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Employee 2.0

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EMPLOYEE 2.0

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Introduction

"[G]ivin away mad shit at the bar...all to myself haha little man your beat =)".

""What do you mean Asia is not a country?" Aah, educating the future leaders of America is always a pleasure!"

"[H]ates dealing with parents at work who expect their 4 year olds to be rocket scientists!!!! TGIF!" [1]

These are some of the messages that were posted on facebook. Some of these postings were liked and commented on by many "friends", including some coworkers, of the poster. None of the above posters were fired after putting up the above postings, but it wouldn't be shocking if the posters are in violation of their employer's policies by making such statements. However, someone did get fired after posting, "Looks like I'm getting some time off. Love how the company allows a 17 to be a supervisor" on facebook. [2] The employee, Dawnmarie Souza, was expressing her frustration with her supervisor who was investigating into customer complaints about her.[3] The facebook posting received some supporting and even more negative comments from Souza and Souza's coworkers, but Souza was fired after these postings came to light.[4] After conducting an investigation, the National Labor Relations Board ("NLRB") sued Souza's employer, American Medical Response of Connecticut, Inc. ("AMRC") for violation of federal

[1] The three postings are quoted anonymously so as not to harm to the posters and any other parties mentioned in the actual postings.
[2] "17" is the employer's code referring to a psychiatric patient. Sam Hananel, Woman Fired Over Facebook Rant; Suit Follows, MSNBC.com (Nov. 10, 2010, 9:43 AM), http://www.msnbc.msn.com/id/40097443/ns/business-personal_ finance/
[3] *Id.*
[4] *Id.*

laws protecting employee speech.[5] Souza's facebook postings were compared to conversations held at a water cooler in an office environment by the general counsel.[6] AMRC argued that Souza was terminated due to multiple complaints from customers but eventually, the case was settled outside of court and the arguments were never heard by a panel.[7]

So, how are online postings, specifically those on social networks like facebook, treated differently from a person venting to their friends or bringing up work related issues with coworkers? And what is the impetus for employers to take create policies to limit employee's postings and how effective are such policies?

Rise of Influence of Social Networks

Social networks are reflection of our real lives as people create profiles displaying their interests, thoughts and experiences. Such sites allow a user to share their life with the people the user has chosen to connect with. Depending on the user's preference the audience can consist of only a chose few or it can be open to general public.[8] An active social networker's life can be followed by tracing his path on a single network like facebook or even a combination of networks. Facebook allows a person to update their "status" which essentially is a way to express their thoughts.[9] Facebook allows users to post pictures depict their life experiences.[10] These

[5] News Release: Complaint Alleges Connecticut Company Illegally Fired Employee Over Facebook Comments, Nat'l Lab. Rel. Board (Nov. 2, 2010) , available at http://www.nlrb.gov/news-media/news-releases/archive-news;
[6] Hananel, supra note 2.
[7] Julianne Pepitone, Facebook Firing Test Case Settled Out of Court, CNNMoney.com (Feb. 8, 2011, 1:44 PM), http:// money.cnn.com/2011/02/08/technology/facebook_firing_settlement/index.htm; see Hananel, supra note 2
[8] Facebook, http://www.facebook.com/about/privacy/ (last visited February 12, 2012)
[9] Facebook, http://www.facebook.com/help/?faq=132371443506290#How-do-I-share-a-status-or-other-content-on-Facebook? (last visited January 20, 2012)
[10] Facebook, http://www.facebook.com/help/photos (last visited January 20, 2012)

status updates and pictures can be further commented upon by the poster and the people who the use is sharing them with.[11] Facebook has a "check-in" feature essentially synonymous to checking into a place in real life.[12] Even other social sites like Twitter and Four Square have features which create a virtual reflection of the user's real life.[13]

An active user's life can be easily tracked and monitored by following the person's profile. These sites encourage users to generate more and more content in order to create a profile that depicts a closer reflection of the person and the life the person is living. The leaders of social network sites suggest that if you fear sharing something that means you have something bad to hide.[14] Users share personal experiences as well as work experiences. The number of users on social networks is astonishing. There are more than 158 million people on facebook from the United States alone.[15] This number translates into approximately 51% of population and 66% of population that goes online.[16] Unsurprisingly, these social networks are the new hotbeds for starting new movements and discussions.

Traditionally, an influential person would be defined as someone who is a "celebrity, a politician or a media personality".[17] However, when a layman's posting can spark a revolution[18]

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[11] *Supra* note 9, 10
[12] Facebook, http://www.facebook.com/help/location (last visited January 20, 2012)
[13] Foursquare, https://foursquare.com/about/ (last visited January 20, 2012)
[14] Eva Galperin, *Randi Zuckerberg runs in the wrong direction* (August 2, 2011), https://www.eff.org/deeplinks/2011/08/randi-zuckerberg-runs-wrong-direction-pseudonymity; Also Richi Jennings, *Google CEO: If you want privacy, do you have something to hide,* (December 11, 2009) http://blogs.computerworld.com/15234/google_ceo_if_you_want_privacy_do_you_have_something_to_hide
[15] *United States Facebook Statistics*, available at http://www.socialbakers.com/facebook-statistics/united-states (last visited January 21. 2012)
[16] *Id.*
[17] Stephanie Rosenbloom, *Got Twitter? You've been scored* (January 25, 2011), http://www.nytimes.com/2011/06/26/sunday-review/26rosenbloom.html?_r=1.
[18] See, The Face of Egypt's Social Networking Revolution (February 12, 2011, 7:47 PM) http://www.cbsnews.com/stories/2011/02/12/eveningnews/main20031662.shtml.

or when a home video can bring fame and large sums of money, the traditional definition of "influence" no longer stands valid.[19] Using the enormous amounts of data that social networks generate, start-ups like Klout, Influence and PeerIndex have created scales to measure the "influence" of anyone who is on a social network.[20] For Example, Klout's scale measures influence on the scale of 1 to 100. An average social networker's score is in high teens, while someone with high influence in a particular niche will have a score of 40 or above. A celebrity would have score pushing 100.[21] This score is suppose to be based upon the number of people a person influences on his/her network, how much influence you have on those influenced and the amount of flow through influence those "influenced" have on others in their own networks.[22] These scales have been used by marketers to target influential persons to sway positive opinion towards them.[23] However, a scale is not needed to measure a social network's influences when revolutions toppling national governments have started and sustained over social networks. [24]

Undeniably the influence of a person's opinion is more powerful than ever. Companies scour social networks to find unhappy customers and try to satisfy one customer at a time.[25] The image of a company can be especially vulnerable when an employee portrays the employer negatively.[26] An employee's opinion of the employer is more influential on customers than any

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[19] Brian Stelter, *Youtube videos pull in real money* (December 10, 2008), http://www.nytimes.com/2008/12/11/business/media/11youtube.html
[20] Rosenbloom, supra note 17
[21] *Id.*
[22] Klout, http://klout.com/corp/kscore (last visited January 20, 2012).
[23] Klout, http://klout.com/corp/faq (last visited January 20, 2012).
[24] *See, The Face of Egypt's Social Networking Revolution* (February 12, 2011, 7:47 PM) http://www.cbsnews.com/stories/2011/02/12/eveningnews/main20031662.shtml
[25] Laura Northrup, *Twitter Complaint Makes Maytag Step Up, Fix Problem*, (April 14, 2010), http://consumerist.com/2010/04/twitter-complaint-makes-maytag-step-up-fix-problem-washer.html
[26] Edelman and Intelliseek, *Talking from the Inside Out: The Rise of Employee Bloggers*, Pg. 6, *available at* http://www.edelman.com/image/insights/content/Edelman-Intelliseek%20Employee%20Blogging%20White%20Paper.pdf

marketing campaign.[27] As a result, an employee's use of social networks raises new legal issues and presents challenges to businesses.[28]

Social networks allow employees to voice their opinions about work related issues in unique ways.[29] For example, employees of a Canadian coffee chain, Tim Hortons, created a group dedicated to criticize their own customers.[30] The group was formed to inform customers about proper ways of ordering at the coffee chain.[31] However, some of the suggestions clearly cross the line into criticizing the customer's behavior. For example, one of the suggestions posted advices customers to have their orders ready prior to driving up to the speaker boxes and to not ask for "Give me a seconds" or "Hold ons" as they don't carry those on the menu.[32] Another employee stated that, "Not everyone can have coffee from the top of a pot".[33] Another example of employees using online channels to work together is that of employees of Wal-Mart.[34] Wal-Mart employees have various avenues to choose from when trying to voice their concerns regarding employment terms and conditions.[35] The influence of these groups can be limited as these platforms do not turn give them the leverage that a registered union may have to negotiate bargaining agreements. [36]

If allowed within the law the employer can sever ties with employees, who reflect negatively on the employer, to limit the damage. However, this does not mean an employer can

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[27] *Id.*
[28] *See* infra cases sited notes
[29] *See* infra note 30
[30] *Tim Hortons Rules of Ordering and More,* http://www.facebook.com/group.php?gid=2581280419 (last visited January 23, 2012)
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *See* infra note 35.
[35] *See* generally, http://forrespect.org/ (last visited January 23, 2012) ; *also* http://makingchangeatwalmart.org/ (last visited January 23, 2012).
[36] *Our trip to Bentonville,* http://forrespect.org/public/our-walmart-trip-to-bentonville / (last visited January 23, 2012)

control the opinions of the employee; the employer is limited by certain federal statutes and in many situations some state law. The following discussion talks about some of the limitations imposed on employers preventing them from firing employees for acts they commit.

Employment Law and Its Influence on Social Networking

In United States, private employment is governed primarily by the principle of at-will employment.[37] The at-will employment doctrine is applicable in all but one state.[38] Under the at-will employment doctrine, an employee may quit their jobs at any time, for any reason.[39] Similarly, an employer can fire the employee at any time with or without cause.[40] The employee can be legally fired even when the employer applies poor judgment in their decision as long as the employer does not go beyond certain limits imposed by federal and state law.[41] Further, the right to freedom of speech under the First Amendment does not apply to private employees in the workplace.[42] The right is only available to government sector employees and actors.[43] Thus, an at-will employee has limited protection unless an exception, granting additional safeguards, is applicable.

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[37] *See* generally Henry Hoang Pham, *Bloggers and the Workplace: The Search for a Legal Solution to the Conflict Between Employee Blogging and Employers*, 26 Loy. L.A. Ent. L. Rev. 207, 225-26 (2006)
[38] *Id* at 211 ("All states except for Montana retain the "at-will" employment doctrine)
[39] *See*, e.g., *Corcoran v. Chi. Park Dist*., 875 F.2d 609, 612 (7th Cir. 1989)
[40] *See Smith v. Calgon Carbon Corp*., 917 F.2d 1338, 1341 (3d Cir. 1990) ("[I]t is an established general principle that in an employment relationship, an employer 'may discharge an employee with or without cause, at pleasure, unless restrained by some contract.")
[41] *See*, e.g., *Deerman v. Beverly California Corp*., 518 S.E.2d 804, 948 (N.C. Ct. App. 1999).(" While there may be a right to terminate at-will employment for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such employment for an unlawful reason or purpose that contravenes public policy"); *Also, Schmitz v. ING Securities, Futures & Options, Inc.*, 10 F. Supp. 2d 982, 481 (N.D. Ill. 1998)(" Under Illinois law, the common law rule that an employee at will can be discharged at any time, for a good reason, a bad reason, or no reason at all, remains in force, modified only by the prohibition of discharges in contravention of a clearly mandated public policy"
[42] David L. Hudson, Jr., *Blogs and the First Amendment*, NEXUS, 2006, at 129, 134 ("Private employees do not receive the protections of the First Amendment because there is no trigger of state action".)
[43] *Id.*

One of the ways that an employee can gain protection is if he has a contract, implied or express, which defines the length of employment, the terms and conditions of employment or requires dismissal only for cause.[44] Another way Courts extend protection is by applying judicially created exceptions like good faith, fair dealing and public policy.[45] The public policy category includes non statutory and certain statutorily created exceptions like whistle blowing, refusal to commit an illegal act, performance of statutory obligation and exercise of a statutory right or privilege.[46]

One of the strongest forms of protection that an at-will employee can have is a statutory created exception. The Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on "race, color, religion, sex or national origin."[47] If an employer takes action against select few employees, belonging to a protected group, voicing their opinions on social networks than they may be afforded protection under this act.[48] Another federal statute that gives protection to at-will employees is the National Labor Relations Act (NLRA).[49] The NLRA protects the "right to form, join or assist labor organizations".[50] The NLRA is discussed in detail below as it is a field of employment law where social networking activities have received great amount of focus.

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[44] *See*, e.g., *McDonald v. Union Camp Corp*., 898 F.2d 1155, 1163 (6th Cir. 1990)
[45] *See*, e.g., *LaScola v. U.S. Sprint Commc'ns*, 946 F.2d 559, 563-64 (7th Cir. 1991) (listing the judicially established exceptions to the employment at-will doctrine).
[46] *See generally*, J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 Iowa L. Rev. 347 (1995)
[47] 42 U.S.C. §2000e (2000)
[48] Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 La. L. Rev. 1079, 1091 (2006)
[49] *See generally* 29 U.S.C. §§151-169 (2000)
[50] 29 U.S.C. §157 (2000).

Section 7 of National Labor Relations Act

The section 7 of NLRA protects "concerted activities for ….mutual aid or protection".[51] This protection extends to most private sector employees who do not have a supervisory role.[52] Section 8(a)(1) adds, "it shall be an unfair labor practice for an employer … to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7". [53] The NLRA applies to union as wells non-union workers.[54] In devising this act, one of Congress's main purposes was "to protect the right of workers to act together to better their working conditions."[55] In order to enforce and investigate claims under the NLRA, the NLRB was formed.[56] The NLRB is managed by a five person board and a General Counsel.[57] The board acts as a judicial body whose decisions resemble decisions by administrative judge.[58] The General Counsel acts as a prosecutor, tasked with investigating and presenting claims in front of the board.[59] The General Counsel also issues two types of advice memos.[60] First, the Counsel issues memos wherein certain NLRA charges are recommended for dismissal.[61] Second category, issued at the discretion of the General Counsel, includes memoranda in closed cases that are not required by law to be published[62].

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[51] *Id.*
[52] 29 U.S.C. §152(2) (2000) (excluding federal, state, and municipal governments and unions from the definition of employer); 29 U.S.C. §152(3) (excluding "any individual employed as a supervisor" from the definition of employee").
[53] 29 USC §158(a)(1) (2000).
[54] *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948)
[55] See *NLRB v. Wash. Aluminum*, 370 U.S. 9, at 14 (1962)
[56] *Who we are*, Nat'l Lab. Rel. Board, https://www.nlrb.gov/who-we-are (last visited January 25, 2012)
[57] *Id.*
[58] *The NLRB Process*, Nat'l Lab. Rel. Board, http://www.nlrb.gov/nlrb-process (last visited January 25, 2012).
[59] *Supra* notes 56, 58.
[60] *Advice Memos*, Nat'l Lab. Rel. Board. https://www.nlrb.gov/cases-decisions/advice-memos (last visited January 25, 2012) .
[61] *Id.*
[62] *Id.*

The NLRA extends protection to only those activities that are "concerted".[63] Neither the act defines the term "concerted" nor does the legislative history of the NLRA indicate what Congress meant.[64] Generally, an activity is concerted when it is "planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme."[65] The definition for the purposes of this act is derived from common law. Traditionally, courts have interpreted the terms "concerted activities" and "mutual aid or protection" broadly to protect employee rights in both union and non-union background.[66] An employee's action is "concerted" when he or she acts with authority of other employees.[67] An individual employee's action may also be "concerted" in nature if the employee is speaking on behalf of himself and at least one other coworker.[68] Also, if the individual's action is considered to be a "logical outgrowth" of previous group activities then the actions will be protected.[69] When two or more employees engage in protected discussions under section 7 and following such discussions, one of the individual's acts to promote or further the discussion, the individuals' actions will be considered a logical outgrowth.[70] A single employee's activity can be as much 'concerted activity' as any ordinary group activity when the single employee is recruiting the support of coworkers.[71] This is vital, as when an individual's actions, like an online blog or posting, is analyzed narrowly only the actual author appears to represent the concerns. Thus, as per the above characterization of

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[63] 29 USCA §157(2000).
[64] *NLRB v. City Disposal Sys., Inc*., 465 U.S. 822, 834 (1984).
[65] BLACK'S LAW DICTIONARY 289 (6th ed.1990)
[66] *Supra* note 55 at 17("concerted activities"); Eastex, Inc. v. NLRB, 437 U.S. 556, 564-67 (1978) ("mutual aid or protection").
[67] *See Rockwell Int'l Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987)
[68] *City Disposal Sys*., 465 U.S. at 835 (citing *ARO, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) and *NLRB v. N. Metal Co*., 440 F.2d 881, 884 (3d Cir. 1971)).
[69] See Five Star Transp., Inc., No. 1-CA-41158, 2004 NLRB LEXIS 329, at *21 (June 23, 2004), available at http://www.nlrb.gov/nlrb/shared_files/decisions/ALJ/JD-60-04.pdf (finding that letters written by individual employees were a "logical outgrowth" of an earlier meeting).
[70] *Id.*
[71] *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)

"concerted activity", protection could be afforded under the NLRA to an individual's online activities.

The activity or post must be a form of grievance complaining about work related issue like wage, working conditions or some issue that the employees are facing at work.[72] The complaint's focus must be on the "employee's interest as an employee" and if the complaint lacks this focus no protection can be afforded.[73] Complaints regarding supervisory actions and work quality have been deemed protected activities.[74] At the same time, complaints based upon personal grievances are unprotected as they are beyond the scope of work-related issue. Individual griping is not a protected activity.[75] The Court in *Media Gen. Operations, Inc. v. NLRB* denied protection because the employee was on a personal mission and his words were "devoid of substantive content and meaningful value".[76] The employee used disparaging remarks like a redneck "son of a b_ _ _ _" and "b_ _ _ _ _ d" while describing his supervisor.[77]

Preliminary discussions consisting of mere talk may be protected as concerted activity even if the discussions have not resulted in organized action or demands.[78] This discussion can simply be a conversation between a speaker and listener.[79] However, in order for such employee discussion to qualify for protection under section 7, it must appear to be intended to initiate, induce, or prepare for group action of some kind.[80]

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[72] *NLRB. v. Leslie Metal Arts Co., Inc.* 509 F.2d 811, 813 (6th Cir. 1975).
[73] *Eastex* at 567-68
[74] *Supra* note 72
[75] *See Southwest Latex Corp. v. NLRB*, 426 F.2d 50, 56 n.3 (5th Cir. 1970).
[76] *Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207, 211 (4th Cir. 2005).
[77] *Id* at 209.
[78] See *Mushroom Transp. Co. v. N. L. R. B.*, 330 F.2d 683, 685 (3d Cir. 1964)
[79] *Mobil Exploration & Producing U.S., Inc. v. N.L.R.B.*, 200 F.3d 230, 239 (5th Cir. 1999).
[80] *Mushroom* at 685.

Loss of NLRA Protection

Courts give some leeway to the form of activity the employee engages in to be considered for section 7 protections as long as the activities are not otherwise unlawful or impermissible.[81] An employee does not lose protection when he or she attempts to improve terms and conditions of employment through means outside the immediate employee-employer relations or through means which they employee-employer used previously.[82] For example Courts have even stated that the mutual aid or protection clause shields employees who reach out to a legislature to protect their interests as employees.[83] However, the connection between the concerted activity and the employees' interests may become so wide that the activity could fall outside the limits of protected activity.[84] These communications to third parties are protected so long as the communications are related to an ongoing dispute.[85] These communications must also not be disloyal, reckless or maliciously untrue.[86]The disloyalty towards an employer has been expanded to include activities that breach confidentiality and maliciously false accusations.[87] Leak of information obtained wrongfully or in confidence, even if the information is related to work conditions, is found to be unprotected.[88] On the other hand, not all false statements are

[81] *See F.W. Woolworth Co. v. NLRB*, 655 F.2d 151, 153-54 (8th Cir. 1981) (when balancing the interest of an employee's impulsive action, to ask questions at a meeting, and employer's interest in maintaining order, some leeway is given to the employee). Also, *NLRB v. Local Union No. 1229*, 346 U.S. 464, 473 (1953) ("employees are not given any right to engage in unlawful or other improper conduct.").
[82] Ogihara Am. Corp. & Int'l Union, 347 NLRB 110 (2006)
[83] Meyers Indus., 281 NLRB 882 (1986) ("appeals to legislators to protect their interests as employees are within the scope of [the 'mutual aid or protection'] clause.")
[84] Rural Metro 2011 WL 2960970 (N.L.R.B.G.C.)
[85] *See*, AM. Golf Corp., 330 N.L.R.B. 1238, 1240(2000). Also *NLRB v. Local Union No. 1229*, 346 U.S. 464(1953) (where employee's flyers criticizing the employer's programming was found to be unprotected)
[86] *See*, supra note 85, *Local Union No. 1229.*
[87] *See*, National Labor Relations Act § 7, 29 U.S.C. § 157; Pioneer Natural Gas Co. v. NLRB, 662 F.2d 408, 418 (5th Cir. 1981); TNT Logistics N. Am., Inc., 347 N.L.R.B. No. 55, 2006 NLRB LEXIS 287, at *7-*8 (July 24, 2006), available at http://www.nlrb.gov/nlrb/shared_files/decisions/347/347-55.pdf
[88] *NLRB v. Brookshire Grocery Company*, 919 F.2d 359, 363 (5th Cir. 1990)

unprotected. False statements lose protection when they are made with "actual malice" or recklessly. [89]

Another way an employee forfeits protection under the NLRA is by engaging in misconduct during the course of otherwise protected activity.[90] In order to determine whether the employee's conduct is so egregious that it deserves losing protection, the courts look at factors listed in *Atlantic Steel Co.*[91] The factors stated by the court are: (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.[92]

Also, although the NLRA was enacted before the widespread use of internet, Courts have not forbid electronic communications from being part of a protected activity.

NLRB's Categorization of an Employee's Social Activities

In recent years with the rise in the use of social websites to communicate and gather, the General Counsel has increasingly taken a stand against employer curbing protected activity over new mediums.[93] However, even when construed liberally, many online activities are not found to be protected but either a personal grievance or a rant.[94] The *American Medical* was one of the first cases that the NLRB filed against an employer for violating an employee's rights under

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[89] *Konop v. Hawaiian Airlines, Inc*., 302 F.3d 868, 883 (9th Cir. 2002) ("law protects even false and defamatory statements unless such statements are made with actual malice.....or with reckless disregard")
[90] Atl. Steel Co., 245 NLRB 814 (1979)
[91] *Id.*
[92] *Id.*
[93] Daniel B. Gilmore, *NLRB Continues Close Scrutiny of Policies that Limit Employee Communications Through Social Media*, (February 3, 2010), http://www.martindale.com/administrative-law/article_Chambliss-Bahner-Stophel-PC_1433318.htm.
[94] *See infra sections.*

NLRA for social networking activities.[95] However, the case was settled prior to completion of litigation and no legal conclusions could be drawn from it.[96]

The NLRA seeks to protect activities and communications fostering groups that attempt to improve working conditions. In order for an individual's online posting to be a protected activity it must fit the parameters set by precedent cases. One of the first requirements is that the activity must be engaged in a concerted manner.[97] At the same time, courts are willing to protect individual actions in limited circumstances. In order for an employee's online posting to be categorized as protected activity, the posting must further some group interest.[98] The posting also must precede some group discussion or the posting's purpose must be to "initiate, induce or prepare for group action.[99] In *Walmart,* an employee, after speaking to a newly appointed Assistant Manager, 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!"[100]

One of the two coworkers who commented on this post asked the poster why he was upset and the employee responded by making disparaging comments about the new manager including the criticisms given to him regarding his work by the manager.[101] Other coworkers also posted generally supportive comments. Eventually, a store manager learned of these comments and the original poster was fired.[102]

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[95] Julianne Pepitone, Facebook Firing Test Case Settled Out of Court, CNNMoney.com (Feb. 8, 2011, 1:44 PM), http:// money.cnn.com/2011/02/08/technology/facebook_firing_settlement/index.htm
[96] *Id.*
[97] 29 USC §157
[98] *Leslie* at 813
[99] Walmart, 2011 WL 3223852 (N.L.R.B.G.C.), 2 (citing *Meyers Indus*., 281 NLRB 882, 887 (1986))
[100] *Id.*
[101] *Id.*
[102] *Id.*

In its investigation the General Counsel found insufficient evidence of any "concerted activity". In the Counsel's opinion the comments were "solely by and on behalf of the employee himself".[103] Such comments/activities are gripes and not gripes are unprotected. [104] The employee's posting was a medium to express frustration lacking any inducement or encouragement for group action.[105] The responses that the poster was able to solicit showed that the coworkers either found the posting humorous or a plea for emotional support.[106]

Contrast this matter with *Hispanics United of Buffalo, Inc.,* where the court described the terminated employee's activities could be soliciting the support of coworkers.[107] After being criticized by a superior coworker, a employee posted on facebook,

"Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it. My fellow coworkers how do you feel about it."[108]

The posting received numerous comments from other workers at Hispanics United.[109] The coworkers severely criticized Ms. Cruz's interpretation of their workload. Some of them even described how they were overburdened by the high number of cases/programs each worker was handling.[110] The posting also received a reply from Ms. Cruz accusing the original poster of lying and stated, "I'll b at HUB Tuesday…"[111] All these posts and comments were made over a weekend and none of the employees used Hispanic United's computers.[112] Over the course of the

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[103] *Id.* at 2.; *see also Meyers I*, 268 NLRB at 497.
[104] *See Mushroom Transportation Co. v. NLRB,* 330 F.2d at 685.
[105] *Supra* note *103*
[106] *Supra* note 99 (One employee stated, "[H]ahaha like!". Another Employee stated, "[H]ang in there".)
[107] *Hispanics United of Buffalo, Inc. & Carlos Ortiz an Individual*, 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges) (Sept. 2, 2011)
[108] *Id.*
[109] *Id.* (E.g. Employee 1: "What the f…Try doing my job I have 5 programs", Employee 2: "What the Hell, we don't have a life as is, What else can we do???").
[110] *Supra* note *109*
[111] *Supra* note 107
[112] *Id.*

weekend, Ms. Cruz contacted the executive director of Hispanic United.[113] The subsequent Tuesday the poster and four other coworkers who had made comments criticizing Ms. Cruz were fired for comments made on facebook.[114]

Subsequently, the NLRB filed a complaint against Hispanics United and the organization was ordered to rehire the employees as it had violated section 8(a)(1) by interfering with the employee's section 7 rights.[115] A discussion of job performance between coworkers is a protected activity, even though it does not call for a change or improvement to their working conditions. [116] Further, the stated that "an employer violates Section 8(a)(1) in disciplining or terminating employees for exercising rights" despite lack of evidence suggesting that such discussions were being done with the intention of initiating a group action. [117] At the same time, under *Mushroom* the facebook discussions would also constitute an initial step towards group action.[118] The employer acknowledged that the five employees were fired solely because of their discussions.[119] These five terminated employees were engaged in a discussion of work related concern, and this the Board found to be a violation of Section 8 of NLRA.[120] The Judge dismissed any concerns of disloyalty or misconduct.

In both *Walmart* and *Hispanics United*, an employee posted comments on facebook after hearing critical remarks from a senior employee. In both matters, fellow coworkers further

[113] *Id.* ("Her text messages to Iglesias suggest that she was trying to get Iglesias to terminate or at least discipline the employees who posted the comments").
[114] *Supra* note 107
[115] *Id.*
[116] *Id* (citing *Aroostook County Regional Ophtalmology Center*, 317 NLRB 218, 220 (1995) enf. denied on other grounds 81 F. 3d 209(D.C. Citcuit)(1996)(where complained to each other about work schedule))
[117] *Supra* note 107
[118] *Id.*
[119] *Id.*
[120] *Id.*

continued the conversation by commenting. The key difference in the differing outcome is the intentions of the employee in *Hispanics United*. The employee clearly intended to raise an issue that would be common with other employees, while the employee in *Walmart* raised an issue that pertained specifically to him.[121] Another difference is the type and amount of response each posting received from the coworkers. In *Hispanics United*, the posting solicited comments/opinions of coworkers and, accordingly the employee received multiple input from his peers. On the other hand, the Walmart employee's posting appeared to speak for a group, however there was no group discussion behind it nor did the posting received anything more than supporting comments.

Engaging in protecting activity does not guarantee that an employee cannot be terminated. Protection can be lost if the communications reach to the "level of disparagement necessary to deprive other protected activities."[122] An employee engaging in protected activity also risks termination if parts of the activity are found unprotected.[123] In *Karl Knauz Motors*, a BMW salesman mocked his employer by posting multiple pictures of events and incidents taking place at the dealership. The first series of pictures depicted food arrangements made by the dealership to drum up customer interest in the launch of a new variation of high selling model.[124] This promotion was a significant event as it was the launch of the "bread and butter" product of BMW.[125] The pictures depicted an arrangement of Doritos, cookies, fruit platters along with a hot dog stand.[126] Comparatively, when a competitor was having a significant launch the dealership served hors d'oeuvres with servers. The BMW dealership's plan to serve substandard

[121] *See* supra.
[122] *Alled Aviation Service Company of New Jersey, Inc.* 248 NLRB 229, 331 (1980)
[123] Karl Knauz Motors, Inc., 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011)
[124] *Id.*
[125] *Id.*
[126] *Id.*

food was met with resistance by its employees; however, no changes were made. [127] The pictures of the event's food arrangements on facebook were accompanied by captions like:

"I was happy to see that Knauz went "All Out" for the most important launch of a new BMW.....The small 8oz bags of chips, and the $2.00 cookie plate from Sam's Club, and ...were a nice touch...but to top it all off... the Hot Dog Cart. Where our clients could attain a cooked wiener and a stale bunn"[128]

The pictures received numerous comments from the employee's facebook friends.[129] This series of pictures was followed by pictures of an accident that took place at the employer's sister Land Rover dealership.[130] A salesman at the Land Rover dealership, located next to the BMW dealership, allowed a 13 year old to sit in the driver seat, who inadvertently drove it into a nearby pond.[131] The second series of pictures depicted scenes from this accident with captions like:

"I love this one...The kid's pulling his hair out...what did I do? Oh no, is Mom gonna give me a time out"[132]

Multiple employees commented on this series of pictures. The day after the Land Rover accident pictures were posted, the employee's supervisor confronted him about 2 series of pictures.[133] The following week he was terminated. The NLRB concluded that the termination was based upon the latter series of pictures and found the discharge lawful. At the same time, the posting of food arrangements were seen as protected activity.

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[127] Karl Knauz Motors, Inc., 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011).
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*

Effect on Employer's Actions and NLRA

An employer has a genuine interest in monitoring certain actions of employees.[134] The employer has a large financial stake in protecting trademarks and confidential materials from leaking out.[135] However, an employer's monitoring of employee's sometimes fails the scrutiny under the NLRA.

The NLRA was established with the goal to foster group employee activities attempting to improve their working conditions.[136] Section 8(a)(1) of the NLRA states that "[i]t shall be an unfair labor practice for an employer-(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."[137] An employer retaliating or discriminating against an employee for engaging in 'protected activity' carries out unfair labor practice.[138] Further, the NLRA also limits actions of an employer which may inhibit the employees' rights. For example, an employer is restricted from monitoring or surveying union or organizing activities.[139] These surveillance acts are disallowed as any information gathered could be used towards future discriminatory acts by the employer.[140] Also, if employees are aware of such surveillance, they will be deterred from engaging activities even though they would be lawfully exercising their rights.[141] An employer also cannot engage in activities which creates the

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[134] *See Konop v. Hawaiian Airlines, Inc*., 236 F.3d 1035 (9th Cir. 2001); *U.S. v. Simons*, 206 F.3d 392, (4th Cir. 2000), cert denied 534 U.S. 930 (2001); *U.S. v. Bailey*, 272 F. Supp. 2d 822 (D. Neb. 2003); *Biby v. Bd. of Regents*, 419 F.3d 845 (8th Cir. 2005).
[135] *Konop* at 1035.
[136] 29 U.S.C.A. § 151.
[137] 29 U.S.C. § 158(a)(1).
[138] *Id*.
[139] See Konop v. Hawaiian Airlines, 302 F.3d 868, 884 (9th Cir. 2002) ("[E]mployer surveillance 'tends to create fear among employees of future reprisal' and, thus, 'chills an employee's freedom to exercise' his rights under federal labor law." (quoting Cal. Acrylic Indus. v. NLRB, 150 F.3d 1095, 1099 (9th Cir. 1998)))
[140] *Id.*
[141] *Id.*

"impression of surveillance".[142] Employees should feel free to participate in union activity "without the fear that members of management are peering over their shoulders [.]"[143]

Generally, when an employer observes open and public group activity, on or around its property it does not constitute a violation of section 8.[144] On the other hand, when an employer behaves out of the ordinary, like abandoning a pattern to observe employees, courts find it to be an unlawful surveillance.[145] An employer also engages in "unfair labor practices by eavesdropping on private conversations between employees".[146] This eaves dropping is akin to wrongly gaining access to online discussions where employer should not have access.[147] In *Konop*, a vice president improperly acquired credentials to enter a secured website made just for the pilots.[148] The employer continued to monitor interaction between employees and other possible union activities using the improper credentials.[149] The court stated that the monitoring of the website was unlawful as the maintenance and development could be protected activity. Although *Konop* applied the Railway Labor Act (RLA), the court used cases interpreting the NLRA to make its decision.[150]

As stated earlier, the employer is not only prohibited from monitor employee's group activities, but it is also forbidden from creating an impression of surveillance.[151] An impression of surveillance is created, when a supervisor implies to an employee that he has knowledge of the employee's involvement in a union or group activity, that is not generally known, but doesn't

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[142] Flexsteel Industries, 311 NLRB 257, 257 (1993).
[143] *Id.*
[144] *Snyder's of Hanover, Inc. v. N.L.R.B.*, 39 F. App'x 730, 735 (3d Cir. 2002)(quoting *Hoschton Garment Co*., 279 N.L.R.B. 565, 567 (1986))
[145] *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 229 F.2d 816, 818 (5h Cir. 1956)
[146] *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir.1995),
[147] *Konop* at 884 (9th Cir. 2002)
[148] *Id.* at 873.
[149] *Id.* at 882.
[150] *See Id.* at 882; *see also* 45 U.S.C. §§ 151-188
[151] *Supra* note 142

reveal the source of information.[152] This is because the employee can "reasonably assume from the [employer's] statement that their [sic]...activities had been placed under surveillance".[153] On the other hand, there is no impression of surveillance when the employer mentions an online posting forwarded to him by an employee, without revealing the name of the employee.[154] In *Frontier Telephone,* the website was accessible only to employees. The Board concluded that a reasonable employee would have assumed that the supervisor learned of the posting through another website subscriber, an employee who publicly revealed the information, rather than through surveillance of the website.[155] This is consistent with cases where the employer becomes apprised of an employee's activities after being informed by other employees.[156]

Based upon these cases, multiple general counsels have issued advice wherein private facebook postings were made public by coworkers who were 'friends'.[157] In *Public Service Credit Union*, the employer's privacy settings on facebook limited the visibility of his "venting posts" to only his "facebook friends".[158] The employee's supervisor was informed of postings disparaging a customer by a coworker. The supervisor then received printouts of the postings from another employee and confronted the poster in a meeting.[159] Subsequently, the employee was fired for making derogatory statements about customers.[160] There was a dispute as to whether these printouts were solicited, which could have been unlawful.[161] However, the

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[152] See, Stevens Creek Chrysler Jeep Dodge, 353 NLRB No. 132, slip op. at 3 (employer's failure to identify employee source of information was "the 'gravamen"' of an impression of surveillance violation).
[153] *Supra* note 142 at 257.
[154] See generally, Frontier Tel. of Rochester, Inc., 344 NLRB 1270 (2005)
[155] Frontier at 1276.
[156] Flexsteel at 257; Schrementi Bros., 179 NLRB 853 (1969).
[157] See, Public Service Credit Union, 2011 WL 5822506 (N.L.R.B.G.C.); MONOC, 2010 WL 6162573 (N.L.R.B.G.C); Buel, Inc., 2011 WL 3793671 (N.L.R.B.G.C);
[158] Public Service at 1.
[159] *Id.* at 3.
[160] *Id.*
[161] Public Service at 3; *See also* N. Hills Office Services, Inc. & Serv. Employees Int'l Union, Local 32b-J, 346 NLRB 1099 (2006) ("Volunteering information concerning an employee's union activities by other employees such

Counsel concluded that posting employee could not have reasonably concluded that his profile was being monitored by management as he had limited visibility to his 'friends'.[162] Similarly in *Monoc*, an employer got hold of emails and online postings between multiple employees.[163] These employees were specifically were advised that the information was received from another employee without solicitation.[164] The employees were suspended as their comments suggested they were not providing proper care to their customers.[165] Even though some of the activities that the employees were involved in were protected, the Counsel found the suspensions appropriate and did not find any improper impression of surveillance.[166]

In *Buel, Inc.*, there was no random employee providing a supervisor access to the charging party's facebook page, but the supervisor himself was friends with the employee, who was complaining about work, on facebook.[167] The employee resigned, after being demoted due to the facebook comments. The Counsel compared the acceptance of "friendship" on facebook to an invitation to a union meeting.[168] In *Donaldson Bros. Ready Mix, Inc.*, the NLRB found no unlawful surveillance when a supervisor, on invitation, attended a union meeting and reported on the meeting.[169] Akin to *Donaldson,* the supervisor in *Buel*, the Counsel concluded, was not on facebook for the sole purpose of monitoring employee postings.[170] By accepting his supervisor as a friend, the employee had essentially invited his supervisor to view his postings.[171] Thus, neither

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as occurred here, particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance.").
[162] Public Service at 4.
[163] MONOC at 1.
[164] MONOC at 2.
[165] *Id.*
[166] MONOC at 6.
[167] Buel at 1.
[168] Buel at 3; *Also* Donaldson Bros. Ready Mix, Inc. & Int'l Union of Operating Engineers, Local 400, Afl-Cio, 341 NLRB 958 (2004)
[169] Donaldson at 961.
[170] Buel at 3.
[171] *Id.*

the employer engaged in an unlawful surveillance nor was there an unlawful impression of surveillance.[172] On the other hand, in *Konop* the vice president became apprised of Konop's activities only after the supervisor compelled other employees to give him access to the website.[173] There, the Court concluded that it was a triable issue whether the employer interfered with organizing activities by wrongfully accessing Konop's website.[174]

Effect of NLRA on Employer's Policies

In order to minimize fallout from inadvertent employee behavior, increasing number of employers are outlining social media policies describing expectations from employees.[175] An overly broad policy dictating an employee's actions could come under the scrutiny of the NLRB for violation of Section 8(a)(1).[176] An employer violates section 8(a)(1) if a workplace policy or rule would "reasonably rend to chill employees in the exercise of their Section 7 rights."[177] There is two-step inquiry to establish if a rule would have such an effect.[178] First, a policy is unlawful if it clearly limits Section 7 activities.[179] Second, if the language of the policy does not clearly restrict protected activities, then it will be found unlawful only if one of the following conditions is met[180]. If the rule was enacted in response to section 7 activities or if the rule was used to restrict section 7 activities, the rule will be considered unlawful.[181] Also, if employees could

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[172] Buel at 3.
[173] *Konop* at 873.
[174] *Konop* at 883.
[175] Jordan Mccollum, *29% of companies have a social media policy*, marketpilgrim.com (February 4, 2010), http://www.marketingpilgrim.com/2010/02/29-of-companies-have-a-social-media-policy.html
[176] *See infra sections.*
[177] Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd., 203 F.3d 52 (D.C. Cir. 1999).
[178] Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004).
[179] *Id.*
[180] *Id.*
[181] *Id.*

reasonably construe the policy's language as prohibiting Section 7 activity, the employer will be found to be in violation of Section 8(a)(1).[182] While interpreting a policy, the Board reads the rule in context and not in isolation.[183]

Based upon this precedent, opinion memos by General Counsels have found many employers' social media policies in violation of Section 8. In *Flagler Hospital,* the media policy was found to be overbroad as one of the rules barred "statements which ...might cause damage to or does damage the reputation or goodwill of the Hospital."[184] Another rule barred using social media to "post any communication or post which constitutes embarrassment, harassment or defamation of the Hospital or of any employee.... or staff member".[185] One of the failures of these rules was they did not provide examples of behavior prohibited by the employer.[186] Similarly, in *Thomson Reuters*, the employer's social media guidelines disclosure of "confidential" or "sensitive" information.[187] This rule also did not provide any explanation as to what the Employer defined or considered to be confidential or sensitive.[188] While addressing this issue, the General Counsel stated that policies lacking limitations or examples could be reasonably considered by employees to cover protected activities and therefore such policies are unlawful.[189] A lawful policy, which cannot be construed to cover protected activity, should clarify the type of illegal or unprotected activities which the employer wishes to prohibit.[190] The policy in *Sears Holdings,* also banned "[d]isparagement of company's ... executive leadership,

[182] Lutheran at 646
[183] *Id.*
[184] Flagler Hospital, 2011 WL 5115074 (N.L.R.B.G.C.), 1
[185] *Id.*
[186] Flagler at 2.
[187] Thomson Reuters, 2011 WL 6960026 (N.L.R.B.G.C.), 4
[188] Thomson at 15
[189] *Id.*
[190] *Id.* Also, Sears Holdings (Roebucks), 2009 WL 5593880 (N.L.R.B.G.C.), 3

employees, [or] strategy".[191] When this rule is read in isolation, it could be construed as prohibiting protected activities. However, the rule was part of a list of examples that the employer frowned upon.[192] Amongst other subjects, the list prohibited posts discussing illegal drugs, explicit sexual references and posts disparaging any race, religion, gender, etc. Consequently, the employer's social media policy was found law abiding.[193]

In *Thomson* Reuters, the guidelines also prohibited communications that would embarrass, disparage, attack, insult or disparage the employer.[194] This rule was used by the employer to reprimand an employee for making comments about union discussions. This was an unlawful application of the overbroad policy.[195] Until recently, any punishment imposed under an overbroad policy was consistently found unlawful.[196] However recently the board found an employer's policy broad and unlawful yet a disciplinary action under the policy was found lawful.[197] A disciplinary action under an unlawfully broad violates the NLRA only if the employee violated the rule by engaging in protected activity or engaging in "conduct that otherwise implicates the concerns underlying Section 7 of the Act".[198] An employer can also avoid liability if it can show that the employee's activity interfered with his own work, other employee's work or with the employer's operations.[199] The basis of discipline in these instances must be the interference and not violation of employer's rules.[200]

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[191] Sears at 2.
[192] Sears at 3.
[193] *Id*.
[194] *See* Thomson generally
[195] Thomson at 15.
[196] *See*, e.g., Double Eagle, 341 NLRB at 112 fn. 3; Saia Motor Freight Line, 333 NLRB 784, 785 (2001); Opryland Hotel, 323 NLRB 723 (1997); A.T. & S.F. Memorial Hospitals, 234 NLRB 436 (1978); Miller's Discount Dept. Stores, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974)
[197] The Cont'l Group, Inc., 357 NLRB No. 39 (Aug. 11, 2011)
[198] *Id*.
[199] *Id*.
[200] *Id*.

Based on the board's ruling in *Continental*, the Associate General Counsel opined in *The Wedge Corporation* that the employer's rules were unlawfully overbroad, but the employee's online postings did not fit the parameters of the *Continental* test.[201] The employer's overbroad social media rules prohibited "inappropriate conversations" and "insubordination or disrespectful conduct.[202] An employee aired frustration about a coworker's conduct with customer's in a series of facebook postings. These postings were visible not only to some coworkers but also to a few customers.[203] Since complaints about quality of service are not considered a protected activity, the employee's discharge was found lawful.[204]

A disclaimer or savings clause in the employer's policy which provides exceptions for lawfully protected activities in the midst of overbroad rules does not sanitize the unlawful policy.[205] An employer cannot avoid liability on the basis of a savings clause by attempting to limit the scope of its rules as employees cannot be reasonably expected to know what would be protected within the realms of law.[206] In *Flagler Hospital*, one of employer's rule stated that, "Any conduct..... 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".[207] Based on other overbroad rules that the employer had in place and the lack of knowledge of NLRA on part of a reasonable employee, this rule was also found to be in violation of section 8.[208]

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[201] The Wedge Corp'n d/b/a The Rock Wood Fired Pizza & Spirits Continental 2011 WL 4526829 (N.L.R.B.G.C.), 2.
[202] Wedge at 1.
[203] *Id.*
[204] *Id., also* Five Star Transp., Inc. & Transp. Div., United Food & Commercial Workers Union, Local 1459, Afl-Cio, 349 NLRB 46 (2007)
[205] *See* Flagler at 3, *also* Giant Eagle, Inc., 2011 WL 5115076 (N.L.R.B.G.C.), 3
[206] *Id.*
[207] Flagler at 3.
[208] *Id.*

Conclusion

Social Networks have become an engraved part of our life. They connect us to others and have replaced the local bulletin boards. At the same time they provide an easy avenue where employees can falter and leak information that employers pursue to keep secret. Employers must devise social media policies to protect themselves and to provide employees guidelines describing the type of behavior condoned. At the same time, the policies should be careful to not intervene upon an employee's rights as it can place the employer on the wrong side of the law. This balancing of interests, though difficult, can and must be achieved in order to continue the balance of powers between employees and employers.