5-1-2013

The NLRA vs. The First Amendment: Which One Helps the Employee Who Loves Social Media?

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Introduction

"I'm not a teacher --- I'm a warden for future criminals! They had a scared straight program in school --- why couldn't i [sic] bring 1st graders?[1]" In March 2011 Jennifer O'Brien, a first grade school teacher in Patterson, New Jersey, posted this comment on her Facebook page commenting on her class and a program the school held for other students. While the audience of O'Brien's comment may have only been intended for a few "friends," the actual audience was anything but.[2] National news networks reported on the comment while parents and community organizers protested the behavior of the teacher.[3] Soon after the comment was made, O'Brien was suspended without pay, and administrative law proceedings commenced thereafter to determine whether probable cause existed to warrant her dismissal from her tenured position.[4]

Viki Knox, a teacher in Union, New Jersey, faced a similar fate as O'Brien when she posted a comment expressing her opinion concerning a display the high school devoted to the

[1] *Matter of Tenure Hearing (O'Brien)*, OAL DKT EDU 05600-1, 2011 WL 5429055, at *1 (N.J. Admin Oct. 28 2011).
[2] *See Id*. at *2; Joe Green, *Judge Rules Paterson, N.J. Teacher Jennifer O'Brien Can be Fired for Facebook Comments*, NEWSROOM JERSEY (Nov. 10, 2011), http://www.newjerseynewsroom.com/state/judge-rules-paterson-nj-teacher-jennifer-obrien-can-be-fired-for-facebook-comments.
[3] *Id*. at *3.
[4] *Id*. at *1.

Lesbian Gay Bisexual Transgender History Month.[5] Similar incidents of employees posting comments that spark a firestorm of debate among the public community have also been reported across the country, and while some employers have responded with appropriate social media policies, this new area of law ignites debate over the constitutional and labor rights of employees in general.[6]

This paper attempts to address this new area of social media output and federal employment law. Should employees be subject to discipline for what they say on Facebook? What are the potential free speech implications for taking action against what employees say after hours, and for what is only intended to be said among a few "friends?" This paper will then address what other potential labor issues a private employer can face if they fire an employee for what he or she says on a social media site. Finally, this paper will compare and contrast private employees' rights with public employees' rights to determine which employees' speech is protected more.

To answer these questions this paper will first review the free speech laws in the employment context. It will then address the private and public employment distinction in the law, and how the distinction affects employees in their social media interactions. Finally, this paper will examine how private employees have tackled social media problems, and compare

[5] Bob Considline and Jessica Calefati, *School Board Files Tenure Charges Against N.J. Teacher Who Made Anti-Gay Comments on Facebook*, N.J.COM (Jan. 12, 2012), http://www.nj.com/news/index.ssf/2012/01/school_board_files_tenure_char.html (Knox posted, "Why parade your unnatural immoral behaviors before the rest of us?... I DO NOT HAVE TO TOLERATE ANYTHING OTHERS WISH TO DO. I DO HAVE TO LOVE AND SPEAK AND DO WHAT'S RIGHT!").

[6] *NJEA Members: Tips for Twitter and Facebook*, NJEA, http://www.njea.org/resources/~/link.aspx?_id=C7C0D97FC1D74C6D9B918E6BA12A87BF&_z=z

which approach, the private approach or the public approach, better protects employees' speech on Facebook.

A. General Free Speech Overview

1. Public Employment

While the First Amendment explicitly states that "Congress shall make no law… abridging the freedom of speech," the protections of the First Amendment are in no way absolute, especially in the context of employment.[7] Generally speaking, "employees have the right to speak on matters of public concern."[8] To determine when an employee's right can be enforced against adverse employment actions, the Supreme Court conducts a balancing test taking into account both the State's interest as an employer and the employee's First Amendment protections.[9]

> "[T]he State has interest as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."[10]

This *Pickering* balancing approach has been refined and applied by the Supreme Court in a two pronged analysis articulated in *Connick v. Myers*.[11] First, the Court analyses whether the speech

[7] U.S. CONST. amend I; *see City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (holding that the State employer can "impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public[;]" *see Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Ill.*, 391 U.S. 563, 568-69 (1968); *see also, Waters v. Churchill*, 511 U.S. 661 (1993).
[8] *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004).
[9] *Pickering*, 391 U.S. at 568;
[10] *Id.*
[11] *Connick v. Meyers*, 461 U.S. 138, 146 (1983).

at issue can be "fairly characterized as constituting speech on a matter of public concern."[12] If the speech at issue is not characterized as such, then the Court does not need to examine the adverse employment action taken by the employer under free speech grounds.[13] The Court reasoned that this characterization test is necessary in order to prevent a flood of constitutional challenges taken anytime that a state employee was disciplined for what he or she said. [14]

If the speech at issue does touch "upon a matter of public concern," and the speech contributed to an adverse employment action, the Court must then "reach the most appropriate possible balance of the competing interests," those being that of the employee's free speech interest with the "government's interest in the effective and efficient fulfillment of its responsibilities to the public."[15]

While not addressing social media output, the Supreme Court stated that the second step in the public employee free speech balancing test is only applied "when the employee speaks as a citizen upon matters of public concern rather than as an employee upon matters only of personal interest."[16] Determining whether speech is a "matter of public concern" in the social media age can potentially prove problematic.[17] Courts must determine whether an employee who uses

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[12] *Id*.
[13] *Connick*, 461 U.S. at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government official should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."
[14] *Id*. at 149. ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark- and certainly ever criticism directed at a public official- would plant the seed of a constitutional case…the First Amendment does not require a pulic office to be run as a roundtable for employee complaints over internal office affairs.")
[15] *Id*. at 150-51.
[16] *City of San Diego*, 543 U.S. at 83 (2004).
[17] *See Matter of Tenure Hearing (O'Brien)*, OAL DKT EDU 05600-1, 2011 WL 5429055, at *2 (Determining that O'Brien "took a legitimate issue of public concern 'and distorted [it] into a vehicle' to let her more than 300 Facebook 'friends' know she was having a bad time at work.")

social media is truly expressing a matter of public concern when they do so, or rather, if they are "distorting" matters of concern into a "vehicle" to complain about work.[18] Courts arguably have the most difficult time determining whether this aspect of the *Connick* analysis has been met.[19]

In *City of San Diego* the Supreme Court had to address whether a police officer's sexual videos sold online were "matters of public concern" and if so, whether he could be fired from his state employment.[20] The police officer in *City of San Diego* was fired because he sold videos of himself stripping in a police uniform, and he also had an online forum where he sold official police uniforms, and other official police equipment of the San Diego Police Department.[21] The Court outlined the reasons for protecting State employees' First Amendment rights, stating, "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issue."[22] The Court focused on the interest of the public in allowing public employees to speak on important issues, reasoning that "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[23]

Determining what speech qualifies for protection, the Court examined "the 'content, form, and context of a given statement, as reveled by the whole record.'"[24] Examples of speech that the

[18] *Id*.
[19] *See* Elizabeth J. Bohn, *Put on Your Coat, A Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in Tenth Circuit First Amendment Retaliation Claims*. 83 DENV. U. L. REV. 867, 869 (2006).
[20] *City of San Diego*, 543 U.S. at 78.
[21] *Id*. at 78.
[22] *Id*. at 83.
[23] *Id*.
[24] *Id*. at 83 (citing *Connick*, 461 U.S., at 146-47.)

Court gave that are "matters of public concern" included comments about the President of the United States, and statements that are the "subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[25] In *City of San Diego*, the Court found that sexual videos being sold online were not matters of public interest and no balancing of the interests was necessary.[26]

While the actual speech at issue in *City of San Diego* was not a Facebook post, it was a form of Internet communication engaged in during off-work hours.[27] So while employees may not be on the clock when they are posting status updates on Facebook, they can still be held accountable by their employers for what they say online, if what they say does not fall into a "matter of public concern." However, even if what a public employee says online can qualify as a "matter of public concern," the government employer's interest may be so great, that it can overcome the constitutional interests of the employee.[28]

In the school context, courts are hesitant to protect the free speech of a teacher when the comments made by the teacher have interfered with the purpose of a school.[29] The *O'Brien* court rejected the argument that the speech at issue was a matter of public concern, however, the court held that even if the speech was a matter of public concern, the State's interest would still prevail because of the setting the employee worked in. What can be derived from this particular case is that the public employee may have more or less restraints on his or her free speech protections depending on the type of position they serve for the state.

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[25] *Id*. at 83-84
[26] *Id*. at 84.
[27] *Id*. at 78.
[28] See *Matter of Tenure Hearing (O'Brien)*, OAL DKT EDU 05600-1, 2011 WL 5429055, at *2-3 (While the Court ultimately held that the employees comments were not matters of public concern, they still engaged in a Pickering analysis, holding that the employers interest outweighed the interests of the employee.)
[29] *See generally, id.*

For schools, the *O'Brien* court stated that "restraints on speech have particular applicability in a school setting, where a teacher, like O'Brien, is responsible for nurturing young children, and must work in concert with administrators, parents and the community at large to promote student success."[30] The importance of the school setting in the determination of free speech infringements is also seen by the deference courts give to the findings of the arbitrators.[31] In some states, like New York, great deference is given to the findings of arbitrators in determining whether free speech rights have been violated. There, courts will not even examine the free speech arguments if the hearing officers determine that the comments were not a matter of public concern.[32]

In different contexts however, courts may not give the same deference as they would for a school.[33] In *Mattingly*, the Eastern District of Arkansas held that an employee's complaints[34] about the firing of other co-workers in the Circuit Clerk's office were matters of public concern. Even though multiple phone calls were made by the public to the Circuit Clerk's office criticizing the Clerk for firing employees, the court found that the posts did not "'adversely affect[] the efficiency of the Circuit Clerks office.'"[35] No special weight was given to the Circuit Clerk's office in the *Mattingly* opinion so as to allow for the employer to justify the firing in relation to a Facebook post.

While not about social media output, in *Rankin v. McPherson*, the Supreme Court held that when "an employee serves no confidential, policymaking, or public contract role, the danger

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[30] *Id*.
[31] *See Rubino v. City of New York*, No. 107292/11, 2012 WL 373101, at *5 (N.Y. Gen. Term Feb. 1, 2012).
[32] *See Id*.
[33] *See Mattingly v. Milligan*, 4:11CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011).
[34] *Id*. at *2. (Employee posted after co-workers were fired, "my heart goes out to the ladies that were told by letter they were no longer needed… It's sad").
[35] *Id*. at *4 (quoting *Shockency v. Ramsey Cnty*, 493 F.3d 941, 949 (8th Cir. 2007).

to the agency's successful functioning from that employee's private speech is minimal."[36] The Court went further and stated that "[w]e cannot believe that every employee in [the law enforcement] office, whether computer operator, electrician, or file clerk, is equally required, on pain of discharge, to avoid any statement susceptible of being interpreted by the Constable as an individual that the employee may be unworthy of employment in his law enforcement agency."[37] *McPherson* explains that it is not only the actual place of work that is taken into account when examining the employer's interest for the purposes of *Pickering*, but the type of work the employee at issue performs. A teacher, therefore, may be restricted from what he or she says online, more so than another employer, like the office clerk in *McPherson*. This does however, create some discrepancies as to how to apply the balancing test concerning social networking sites.[38]

2. The Public and Private Employment Distinction

The First Amendment protects individuals from government infringements.[39] Generally speaking the First Amendment does not protect against private employers adverse employment actions taken against employees for things said on social media sites.

In the private sphere, employees do not enjoy the same First Amendment protections that many public employees enjoy. [40] However, the NLRB similarly protects employees who speak

[36] 483 U.S., 378, 390-91 (1987)
[37] *Id*. at 391.
[38] *See* Patricia M. Nidiffer. *Tinkering with Restrictions on Educator Speech: Can School Boards Restrict What Educators Say on Social Networking Sites?,* 36 U. DAYTON L. REV. 115, 129 (2010)
[39] U.S. CONST. amend I; *See Lloyd Corp., v. Tanner,* 407 U.S. 551, 567 (1972).

out on Facebook about their work, but uses different reasoning than courts use for public employees.[41]

B. The National Labor Relations Act and Employee Speech

While private employees may not have the same First Amendment protections against adverse employment actions as public employees, private employees may use the National Labor Relations Act as a means to protect what they say off hours on social media sites.[42] Public employees cannot use the NLRA against their public employers because Section 2(2) excludes "any wholly owned Government Corporation, or any Federal Reserve Bank, or any State of Political subdivision thereof" from the protections of the act.[43] Section 7 of the NLRA lists the rights that are guaranteed to employees while section 8(a)(1) declares that employer interferences with employee Section 7 rights is an unfair labor practice. Included in an employees Section 7 rights is the right "to engage[] in … concerted activities for the collective bargaining or other mutual aid or protection."[44] The term "concerted activity" has never been explicitly defined by congress, and there has been a variety of activity that has been determined to be protected by the NLRB and the Supreme Court under this term, opening up debate over what the phrase truly covers.[45]

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[41] William C. Martucci, *Hiring and Firing in the Facebook Age (with Sample Provisions),* Prac. Law October 2010, at 19, 25 ("Public employers must also be cognizant of First Amendment limitations on their ability to discipline employees who speak out on matters of public conern. For private employers, free speech normally is not an issue since the First Amendment only applies to state action and not to private conduct.")

[42] *See Karl Knauz Motors, Inc.*, 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011).

[43] National Labor Relations Act § 2(2), 29 U.S.C. §152(2) (2012)

[44] National Labor Relations Act §7, 29 U.S.C. § 157 (2012); National Labor Relations Act § 8, 29 U.S.C.. 160 (2012)

[45] *See* Robert Sprague. *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices,* 14 U. PA. J. BUS. L. 957, 959 (2012) ("The term "concerted activities" is not defined by the NLRA and has been the subject of challenging interpretations and debate.")

After the advent of Facebook and the growth of policies issued by employers restricting employees' activities on social media sites, the NLRB has received hundreds of charges by employees concerning adverse employment actions taken for updates on Facebook, and employee complaints over their employer handbooks restricting the speech of employees on social media sites.[46] This suggests that the area surrounding private employment, social networking sites, and employee activity is still unclear with regards to what an employer can and cannot restrict.[47]

Some of the debate over what employees post online and whether an employer can take adverse action against employees surrounds their employer's social media policy handbook.[48] The General Counsel for the NLRB has found that in cases addressing social medial policies, an employer can violate section 8(a)(1) of the act if their policy is found to be too broad.[49] The General Counsel articulates that "[a]n employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would reasonably tend to chill employees in the exercise of their Section 7 rights."[50] To determine whether a policy or rule will chill an employee's Section 7 rights, the Board takes a two-prong approach.[51] First the Board determines if the policy "explicitly restricts Section 7 activity." Then, if the rule does not restrict Section 7 activity explicitly, the policy "will violate the Act only upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule

[46] *See Id*. at 957.
[47] *See Id*. (Employee's charges over social media activity "raise concerns over the enforcement of overly broad social media policies by employers.")
[48] *See Id*. at 966.
[49] Advice Memorandum from the NLRB Office of the Gen. Counsel to Karen Fernback, Acting Regional Director of Region 2, Thomas Reuters, No. 02-CA-39682, 2011 WL 6960026, at *5 (Apr. 5, 2011).
[50] *Id*. at 14.
[51] *Id*.

was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[52] The General Counsel has held that policies can still be legal while the Guidelines associated with the policies can violate Section 7 rights under the two-prong analysis.

The General Counsel stated that using broad terms like prohibiting "against embarrassing or disparaging the employer" or restricting comments "that would damage the reputation of the Employer," either in the policy portion of the handbook or in the guideline portion of the handbook, would violate Section 7 rights under the second prong of the two prong approach.[53]

In approaching a handbook case, the Office of the General Counsel struck down provisions of an employee hand book that prohibited employees "from using any social media… that 'may in any way violate, compromise, or disregard … the rights and reasonable expectations as to privacy or confidentiality of any person or entity.'"[54] In Flagler Hospital, the Office of the General Counsel also stuck down two more provisions of an employer social media handbook, that first restricted "'[a]ny communication or post which constitutes embarrassment, harassment or defamation of the Hospital' or of 'any employee, officer, board member, representative or staff member,'" and second restricted "'statements which lack … truthfulness or which might cause damage to or does damage the reputation or goodwill of the Hospital.'"[55] Here the General Counsel struck down all three provisions as being over broad, however, the General Counsel gave no guidance as to what an appropriate employee handbook should be. In the context of employee handbooks, cases like Flagler Hospital provide little guidance to employers who want

[52] *Id*.
[53] *Id*. at 15.
[54] Advice Memorandum from the NLRB Office of the Gen. Counsel to Rochelle Kentov, Acting Regional Director of Region 12, Flagler Hospital, No. 12-CA-27031, 2011 WL 5115074, at *2-3 (May 10, 2011).
[55] *Id*.

to create a comprehensive social media policy for their employees. Even though the cases provide some help in determining what employers should not say, there is little advice on what employers can say.

While the cases addressing employer social media policies do not help employers completely in their ability to restrict their employees' actions on Facebook, there has been some guidance provided by the General Counsel in other contexts. The three cases discussed below do not address the NLRA through an employee handbook analysis, but rather outline how the Board analyzes Facebook posting in the absence of any employee policy or in the presence of an unlawful or ambiguous policy.

The Supreme Court has held that an employee can still engage in concerted activity even if the employee is acting alone.[56] Also, the NLRB as well as multiple courts have held that various amount of activities can be interpreted as "concerted activities" that are protected under NLRA.[57] Such broad interpretations have laid the groundwork for the NLRB to conclude that social media output can, in certain circumstances, be protected under the NLRA even if there is no social media policy handbook in place restricting the comments of the employees.[58]

In *Knauz Motors*, an employee posted various pictures of events taken at his work place and then posted comments about the pictures on his Facebook profile.[59] In the Board's ultimate holding, one set of comments made by the employee was protected under the NLRA while another set was held to be unprotected. One set of pictures and comments related to a

[56] *See NLRB v. City Disposal Systems Inc*., 465 U.S. 822 (1984)
[57] *See i.e. Eastex v. NLRB*, 437 U.S. 556 (1978)*; see i.e., Timekeeping Systems, Inc.*, 323 NLRB 244, 249 (1997).
[58] *See Knauz Motors*, 13-CA-4652, 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011).
[59] *Id*.

promotional event his workplace held while another was of an accident that took place at work.[60] The promotional event served food that was dissatisfying to the employee, who stated below a picture of the event, "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 over cooked wiener and a stale bun." There were multiple other comments made by the employee and others over the series of pictures that the employee posted online. The second set of posting at issue in the *Knauz Motors* case dealt with an accident at work, in which a teenager was allowed behind the wheel of a car and ran over a customer's foot. The employee stated, "[t]his is what happens when a sales person sitting in the front passenger seat … allows a 13 year old boy to get behind the wheel of a 6000 lb. truck … The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOPS!" Multiple comments were made by "friends" of the employee on Facebook in connection to this event, including other employees of the company.

The Board addressed both comments made by the employee by first determining whether the activity at issue was "concerted activity" for the purposes of the NLRA.[61] The Board quoted a Ninth Circuit case to support the conclusion that Facebook comments could be concerted activity, stating "the 'activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity."[62]

For the promotional event, the Board noted that it was important that the employee had previously complained about food being served at the first event at issue, stating, "[t]he lone act

[60] *Id*.
[61] *Id*.
[62] *Id*. (quoting *NLRB v. Mike Yurosek & Son, Inc*., 53 F.3d 261, 265 (9th Cir. 1995)).

of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity." [63] Furthermore, the Board also found that his complaints connected to his wage or benefits. The Board reasoned, "there may have been customers who were turned off by the food offerings at the event and either did not purchase a car because of it, or gave the salesperson a lower rating in the Customer Satisfaction Rating because of it."[64]

For the Facebook postings about the car accident, the Board outright rejected any argument that the posting was concerted activity related to wages or terms of employment. The posting, according to the Board, did not relate to any discussion the employee ever had with the employer or other employees. The Board also did not find any connection to the terms and conditions of employment so as to deserve protection under the NLRA.[65]

It is also important to note that even if the Facebook activity is "concerted activity" for the purposes of Section 7 of the NLRA, an employee can still lose the protections of the Act if the comments "rose 'to the level of disparagement necessary to deprive otherwise protected activities".[66] In *Knauz Motors*, the Board went into an analysis to determine whether the comments made about the promotional event were characterized in such a way as to lose the protections of the NLRA. The Board acknowledged that the employee used a "mocking and sarcastic tone" but that such tone did not rise to the level as to "deprive the activity of the protection of the Act."[67]

While, in theory, it may possible for an employee to lose the protections of the NLRA through necessary disparagement, in practice, the General Counsel has actually allowed the

[63] *Id*. (internal quotations omitted.)
[64] *Id*.
[65] *Id*.
[66] *Id*. (quoting *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229, 231 (1980)).
[67] *Id*.

Facebook comments to go quite far.[68] In the AMR Adv. Mem., the General Counsel stated that a Facebook conversation in which an employee called her supervisor a "dick" and a "scumbag" did not raise to the level of disparagement that would lose the protection of the act. Specifically, the AMR Adv. Mem. looked at four factors to determine when an employee, while engaging in protected activity "has by opprobrious conduct lost the protection of the Act: (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."[69] Here, despite the inappropriate language used by the employee, the Office of the General Counsel held that, "the name-calling was not accompanied by any verbal or physical threats, and the Board has found more egregious name-calling protected." The Office also took into account the fact that the comments were made in an online forum, and multiple people, including former co-workers engaged in conversation through Facebook.[70]

In advising a Region as to how to decide another Facebook case more similar to *Knauz Motors* than to the AMR Adv. Mem., the Office of General Counsel for the NLRB issued an opinion that mirrored the *Knauz Motor* analysis.[71] The General Counsel was asked to issue advice for the Region for a case in which an truck employee posted online, "[H]ow the hell are you suppose to call in to your company dispatch and tell them anything when no one is there and the phone were not forwarded…Well if Im [sic] or any other drive for our company is late it will

[68] *See* Advice Memorandum from the NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg, Regional Director of Region 34, American Medical Response of Connecticut, Inc., No. 34-CA-12576 at 9 (Oct. 5, 2010) [hereinafter AMR Adv. Mem.], available at http://mynlrb.nlrb.gov/link/document.aspx/09031d458055b9c4; see also Complaint and Notice of Hearing, Am. Med. Response of Conn., Inc., No. 34-CA-12576 (N.L.R.B.G.C. Oct. 27, 2010)
[69] *Id*. at 9.
[70] *Id*. at 9-10.
[71] *See* Advice Memorandum from the NLRB Office of the Gen. Counsel to Jane North, Acting Regional Director Region 11, Buel, No. 11-CA-22936, 2011 WL 3793671 (N.L.R.B.G.C. July 28, 2011).

be your fault for not properly forwarding the phones on the call dispatch!"[72] Despite the direct reference to a problem and issue with his work, the General Counsel advised that no concerted activity had occurred because the employee "did not discuss his Facebook posts with any of his fellow employees and none of his coworkers responded to his complaints about work-related matters… [and that] there is insufficient evidence that his Facebook activity was a continuation of any collective concerns." The General Counsel also found that the comment was more of an expression of "his own frustration and boredom while stranded by the weather."[73] The General Counsel reasoned that protected activity "includes 'circumstances in which the employees seek to initiate or to induce or to prepare for group action' and where individual employees bring 'truly group complaints' to management's attention."[74]

What can be concluded from these two cases is that the NLRB has created a very fact-sensitive analysis for determining whether a social media update during off hours is a protected activity under the NLRA. Despite the fact that in both cases the employees were discussing issues they had with work, the Board and the General Counsel seem to find the actions of the employees before they posted any comments online, and the connection to terms and conditions of employment, to be the main determining factors in deciding the protected status of a comment. Also relevant, was whether any other employee participated in the Facebook comments. Neither case however, outlines or acknowledges the interests of the employer within the context of the First Amendment.

[72] *Id*. at *1.
[73] *Id*. at *2.
[74] *Id*.

Another issue not addressed by the two cases discussed above but also relevant to employee Facebook postings, is the issue of unlawful surveillance.[75] In the MONOC advisory opinion, the Regional Director addressed a nurse's Facebook posting that, according to the employer, were potential threats to withholding patient care.[76] The employer became aware of the Facebook postings by the nurse employee when another employee contacted upper management about the online communications.[77] The only individuals that were authorized to see the nurse employee's Facebook postings were authorized "friends," which included some co-employees.[78] The nurse employee alleged that the employer obtained the Facebook post through employer monitoring of the employees actions, which would be a violation of Section 7 rights, or rather, the right for employees to "feel free to participate in union activity 'without the fear that members of management are peering over their shoulders[.]'"[79] The Regional Director stated that such a violation occurs when "[a]n employer creates an impression of surveillance when 'the employee would reasonable assume from the [employer's] statement that their [sic] union activities had been placed under surveillance."[80]

In the MONOC advisory opinion, the Regional Director announced that when an employer finds or obtained Facebook postings through the voluntary actions of another employee,

[75] Advice Memorandum from the NLRB Office of the Gen. Counsel to J. Michael Lightner, Regional Director of Region 22, MONOC, No. 22-CA-29008 2010 WL 4685855 at *1 (N.L.R.B.G.C. May 5, 2010).
[76] *Id*.
[77] *Id*. at 5-6.
[78] *Id*. at 2.
[79] *Id*. at 5.
[80] *Id*.

the findings would not constitute the impression of surveillance that would rise to a violation of Section 7 rights.[81]

While the MONOC case did not find employer surveillance, the rule articulated by the Regional Director did not address a scenario in which the employer forces an employee to provide them with their Facebook passwords, or access to their Facebook pages. The MONOC advisory opinion seems to suggest that such force, especially if the employer's Facebook page was extremely limited to a small audience, would constitute a violation of Section 7 activity as unlawful surveillance.[82]

C. The Differences and Similarities Between the Private and Public Employment: Who Protects Speech Better?

Private and public employees are both protected in what they say about their work on their social media sites in different ways. The protection that each employee has is limited dependent upon what laws applies to his or her employer. Analyzing a public employee's conduct on social media sites is different and similar than analyzing a private employee's conduct in five ways: 1. the public employee must take into account the public interest in his or her statement, while the private employer must be wary to take action against their employees interest in the terms and conditions of employment; 2. the public employee does not have to examine how many people commented or participated in the discussion online for protection, while the private employee should take into account whether other employees will respond to the message; 3. both the courts and the Board draw distinctions between "frustrations" and true

[81] *Id*. ("Here the employer did not actually engage in surveillance; instead it obtained [the nurse employee] Facebook pages and e-mails from other employees without soliciting them.")
[82] *See id*.

complaints by looking at the entirety of the statement at issue; 4. the potential surveillance issue for both public and private employees; and 5. the courts balance the interest of the public employer against the employees interest, whereas the Board does not take into account the employer's interest.

1. The Public Interest vs. The Employees Labor Interests

When analyzing free speech claims against employers by employees, the Supreme Court remains cognizant of the public's interest in public employee's speech.[83] In *City of San* Diego, the Court articulated that "[u]nderlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations that are of substantial concern to the public."[84] The Court also states that "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." Additionally, in *McPherson*, the Supreme Court looks towards the overarching principals of free speech, stating that "[d]ebate on public issues should be uninhibited, robust, and wide-open, and… may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[85]

In the context of private employment, the Board does not look towards the public's interest in the free speech of private employees. Neither case addressing Facebook postings without a social medial policy articulated a standard based on any interest of the public.

However, *Knauz Motors* addressed how difficult it would be to strip the protection of the NLRA from actions deemed to be concerted for the purposes of the employees' mutual aid or

[83] *City of San Diego*, 534 U.S. at 82.
[84] *Id*.
[85] 483 U.S. at 387.

protection.[86] The underlying rational in the *Knauz* case was not whether the public had an interest in what the employee was saying, but rather, whether the statement made sought "to initiate or to induce or to prepare for group action" for the purposes of the employees' mutual aid and protection, like wages or other benefits.[87] The private employer, must remain wary of comments made by their employees that affect all employees rights to engage in group activity, where as the public employer should be cognizant as to whether an employee is speaking out about an issue of public concern. However the standard for determining whether a public employee is speaking as to a matter of public concern is anything but clear.[88]

2. The Number of Participants

How many comments one may get on a Facebook status or photo may make or break the determination as to whether a comment will be protected under the NLRA.[89] In the Buel Advisory Opinion issued by the General Counsel of the NLRB, an employee's Facebook comment was not protected because "none of [the employee posting on Facebook's] coworkers responded to his complaints about work related matters. Although he had discussed the fact that the on-call dispatcher was not reachable with other drivers, there is insufficient evidence that his Facebook activity was a continuation of any collective concerns."[90] While other evidence may have supported the conclusion that the activity was a "continuation of any collective concern," other employees commenting on a status could have supported a finding of a Section 8(a)(1)

[86] *Knauz Motors*, 13-CA-4652, 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011).
[87] *Id*.
[88] *See* Elizabeth J. Bohn, *Put on Your Coat, A Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in Tenth Circuit First Amendment Retaliation Claims*. 83 DENV. U. L. REV. 867, 869 (2006).
[89] *See* Advice Memorandum from the NLRB Office of the Gen. Counsel to Jane North, Acting Regional Director Region 11, Buel, No. 11-CA-22936, 2011 WL 3793671, at *2 (N.L.R.B.G.C. July 28, 2011).
[90] *Id*.

violation by the charging party. While in *Knauz Motors*, the NLRB did not hold that the comments on the Facebook page of the employee were dispositive, the employee at issue in that case was friends with other coworkers and had even posted pictures of them at the events at issue online.[91]

While the *O'Brien* court did acknowledge how many Facebook friends the public employee had at issue, it was not related to whether the speech was of the type that could be protected under the First Amendment, but rather, whether the speech adversely affected the employer.[92] In *O'Brien*, her potential issue was the opposite of the problem in the opinion issued by the General Counsel for the NLRB. Her Facebook posts caused too much disruption, and was a factor the court considered in supporting the school's decision to fire her.[93]

Generally speaking, private employees, if they want to gain protection under the NLRA for what they say on Facebook, should take into consideration the number of co-workers participating in the online conversation where as public employees should be wary of how many people, or "customers," may have access to their statements.

3. The Context of the Statement

Both the NLRB and courts look towards the context of the statements at issue to determine whether an employee is truly expressing a grievance or whether they are just taking out their frustrations on Facebook. In the Buel Advisory Opinion issued by the General Counsel of the NLRB, the Counsel reasoned that protection should not be extended to the employee at

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[91] *Knauz Motors*, 13-CA-4652, 2011 WL 4499437 (N.L.R.B. Div. of Judges Sept. 28, 2011).
[92] *O'Brien*, OAL DKT EDU 05600-1, 2011 WL 5429055 at *2-3.
[93] *See Id*. at *7 ("Indeed, while First Amendment protections do not generally rise and fall on public reaction, or on whether the words used were offensive, in a public-education setting thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools. Our courts have recognized that a 'public employer may, consistently with the First Amendment, prohibit its employees from being 'rude to customers.'") (quoting *Waters v. Churchhill*, 511 U.S. 661, 672 (1993)).

issue because he "plainly was not seeking to induce or prepare for group action. Instead, he was simply expressing his own frustration and boredom while stranded by the weather, by griping about his inability to reach the on-call dispatcher."[94] Similarly, a review of the NLRB cases that have address charges similar to the one addressed by the General Counsel revolve around statements of employees "griping about work and getting fired for it."[95]

In the public employment context, workers must also worry about whether their statements can be taken as actual "matters of public concern," or just complaints about their work. In *O'Brien* the court found that the comments the public employee made were not matters of public concern so as to qualify for the protections of the First Amendment.[96] There the court found that the employee "took a legitimate issue of public concern and distorted [it] into a vehicle to let her more than 300 Facebook 'friends' know she was having a bad time at work."[97]

Both the NLRB and the *O'Brien* court looked towards the context of the statement by examining the surrounding circumstances the employee was in when they wrote the comments to determine whether they were venting frustration, or if they were truly engaging in protected activity. In *O'Brien* the court examined the teacher's testimony and found that she could not establish that "she ardently wanted the public to know more about the correlation between classroom behavior and academic performance."[98] Without such testimony, the court did not conclude that the statements made online crossed the threshold of only speaking upon matters of

[94] *See* Advice Memorandum from the NLRB Office of the Gen. Counsel to Jane North, Acting Regional Director Region 11, Buel, No. 11-CA-22936, 2011 WL 3793671, at *2 (N.L.R.B.G.C. July 28, 2011).
[95] Robert Sprague. *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. Pa. J. Bus. L. 957 (2012).
[96] *O'Brien* OAL DKT EDU 05600-1, 2011 WL 5429055, at *6 ("the *Pickering* test is applicable 'only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'") (quoting *City of San Diego*, 543 U.S. at 83.).
[97] *Id*. (internal quotations omitted.)
[98] *Id*. at 6.

personal interest, into matters of public concern.[99] In the Buel Advisory Opinion issued by the General Counsel, the court looked at what the employee was doing at the time he wrote the Facebook status, and held that the employee was ultimately just frustrated about being out in the cold, and therefore did not cross the threshold into "concerted" activity.[100] If instead, the employee attempted to use his own particular situation as a way to engage other co-workers into convincing the employer to keep the employees out of the cold, then the General Counsel may have found differently.

4. Surveillance

None of the cases addressing the First Amendment and public employment took issue with the potential surveillance issues that can come up after an employer takes adverse actions against an employees' Facebook posting. However, in the private sector, employers should stay conscious of the way they obtain their employees' Facebook postings so as to be aware of the potential violation of Section 7 rights. While the NLRB has yet to address a case that is different than a supervisor obtaining a Facebook comment through another co-worker or through their own access to an employee's Facebook page, it is possible that the Board may find surveillance to exist if other means are used to obtain an employee's Facebook information.[101]

Another potential issue that surveillance brings up in the private employment context is whether the General Counsel's advisory opinions addressing the issue have opened the door to chilling the labor rights of individuals. By finding that employers who have obtained Facebook

[99] *See Id*.
[100] *See* Advice Memorandum from the NLRB Office of the Gen. Counsel to Jane North, Acting Regional Director Region 11, Buel, No. 11-CA-22936, 2011 WL 3793671, at *2 (N.L.R.B.G.C. July 28, 2011).
[101] Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. Pa. J. Bus. L. 957, 1009 (2012) ("What is unknown is whether the Board would consider a manager's access to Facebook posts through friend-of-a-friend status to be equivalent to the Charging Party's Facebook friend giving copies of the posts to the manager.")

information of one employee through another employee is not surveillance of an employee's Facebook, employees may be more inclined to restrict their postings to very few "friends" thereby potentially causing an indirect chilling effect of Section 7 activity. While this is an issue addressed in law review articles and in arguments made by employees who have been disciplined by their employers, neither the NLRB or the General Counsel has yet to address this potential chilling effect. However, such a concern may be raised in the future for private employers.[102]

5. The Employer's Interest

In *O'Brien*, the court stated that the school environment was different because the employee at issue "is responsible for nurturing young children, and must work in concert with administrators, parents and the community at large to promote student success."[103] In other public employment contexts, the court does not provide the same amount of deference to employers when they fire employees.[104] In *McPherson* the Supreme Court stated that when "an employee serves no confidential, policymaking, or public contract role, the danger to the agency's successful functioning from that employee's private speech is minimal."[105] *McPherson* supports the proposition that, at least in the public employment context, where you work matters.

The NLRB does not, at least in the cases addressed so far, take into account the employer's interest in determining whether an employee's speech is protected under the NLRA

[102] *Id*. ("Ultimately, is the best advice to employees to limit Facebook posts to friends only and to not make tweets public—fundamentally crippling the social attributes that have made Facebook and Twitter so popular and so dear to hundreds of millions of users? In the alternative, if employees choose to not heavily restrict access to their posts and tweets, are they then allowing their protected activates to be potentially chilled?")
[103] *See O'Brien* OAL DKT EDU 05600-1, 2011 WL 5429055, at *2-3 (addressing the impact the Facebook post had upon the workings of the school).
[104] *See Mattingly*, 4:11CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011).
[105] 483 U.S., 378, 390-91 (1987)

unless the employer has a social media policy and the employer is in the journalism industry.[106] Neither case that addressed social media comments where the employer did not articulate a standard looked towards the employer's interest in any way, and instead focused on the context of the statement and the participants of the postings.

III. Conclusion

Both the private and public employment law surrounding the social media activities of employees has its pros and cons from an employees' perspective. Both legal analyses do not give clear guidance as to what employers should say in restricting employee conduct, and neither give any bright line rules regarding employee actions. Equally murky are the definitions of "public concern" and "mutual aid and protection" that do not provide much guidance as to what types of statements are actually protected under the applicable laws and constitutional provisions. For public employees, where they work makes a large difference in the restrictions placed upon them. For private employees, the interactions that they have with their coworkers about the terms and conditions of their employment matter as to whether or not a statement about work can be protected. So, for Facebook-active employees deciding whether the public or private employment sphere would protect them against adverse employment actions, there is no clear winner in who protects the interest of employees better, the First Amendment or the NLRA.

[106] *See* Advice Memorandum from the NLRB Office of the gen. Counsel to Karen Fernback, Acting Regional Director of Region 2, Thomas Reuters, No. 02-CA-39682, 2011 WL 6960026 at * 15 ("In the specific case of the journalism industry, the Board has recognized that employers have a legitimate business interest in adopting rules to protect their credibility and editorial integrity. However, the rules must strike a balance between that legitimate business interest and the invasion of employee rights. To that end, even in the journalism industry, the rules must be narrowly tailored, unambiguous, and designate the category of employees to whom the rules are applicable.") (internal quotations omitted).