g., Rebecca Stang, *I Get By with a Little Help from my “Friends”: How the National Labor Relations Board Misunderstands Social Media*, 62 DEPAUL L. REV. 621 (2013); Green, *supra* n. 16.

<sup>20</sup> 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).

<sup>21</sup> See, e.g., Nancy B. Schess, *Then and Now: How Technology has Changed the Workplace*, 30 HOFSTRA LAB. & EMP. L.J. 435 (2013); Richard A. Paul & Lisa Hird Chung, *Brave New Cyberworld: The Employer’s Legal Guide to the Interactive Internet*, 24 LAB. L. 109, 120 (2008).

<sup>22</sup> Paul & Chung, *supra* n. 21 at 142.

<sup>23</sup> See, e.g., MARK A. ROTHSTEIN & LANCE LIEBMAN, ROTHSTEIN & LIEBMAN’S EMPLOYMENT LAW CASES AND MATERIALS 149 (4<sup>th</sup> ed. 1998).

<sup>24</sup> Even if it Enrages Your Boss, *Social Net Speech is Protected*, New York Times, Jan. 21, 2013 (quoting NLRB Chair Mark Pearce: “Many view social media as the new water cooler.”)

<sup>25</sup> 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 membership is in the United States, where private sector figures declined from 21.7% in 1977 to 7.2% in 2009”).

<sup>26</sup> See Dean Takahashi, *Hearsay Social raises \$18M so your employees won’t embarrass you on social media*, VENTURE BEAT (July 28, 2011), <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”).

<sup>27</sup> Rebekah Mintzer, *Social Media and Restrictive Covenants*, NAT. L.J. (June 8, 2015) at 6.

<sup>28</sup> See, e.g., 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 the ability to convey nonverbal communication cues allows communicators to appreciate each other interpersonally and facilitates understanding their messages).

<sup>29</sup> See NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984) (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.”)

- <sup>30</sup> *Meyers Industries (Meyers I)*, 268 NLRB No. 493 (1984), *rev'd. sub nom.* Prill v. NLRB, 755 F.2d 941, (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *on remand* *Meyers Industries (Meyers II)*, 281 NLRB No. 882 (1986), *aff'd. sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).
- <sup>31</sup> *Employee Rights*, NATIONAL LABOR RELATIONS Bd., <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited July 3, 2015); see also *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 790 (8<sup>th</sup> Cir. 2013); *Lou's Transport, Inc.*, 361 NLRB No. 158 (2014).
- <sup>32</sup> See Stang, *supra* n. 19 at 627-628.
- <sup>33</sup> Compare *Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872 (Sept. 6, 2011) with *Wal-Mart*, NLRB Adv. Mem., Case No. 17-CA-2503 (July 19, 2011).
- <sup>34</sup> Reports of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74 (Aug. 18, 2011) (Report I), Memorandum OM 12-31 (Jan. 24, 2012), Memorandum OM 12-59 (May 30, 2012).
- <sup>35</sup> *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012). Report I, *supra* n. 34 at 3.
- <sup>36</sup> Report I, *supra* n. 34 at 3.
- <sup>37</sup> *Hispanics United of Buffalo*, NLRB Administrative Law Judge Decision, Case No. 3-CA-27872, (Sept. 6, 2011) at \*4-6.
- <sup>38</sup> *Hispanics United of Buffalo*, 359 NLRB No. 37 (2012) at \*4.
- <sup>39</sup> *Opprobrium definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/opprobrium> (last visited July 4, 2015).
- <sup>40</sup> *Atlantic Steel Co.*, 245 NLRB No. 814 (1979) at \*4-5.
- <sup>41</sup> *Hispanics United of Buffalo*, 359 NLRB No. 37 (2012) at \*3, *citing* *Relco Locomotives, Inc.*, 358 NLRB No. 37 (2012) at \*17.
- <sup>42</sup> *Id.* at \*4.
- <sup>43</sup> *Daly Park Nursing Home*, 287 NLRB No. 710 (1987).
- <sup>44</sup> *Hispanics United of Buffalo*, 359 NLRB No. 37 (2012) at \*5 (Hayes, dissenting).
- <sup>45</sup> Christine Neylon O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OREGON L. REV. 337, 344 (2013); see also 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 UNIV. L. REV. 29 (2011).
- <sup>46</sup> Report I, *supra* n. 34 at 5.
- <sup>47</sup> *Id.* at 5-6.
- <sup>48</sup> *Id.* at 6.
- <sup>49</sup> *Karl Knauz Motors, Inc.*, 358 NLRB. No. 164 (2012).
- <sup>50</sup> NLRB Administrative Law Judge Decision, Case No. 13-CA-46452 (Sept. 28, 2011) at 7.
- <sup>51</sup> *Id.* at 8.
- <sup>52</sup> *Id.* at 8-9.
- <sup>53</sup> Report I, *supra* n. 34 at 7.
- <sup>54</sup> *Id.* at 8.
- <sup>55</sup> *Id.* at 11.
- <sup>56</sup> *Id.* at 12.
- <sup>57</sup> *Karl Knauz Motors, Inc.*, 358 NLRB. No. 164 (2012) at \*1 fn. 1.
- <sup>58</sup> *Id.* at \*1-2.
- <sup>59</sup> *Id.* at \*2-3 and fn. 11.
- <sup>60</sup> *Wal-Mart*, NLRB Adv. Mem., Case No. 17-CA-25030 (July 19, 2011).
- <sup>61</sup> *Id.* at 1-2.
- <sup>62</sup> Report I, *supra* n. 34 at 17.
- <sup>63</sup> *Id.* at 17-18.
- <sup>64</sup> *Wal-Mart*, at 2.
- <sup>65</sup> *NLRB v. Three D, LLC d/b/a/ Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014) at \*4-6.
- <sup>66</sup> *Id.* at \*4-5.
- <sup>67</sup> *Id.* at \*5-6.
- <sup>68</sup> *NLRB v. Local Union 1229, Int'l. Brotherhood of Electrical Workers*, 346 U.S. 475 (1953).
- <sup>69</sup> *Linn v. United Plant Guard Workers of America*, 383 U.S. 64 (1966).
- <sup>70</sup> *Triple Play*, at \*5-6, *citing* *MasTec Advanced Technologies*, 357 NLRB No. 17 (2011) at \*5.
- <sup>71</sup> *Id.*
- <sup>72</sup> *Id.* at \*6-7 and fn. 17.
- <sup>73</sup> *Id.* at \*7.
- <sup>74</sup> *Id.* at \*7-8, *citing* *Lutheran Heritage Village*, 343 NLRB No. 646 (2004).
- <sup>75</sup> *Id.* at \*8.
- <sup>76</sup> *Id.* at \*12-13, *citing* *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960) and *quoting* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959) (Miscimarra, dissenting).
- <sup>77</sup> *Richmond Dist. Neighborhood Center*, 361 NLRB No. 74 (2014).
- <sup>78</sup> *Id.* at \*1-2.
- <sup>79</sup> *Id.* at \*2-3.
- <sup>80</sup> *Pier Sixty, LLC*, 362 NLRB No. 59 (2015).
- <sup>81</sup> *Id.* at \*1-2.
- <sup>82</sup> *Id.* at \*3.
- <sup>83</sup> *Id.* at \*4.
- <sup>84</sup> *Id.* at \*4-5.
- <sup>85</sup> *Id.*
- <sup>86</sup> Report of the General Counsel Concerning Employer Rules Memorandum CG 15-04 (March 18, 2015).
- <sup>87</sup> *Id.* at 2.

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