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Free Speech and the Workplace: The Propriety Of Employers' Regulating Unionized Employees' Off-Site Speech

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I. INTRODUCTION

In an era of increasing interconnectivity communication, exchanging information has increased to levels unknown in earlier times. In particular, technological advances and programs, such as social media have saturated participants with constant updates about the people in their social sphere. Consequently, the line between employees' work and private lives is harder to distinguish.[1] Some theorists speculate that social-media related terminations will accelerate in the coming years as young adults begin their professional lives and enter the workforce.[2] In response to a perceived threat, many employers have taken precautions by advising their employees not to discuss company matters in public or to managers, co-workers or the company itself, as violations could be a firing offense.[3] The extent to what actions employer can regulate online communication in and out of the work place is a question in the courts presently.

Twenty-first century social media permeates the American workplace.[4] In 2010, Mariana Cole-Rivera was fired from Hispanics United of Buffalo, a nonprofit social services provider in

[1] Emeline Gaske, *Like it or not, Facebook pots could cost your job,* THE AGE. (Oct. 10, 2012) *available* http://www.theage.com.au/opinion/society-and-culture/like-it-or-not-facebook-posts-could-cost-your-job-20121009-27b7h.html.

[2] Catherine Crane, *Social Networking v. the Employment-at-Will Doctrine: A Potential Defense for Employees Fired for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking*, 89 WASH. U.L. REV. 639, 640 (2012).

[3] Steven Greenhouse, Even if it Engages Your Boss, Social Net Speech Is Protected, N.Y.Times (Jan. 21, 2013) http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all&_r=0.

[4] Bryan Russell, *Facebook Firings and Twitter Terminations: The National Labor Relations Act As A Limit on Retaliatory Discharge*, 8 WASH. J. L. TECH. & ARTS 29, 30 (2012).

upstate New York, for an Internet posting she made on Facebook, a social networking site.[5] Mariana posted a Facebook message asking, "My fellow co-workers, how do you feel?" in response to a colleague that threatened to tell their supervisor that they were not working hard enough.[6] Some of her co-workers responded saying, "Try doing my job. I have five programs," and "What the hell, we don't have a life as it is."[7] After this exchange, Hispanics United dismissed Ms. Cole-Rivera and four other caseworkers who responded to her post, on the basis that they had violated the company's harassment policies by going after the caseworker who complained.[8]

Mariana filed a suit with the National Labor Relations Board (NLRB).[9] In a 3-to-1 decision, the NLRB concluded that the caseworkers had been unlawfully terminated.[10] The Board opined that the posts in 2010 were in the genus of "concerted activity" for "mutual aid" that is expressly protected by the National Labor Relations Act (NLRA).[11] Mariana's posts might have displeased the employer, but mere unpleasantness is not enough to make her speech actionable.

Efforts to resolve employee Internet speech issues range from allowing employers to fire employees over any Internet speech to claiming an employee has a right to talk about whatever he or she want outside the workplace.[12] In recent rulings and advisories, labor regulators have

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[5] *Hispanics United of Buffalo, Inc.,* 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges Sept. 2, 2011).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Hispanics United of Buffalo, Inc.,* 2011 WL 3894520 *10.
[12] Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1708 (2004) (quoting Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 Am. Bus. L.J. 653, 653 (2000)).

declared employer's restrictions on social media posts illegal.[13] The NLRB says workers have a right to discuss work conditions freely and without fear of retribution, regardless of whether the discussion takes place online.[14] Still, to what extent can employers use social networking posts to dismiss employees from work? Can employers craft their work policies to compromise wholesale the right to speak one's mind?

This paper explores the implications of that decision for unionized employees' free speech rights, particularly when the employee exercises those rights off-site, most usually through social media, blogs and other Internet tools. The interests of both the employer and employee are of the upmost important and must be considered when drafting new social media rules. Those interests are addressed throughout the paper as I propose that the how the NLRB should apply a narrow, direct, and clear test to social media speech. A healthy balance of employer and employees' interest must be met.

First, this paper will discuss the history of how First Amendment Values came to be applied to organized labor. Second, this paper will consider how the NLRB came to accommodate union's free speech right. Third, this paper will discuss the how the NLRB has treated cases on employer's First Amendment rights. Fourth, this paper will discuss special concerns for First Amendment Values raised by social media for union members and employers. Fifth, this paper will conclude by giving recommendation on how employers can draft their social media policies in a way to benefit both the employer and employee.

II. HISTORY OF FIRST AMENDMENT VALUES AS APPLIED TO ORGANIZED LABOR

[13] *Id.* at 1708.
[14] *Id.*

A. The Rise of Unions

Labor unions were born at the turn of the nineteenth century as the United States was transforming from a rural and small-town agricultural economy into an urban and industrial one.[15] People migrated from farm work and enter the industrial wage labor.[16] In this early era a free labor or "laissez-faire" system was in favor.[17] In this system both the employer and employee were free to make employment contracts on any terms they found mutually advantageous.[18] This resulted as "employment at will" contract.[19] An employment at will contract is an agreement that either party can terminate the working relationship at any time and with no subsequent liability to the employer.[20] Under these terms, either party could terminate the contract for any reason whatsoever. Most importantly, the state would not interfere as individuals bargained over wages, hours, and working conditions.

Shortly after the industrial revolution, in workers realized that there was power in numbers. Labor unions were formed to reform the industrial labor-relations system.[21] Unions, voluntary associations of workers, use strength in numbers to bargain with their employers. Organized labor activity increased after the Civil War, by the industrial revolution.[22] Union members used many tactics, such as withholding their labor in an effort to bring economic pressure on their employer. They would also boycott and picket in their place of employment to persuade other workers not to take their jobs and to persuade customers to refuse to deal with

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[15] *Book Tower Garage v. United Auto Workers Michigan's New Deal,* 88-FEB MICH. B.J. S2, S2 (2009).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at S3.
[20] *Id.*
[21] *Book Tower Garage v. U.A.W.,* 88-FEB MICH. at S3.
[22] Bryan M. O'Keefe, *The Employee Free Choice Act's Interest Arbitration Provision: In Whose Best Interest?*, 115 PENN ST. L. REV. 211, 213 (2010).

struck employers. To combat the growing influence of unions, employers used judicial injunctions to end strikes and the judiciary often complied with management's request.[23]

Until the Great Depression, workers had almost no protection when in unions.[24] Judges exercised discretion over labor-management issues, and tended to be unsympathetic to employees.[25] Courts held union activities, such as strikes, pickets, and secondary boycotts, to be illegal. [26] Additionally, Courts issued injunctions to any union activities. [27] As the Great Depression of the 1930's swept the nation, employees filed suits against employers due to the unjust treatment of workers in worker-management relationships.[28] The workers succeeded in demonstrating the previous years judicial defeats and increasing labor disruptions and that prompted Congress and the Executive Branch to act. The Court began to see wages and working conditions as a matter of public importance and is thereby vital to production.[29] The acts passed by Congress included: the Erdman Act–which provided for the resolution of railroad labor disputes; the Clayton Antitrust Act, which limited antitrust laws' applicability to union activity; the Railway Labor Act, which expanded the Erdman Act and provided support for collective bargaining on the railways; and the Norris-LaGuardia Act in 1932, which broadly prohibited federal courts from enjoining peaceful labor disputes.[30]

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[23] *Id.* at 214.
[24] *Id.*
[25] Peter B. Ajalat, *The Decline of the American Labor Movement: A Proposal for the Constitution As A Source of Workers' Rights,* 6 SETON HALL CONST. L.J. 683, 712 (1996).
[26] *Id.*
[27] *Id.* at 692.
[28] David L. Gregory, *The Right to Unionize in the United States, Canada, and Mexico: A Comparative Assessment,* 10 HOSTRA LAB. L. J. 537, 545 (1993).
[29] Ajalat, *supra* note 25, at 712.
[30] *Id.* at 713.

Three years after the Norris-LaGuardia Act, Congress enacted the most powerful act of all, the National Labor Relations Act (Wagner).[31] The Wagner Act forced employers to recognize and bargain with unions elected by a majority of their workers and outlawed various anti-union tactics.[32] It also established the National Labor Relations Board (NLRB), to enforce the Act.[33] With all of these legislative encouragements, the power of labor unions grew, culminating in the formation of the Congress of Industrial Organizations (CIO), which set out to organize unskilled workers in the mass-production industries like autos, steel, rubber, and meatpacking.[34]

III. HISTORY OF NLRA AND ITS ACCOMMODATION OF EMPLOYEES' FREE SPEECH RIGHTS

The NLRB's primary responsibility is interpretation and enforcement of a federal statute called the NLRA.[35] The NLRA is the main labor policy governing labor relations in the United States governs private union member's speech. Section 7 and 8 of the NLRA is considered the most important provisions of the Act for union members. Under Section 7, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .".[36] Section 8, now 8(a) bans "unfair labor practice[s]" such as employer interference, coercion, or restraint of employees in the exercise of Section 7 rights including domination or assistance of labor organizations, discrimination based on union membership discrimination based on participation in proceedings under the Act and refusal to bargain in good faith with a union

[31] *Id.*
[32] *Id.*
[33] *Id.* at 715.
[34] *Id.*
[35] *Id.*
[36] National Labor Relations Act, 29 U.S.C. § 157 (2006).

representing employees.[37] The Act established a mechanism for the election and certification of representative labor organizations, based on the principle of majority rule.[38]

The NLRA applies to *all* employers, *unionized or not*.[39] Most relevant to the area of social media, the NLRA protects an employee's right to engage in "concerted activity," which occurs under Section 7 of the statute "when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment." "Concerted Activity" is activities workers may partake in without fear of employer retaliation.[40] There is protected concerted activity when two or more employees act together to improve their terms and conditions of employment, even where there is no union involved.[41]

The NLRA established the NLRB, a quasi-judicial tribunal and administrative agency to administer representation proceedings and to enforce the Act, subject to judicial review in the federal courts of appeals.[42] The Board has the authority to issue unfair labor practices against management and unions for violations of the law.[43] With the NLRA and NLRB, the United States Supreme Court seemed more willing to find constitutional rights where labor unions were concerned. In *Thornhill v. Alabama*, the Court held that the First and Fourteenth Amendments protected both labor picketing and organizing.[44]

The NLRA is of vital importance because in the private sector, the First Amendment does not generally cover employees. The NLRB has opined that at-will employees can be dismissed

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[37] *Id* . at § 158(a)(1).
[38] *Id.*
[39] *Frequently Asked Questions,* NATIONAL LABOR RELATIONS BOARD, http://www.nlrb.gov/faq/nlrb (last visited Mar. 15, 2013).
[40] Ajalat, *supra* note 25, at 712.
[41] *Id.*
[42] Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1610 (2002).
[43] *Id.*
[44] *Thornhill v. Alabama*, 310 U.S. 88, 102-03 (1940).

for such reason a as the color of their shoelaces or the lipstick they wear.[45] Moreover, employers cannot fire an employee for filing a complaint with the Equal Employment Opportunity Commission (EEOC). However, they an employer can fire a worker for what they say, unless it's considered protected activity.

The Supreme Court held that in certain circumstances some employee conduct might be disloyal to the employer that it loses statutory protection. [46] Section 7 of the NLRA protects "concerted activities" of employees for "mutual aid or protection" and classifies that speech as concerted and protected conduct if that speech acts to further a group concern.[47]

A. Species of Employee Speech which are not protect by the NLRB

The protected speech rights of employees are not absolute. The NLRB has noted several exceptions that curtail free speech rights of employees about working conditions. Employers are able to dismiss employees who trespass the boundaries of protected speech. The Board has ruled that speech that is disloyal, egregious, and breeches confidentiality will not be protected.

The NRLB ruled that an employer is not liable for dismissing an employee whose conduct is disloyal.[48] In *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers* (Jefferson Standard), employees who distributed handbills that made a "sharp, public, disparaging attack on the quality of the company's product and its business policies" and that did not mention a labor dispute were not protected from discharge by the NLRA.[49] Even though the NLRB held that the terminations were an "unfair labor practice," the Supreme Court ruled that

[45] *How Much Can Employers Limit Workers' Behavior?,* NPR TALK NATION (Nov. 11, 2010), 2010 WLNR 22632811.
[46] *N.L.R.B. v. Local Union No. 1229, Int'l Bhd. of Elec. Workers,* 346 U.S. 464, 466-81(1953).
[47] *Id.* at 470.
[48] *Id.* at 476
[49] *Id.* at 471-72.

the terminated employees' communications were so disloyal as to lose protection under the Act.[50] Specifically, the Court noted that: the handbills were distributed at a "critical time" in the company's business.[51] The Court summarized by stating that there is no more elemental cause for discharge of an employee than disloyalty to his employer.[52]

The *Jefferson Standard* inspired a two-pronged analysis for determining when communication loses its protection.[53] In *In American Golf Corp.* (Mountain Shadows I), the facts are very similar to the *Jefferson Standard* as an employee was terminated for contacting a competitor of his company. The worker had distributed a flier that disparaged the company's operation, which argued for the company's competitors to take over the contract. The NRLB defined the test using the facts of the case. The first prong requires establishing a labor dispute.[54] Moreover, it requires an appropriate labor nexus and the flier failed to meet the prong as it appealed to the interest of the public rather than that of employees.[55] The second prong requires evaluation of whether the communication is "so egregious" that it would supply an independent cause for discharge.[56] The Board opined that the telephone call was protected but that the distribution of the flier was not protected under the *Jefferson Standard* disloyalty exception.[57] The Board remanded the Mountain Shadows case to an ALJ to determine if the employee would have been terminated for cause because of his disloyal conduct independent of his protected activity.

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[50] *Id.* at 466.
[51] Id. at 470.
[52] Id. at 471.
[53] *In Re Am. Golf Corp.,* 330 NLRB 1238, 1240 (2000).
[54] *Id.* at 1241.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 1238.

After remand the case was appealed again to the NLRB. In Mountain Shadow II the Board disagreed with the ALJ, that the complainant would not have been terminated despite his protected conduct, and upheld the legality of the discharge because of the disloyalty, which it concluded was an independent cause for termination.[58] The Board held:

> "employee communications to third parties in an effort to obtain their support are protected where the communication indicated that it is related to an ongoing labor dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection."[59]

The second unprotected speech is that which is so egregious that the speech looses it protection. Recently, a NLRB shed light on the issue of workplace profanity, where profanity is used in the context of a heated debate about wages, hours, and working conditions.[60] In *In Plaza Auto Center, Inc*., a salesman and his supervisor exchanged numerous profane names in a meeting where they were discussing working conditions.[61] Subsequently, the salesman was dismissed.[62] The NLRB inquired as to whether conduct is so egregious that it loses the protection of the NLRA.[63] Since the employee's outburst occurred at a meeting held in the context of his protected concerted activity, the ALJ applied the test set forth by the Board in *Atlantic Steel*, 245 NLRB 814, 816 (1979), for determining whether the conduct was so egregious as to lose the protection of the Act.[64] In *Atlantic Steel*, the Board identified four factors to be balanced in the determination:

[58] *In Re Am. Golf Corp.,* 338 NLRB 581, 582 (2002).
[59] *Id.* at 584.
[60] *In Re Plaza Auto Ctr., Inc.,* 355 NLRB No. 85 (2010).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Atlantic Steel Co.,* 245 NLRB 814 (1979).

> "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices."[65]

The Board found that the employer violated Section 8(a)(1) by discharging the salesman based on his profane outburst in a private meeting with the employer's owner and two sales managers about wages and working conditions.[66] The Board noted that the salesman's conduct was a reaction to the supervisor's own use of profane language, his failure to respond to the salesman's concerns, and the supervisor's suggestion that if the salesman did not trust the company, he could work elsewhere. The Board then demanded reinstatement of the salesman.

Breaches in confidentiality are not protected areas of employee free speech.[67] Employers have an interest in keeping trade secrets. Although there are safe guards for employees to discuss their own working conditions, they are not protected when disseminating information obtained in confidence or without authorization, even when it concerns terms and conditions of employment.[68]

Conversely, false statements may be protected as long as the employee making the statements does so neither knowingly nor recklessly.[69] Employees do not have a duty to investigate the truthfulness of information she gets from a co-worker.[70] The NLRB has ruled that

[65] *Id.* at 816.
[66] *Id.* at 818.
[67] Phil M. Fowler, *Employee Consequences for Breach of Confidentiality*, HOUSTON CHRONICLE (last visited Mar. 16, 2013), http://smallbusiness.chron.com/employee-consequences-breach-confidentiality-15476.html.
[68] Katherine M. Scott, *When Is Employee Blogging Protected by Section 7 of the Nlra?,* 2006 DUKE L. & TECH. REV. 17, 22 (2006).
[69] *Id.* at 17, *9.
[70] *Id.* at 17, *13.

such a duty would unacceptably chill employee speech under Section 7.[71] The NLRA will not protect lies made knowingly or recklessly.[72]

IV. CONTEMPORARY NLRB POSTURE ON FIRST AMENDMENT VALUES IN THE WORKPLACE AND OFF-SITE SPEECH

Employers cannot regulate everything employees do off-site. Recently, the NLRB has opined that workers have the right to express themselves freely about their jobs, work conditions, bosses and other company issues on social networks without having to worry about the consequences to their salaries, promotion prospects or jobs.[73] Profanity towards a boss or saying negative things about the workplace could be considered protected activity. Employers cannot fire employees based on unfavorable speech because the law protects workers from engaging in concerted activity. According to the NLRB Regional Director's handout, "It doesn't take much to establish the concerted nature of the discussion, so long as it involved or touched upon a term or condition of employment," and "anything short of physically threatening activity will likely be protected."[74] The employees' speech might be protected if referring to working conditions.

In 2012, the NLRB interpreted the application of the NLRA to an employees' posting of negative statements concerning his employer on social media. In *Costco Wholesale Corporation*, the NLRB held that Costco violated Section 8(a)(1) of the Act "by maintaining a rule prohibiting employees from electronically posting statements that 'damage the Company . . . or damage any person's reputation.'"[75] The NLRB held that Costco's policy would encompass concerted actions by its employees to protest the treatment of its employees and that kind of

[71] *Id.*
[72] *Id.*
[73] NPR TALK NATION, *supra* at 2010 WLNR 22632811.
[74] Philip Gordon, *The Latest from the NLRB on Social Media,* WORKPLACE PRIVACY COUNSEL (May 2, 2011). http://privacyblog.littler.com/tags/nlrb/.
[75] *Costco Wholesale Corp.,* 358 NLRB No. 106 (2012).

communication is protected under Section 7. [76] If the rule explicitly restricts Section 7 rights, said the Board, it is obviously unlawful. If it does not, a violation depends on a showing of one of the following:

> 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) the rule was promulgated in response to union activity; or 3) the rule has been applied to restrict the exercise of Section 7 rights.[77]

Critically, the NLRB disliked that the policy did not include a specific section for concerted activities protected by Section 7. The Board ultimately held that the blanket prohibition on any communication that damages the Company violates Section 8(a)(1) of the Act because employees must be able to engage in concerted activities that are critical of their employers or the agents of their employers.[78]

The NLRB faced a similar issue in *Karl Knauz Motors, Inc.*, where the auto dealership had a vague policy when it came to speech.[79] A former employee posted a complaint about the food the dealership provided to customers at a sales event and a sarcastic message making light of damage to a vehicle that occurred after a salesperson allowed the son of a customer to get behind the wheel in the car lot.[80] The NLRB applied the same test used in *Costco* and found the employer's "Courtesy" policy violated Section 8(a)(1) of the Act.[81] In this case, the employer maintained a rule in its handbook stating that being courteous is the responsibility of every employee.[82] The policy stated:

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Karl Knauz Motors, Inc.,* 358 NLRB No. 164 (2012).
[80] *Id.* at *10.
[81] *Id.* at *3.
[82] *Id.* at *1.

> "everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership."[83]

The Board went on to say as it did in *Costco*, that the policy was overbroad because there is "nothing . . . that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the policy's reach."[84] The Board feared that this broad policy holding basic levels of courtesy and common sense could be viewed as a violation of the Act if it broadly prohibits any language that would injure the image or reputation of the employer.[85]

The NLRB has recognized that not all of an employee's online activity, even when speech relates to workplace matters, is protected activity.[86] The NLRB did not only strike down the dealership's policy, but also upheld an ALJ's finding that the employer did not violate the Act by discharging a sales representative for photos and comments that he posted to his Facebook page, because the posts that led to his termination were not protected by the Act.[87] The ALJ found that the posting about food provided to customers constituted protected, concerted activity because the post was just a simple discussion that he and his coworkers were having concerning the impact of the sales event on their ability to earn money.[88] The post about the accident on the other hand was not protected, concerted activity because "it was posted solely by [the salesperson] . . . without any discussion with any other employee of, and had no connection to the any of the employees' terms and conditions of employment."[89] The judge found that the

[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at *20.
[88] *Id.*
[89] *Id.* at *18.

employer was fired because of his Facebook posting concerning the accident, and he upheld the discharge.[90]

A. When Employee Speech Becomes Harassment

Employees have found social networking sites such as Facebook and Twitter as the equivalent of talking to co-workers around the water cooler.[91] Unfortunately, some of their social media postings have been the cause of their dismissal. The term "Facebook fired" has become so common that it's now a verb on urbandictionary.com.[92] Many incidents of this sort of venting have been documented, for example:[93] In September 2010, a McDonald's manager was discharged as writing "F--- them nuggets" on a friend's wall.[94]

The New Jersey Superior Court, Appellate Division, upheld a discharge of a teacher for what she posted about her students on Facebook.[95] Jennifer O'Brien was a first-grade teacher in a largely Black and Latino school in Paterson, New Jersey. She posted on her Facebook page that she felt like a "warden for future criminals."[96] At the administrative level, the ALJ recommended that O'Brien be terminated for her Facebook posts. The school district's need to operate efficiently demanded that Ms. O'Brien's free-speech rights be trump because "thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools.[97]" Also, the ALJ found that by posting her comments on Facebook, O'Brien "showed a disturbing lack of self-restraint, violated any notion of good behavior, and [acted in a manner

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[90] *Id.* at *20.
[91] Emily Ngo, *Rights? You don't have many when it comes to getting fired for Facebook,* AMNEWYORK (Nov. 11, 2010), http://www.amny.com/urbanite-1.812039/rights-you-don-t-have-many-when-it-comes-to-getting-fired-for-facebook-1.2453311.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *In re O'Brien*, No. A-2452-11T4, 2013 WL 132508, at *1(N.J. Super. Ct. App. Div. Jan. 11, 2013).
[96] *Id.*
[97] *Id.*

that was] inimical to her role as a professional educator."[98] The teacher then appealed the ALJ's decision to the acting commission of education. When the commission agreed with the ALJ, O'Brien appealed to the N.J. Superior Court. The Court of appeals upheld the termination. The Court determined that her comments were, indeed, "conduct unbecoming a tenured teacher," which is any conduct that has a "tendency to destroy public respect for government employees and confidence in the operation of public services."[99] Many employers have placed social policies to tell employees what is prohibited. Although it is reasonable to warn employees not to disclose trade secrets or confidential financial information, not all policies that regulate employee speech are acceptable under the NLRA.

American Medical Response of Connecticut (AMR) was the first instance where the NLRB issued a complaint in response to an employee who was discharged after posting comments on Facebook that violated the company's blogging and Internet posting policy.[100] The case settled outside of Court, but the NLRB arguments have been applied to many cases. Dawnmarie Souza, AMR's Emergency Medical Technician (EMT), was fired after stating that her boss should have been a psychiatric patient on her Facebook page.[101] The NLRB brought a complaint against the employer for the suspension and firing of an employee who posted negative comments about her supervisor on her Facebook page. AMR maintains a blogging and Internet posting policy that prohibits depicting the company in any way without prior company approval. [102] The company's policy prohibits employees from making "disparaging, discriminatory or defamatory comments when discussing the company or the employees'

[98] *Id.*at *5.
[99] *Id.*
[100] Christine Neylon O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media,* 45 SUFFOLK U. L. REV. 29, 33 (2011).
[101] *Id.* at 35.
[102] *Id.*

superiors, co-workers and/or competitors."[103] The company denied that they fired the employee for her Facebook postings and that the real reason they fired her was because they received two complaints from patients and hospital staff within a ten-day period leading up to her suspension and termination.[104] The NLRB argued the employer had violated the act by firing her for her posts and maintaining a "blogging and Internet-posting policy" that "prohibited employees" from, among other things, "making disparaging comments when discussing the company or the employees' superiors, co-workers and/or competitors."[105] The NLRB said that this one protected activity, and the company was wrong to fire her, because the law protects workers from engaging in concerted activity.[106]

The AMR's case gives guidance to other companies, as they need to be cautious when they create and attempt to enforce social media policies to ensure they do not infringe on employees' Section 7 rights.[107] The NLRB argued that the AMR's blogging and internet-posting policy was overbroad, constituting a violation of Section 8(a)(1) of the NLRA because it unlawfully infringes on Section 7-protected concerted activities.[108] The company settled out of court and agreed to narrow its Internet and blogging policies to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work.[109] The company also agreed not to punish employees for requesting a union representative.[110] American Medical said in its own written statement that

[103] *Id.*
[104] *Id.*
[105] *Id.* at 36.
[106] *Id.*
[107] Reynolds Holding, *Can You Be Fired for Bad-Mouthing Your Boss on Facebook?,* TIME (Mar. 4, 2011), http://www.time.com/time/nation/article/0,8599,2055927,00.html.
[108] *Id.*
[109] *Id.*
[110] *Id.*

it could still bar employees from harassing or defaming co-workers or violating patient confidentiality or company trademarks on Facebook.[111]

The NLRB struck down the policies in *Costco* and *Knaus Motors,* because they deemed overbroad. The policies in those cases combined valid rules requiring courtesy and decorum with impressible rules against disrespectful and defamatory behavior. Any prohibition against employees disparaging or "defaming" their employer or their supervisors will not likely survive scrutiny of the current NLRB. The will somehow find such policies to interfere with employees' right under Section 7 to complain about management and working conditions.

V. BALANCING THE RELEVANT EMPLOYERS' PRSERVATION OF IMAGE AND BRAND AGAINST EMPLOYEES' FREE SPEECH RIGHTS

Employers have a justifiable interest in protecting their image. At the same time, unionized employees do not surrender their First Amendment rights at the workplace. Moreover, employees do not have an expectation that their off-site social media speech could cost them their jobs. Still, the distinction between on-site and off-site speech can be blurred. Both employer's and employees' interest call for a more direct test for protected social media speech.

A. Internet Blurs Lines Between On-Site and Off-Site

We live at a time where almost everyone engages in some sort of social networking, if it's blogging or using sites such as Facebook or Twitter. This new way of life has blurred the line between on-site and off-site workplace communication. Employees now have a new means of discussing issues with each other, regardless of the obstacles presented by differently-timed

[111] Jessica Martinez, *NLRB v. American Medical Response: A Rare Case of Protected Employee Speech on Facebook*, BERKELEY TECH. L.J. (March 7, 2011), http://btlj.org/2011/03/07/nlrb-v-american-medical-response-a-rare-case-of-protected-employee-speech-on-facebook/.

shifts, physically separated workplaces, and the operational demands of work.[112] Employers have set policy to regulate social media activity but it has been proven to be too broad. The NRLB needs to adjust to the changing times and start drafting new sections that address the new means of workplace communication. On the one side, employers have a duty to protect their reputation, image, culture, and preventing disclosure of confidential information, including avoiding liability for harassment. On the other side, employees have the right to speak and connect on their own time and on their own devices as long as they do not violate the employer's legitimate business interests.[113]

Coming back to *Hispanics United* case, the NLRB majority agreed with the ALJ that the terminated employees' speech was protected.[114] The NLRB ruled that comments posted on Facebook are protected in the same manner and to the same extent as comments made at the "water cooler," because the employees were engaged in concerted activity for their mutual aid and protection. Most people use social media to let out their frustrations. The Board relied their judgment on Section 8(a)(1) that bars employers from interfering or restraining, employees in the exercise of their rights. The ALJ held in the *Hispanic United* that the Facebook comments in question constituted protected activity under Section 7 because the employees were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe their fellow co-worker was going to make to management.[115] The Board reiterated that Section 7 protects employee discussions about job performance. Since the Board found that Facebook comments were talking about the workplace environment, the majority held the employees were "clearly engaged in protected activity in mutual aid of each other's defense"

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[112] Scott, *supra* note 68, at *1.
[113] O'Brien, *supra* note 100, at 30.
[114] *Hispanics United of Buffalo, Inc.,* 2011 WL 3894520 *10.
[115] *Id.*

to Cruz-Moore's criticisms of their work performance.[116] Overall, the Board concluded the terminations violated both Section 7 and Section 8(a)(1) of the NLRA because the employees were terminated solely as a result of their Facebook postings and those Facebook comments were protected under the Act.

The dissenting opinion, authored by Member Brian Hayes brings into the light not all speech related to the workplace should be protected. Member Hayes noted that there was "no credible evidence that Cole-Rivera made her initial posting with the intent of promoting a group defense, or that her co-workers responded for this purpose."[117] To the contrary, Member Hayes regarded the Facebook comments as "shop talk" or "group griping," which has not traditionally risen to the level of protected activity.[118] The Board majority on the other hand emphasized the Board's position that Section 7 protects employee discussions about job performance.

Where is the line drawn between protected speech and harassment? There are some limits to what employees can say. Workers comments cannot be libelous or threatening, expose trade secrets or clearly interfere with your job. If an employer wants to talk about their life on the Internet they have all the right to do so.[119]

B. Prescription For Reform Of The NLRA

Most of the NLRB decisions open the door to the argument that any discussion among co-workers pertaining to workplace matters could be considered "protected" under the NLRA, regardless of whether such discussion is undertaken to initiate or prepare for group action in the interest of employees.[120] While the Facebook comments posted by the HUD employees in

[116] *Id.*
[117] *Id.* (Hayes, M., dissenting).
[118] *Id.*
[119] Star-Ledger Editorial Board, *Bad-mouthing the boss YOU'RE FREE TO CRITICIZE, EVEN ONLINE,* THE STAR-LEDGER (Nov. 14, 2010) http://blog.nj.com/njv_editorial_page/2010/11/bad-mouthing_the_boss_youre_fr.html.
[120] *Id.*

Hispanic United case certainly communicated mutual disagreement with Cruz-Moore's criticism of their job performance, they did not suggest or contemplate taking any action in response to this criticism. Yet, the Board concluded that the comments were protected because they were undertaken for mutual aid and protection.[121] The majority's ruling under those circumstances demonstrates an expansion of the NLRB's traditional definition of protected concerted activity.

Consistent with that posture, employers should not have the right to prevent unionized employees from speaking their mind, even if it is on social media sites, unless the employee speech would be actionable as libel, or any of the other traditional grounds for imposing liability. Previous NLRB rulings have shown that employers cannot prevent employers from speaking their mind online. The NLRB, through *Costco* and *Karl Knauz,* has held that broad company policies that prohibit employee statements deemed damaging to the company are a violation of Section 8(a)(1) of the NLRA. It would be best for employers to adopt social media policies that are clear and consistent with the spirit of such precedent. Specific provisions of such company policies could include the prohibition against disclosure of trade secrets and other confidential information, as well as using speech to defame or harass.

By contrast, blanket restrictions on social media speech are illegal.[122] The NLRB's rulings advise companies that it is illegal to adopt broad social media policies.[123] Bans on disrespectful comments or posts that criticize the employer are not a basis for firing an employee.[124] Policies meant to discourage workers from exercising their right to communicate

[121] Greenhouse, *supra* note 3.
[122] Lostant, *Even if It Outrages the Boss, Social Net Speech Is Protected,* NEWS LOAF, http://newsloaf.blogspot.com/2013/01/even-if-it-outrages-boss-social-net.html (last visited Mar. 16, 2013).
[123] *Id.*
[124] *Id.*

with one another are against the law.[125] Indeed, the NLRB recently began ordering the reinstatement of various workers fired for their posts.[126] The Board is further asking companies, including General Motors, Target and Costco, to rewrite their social media rules.[127] The Board's rulings apply to virtually all private sector employers, and tell companies that it is illegal to adopt broad social media policies, such as bans on "disrespectful" comments or posts that criticize the employer.[128] Government employees enjoy much stronger free speech protections because, unlike private sector employers, government employers are subject to the restraints of the U.S. Constitution.[129] Certainly, states are following the NLRB decision in drafting labor law policies.[130] California and Illinois became the fifth and sixth states to bar companies from asking employees or job applicants for their social network passwords.[131]

Unfortunately, many employers and employees fail in their policies and posts, to fully appreciate the power and magnitude of social media. Employers mostly try to regulate what employees' say in social media sites because they do not want anything to reflect negatively on their company or brand. Moreover, young people feel comfortable enough to vent on social networking sites, deeming those sufficiently separate and distinct from any on-the-job communication. The law should honor that reasonable expectation unless the speech is considered to be libel or exposing trade secrets. Employers need to understand that social media does not equal workplace. Today, it behooves employers to enact better polices regarding social media use that will not infringe on the rights of employees.

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Lostant, *Even if It Outrages the Boss, Social Net Speech Is Protected,* NEWS LOAF, http://newsloaf.blogspot.com/2013/01/even-if-it-outrages-boss-social-net.html (last visited Mar. 16, 2013).
[129] NPR TALK NATION, *supra* at 2010 WLNR 22632811.
[130] Greenhouse, *supra* note 3.
[131] *Id.*

For example, Wal-mart's social policy is exemplar because it only restricts behavior already proscribed by other laws, such as speech related to trade secrets, harassment and defamation.[132] The NLRB endorsed the Wal-mart policy because it gave specific examples of conduct that would be improper while at the same time not interfering with employees' rights. That sort of careful check on what could otherwise quickly devolve into employer heavy-handedness ought to become the norm.

Employers are not the only ones that need to be careful; employees need to be aware of the possible consequences of venting on social networks irrespective of the legal standards that apply. Potential employers review social media sites when considering whom to hire.[133] A study, "Employers Firing Employees over Information Found on Popular Social Media Sites Face Legal Risks, Employment Screening Resources," found that thirty-five percent of employers rejected job applicants based on provocative or inappropriate photographs or information posted on social media.[134] Mindful that reputation is everything in the workforce, employers have rejected applicants because of the given candidate's Facebook context.[135] Activities such as drinking or using drugs, bad-mouthing previous employers, co-workers, or clients seem a fairly sure way to get rejected.[136] The study also showed that evidence of poor communication skills, discriminatory comments, misrepresentation of qualifications, and sharing confidential

[132] Greenhouse, *supra* note 3.
[133] Thomas Ahearn, *Employers Firing Employees over Information Found on Popular Social Media Sites Face Legal Risks, Employment Screening Resources,* EMPLOYMENT SCREENING RESOURCES (Jan. 25, 2011), http://www.esrcheck.com/wordpress/2011/01/25/employers-firing-employees-over-information-found-on-popular-social-media-sites-face-legal-risks.
[134] *Id.*
[135] *Id.*
[136] *Id.*

information from a previous employer were the other bases mentioned for rejecting an applicant.[137]

How can employers in the labor setting avoid violating employees' right to free speech? Ultimately, employer policies on social media should begin by "encouraging innovation and dialogue."[138] Instead of prohibiting speech outright, the policies should aim to provide guidance. Policies should address the difference between actionable employees' comments that are "disloyal" and "have the potential to damage the employer's business and reputation or . . . breach confidentiality," from the traditionally protected lunch table or "water cooler" conversations about terms and conditions of employment.[139] Also, employers need to set forth clearly the protections afforded by Section 7 of the NLRA while at the same time noting that the statute does not protect egregious misconduct, including violations of law or rules that are justified by the employer's legitimate business concerns.[140]

C. Recommendations

The NLRB should take both employers and employees' interest into account when drafting social media speech rules. The test that the NLRB applies to social media speech that relates to the workplace should be narrow, direct, and clear. With today's standard, virtually any statement made about the workplace could be considered concerted activity for mutual aid or protection. When evaluating a given employee's speech, courts should consider context, so that social media speech where employees discuss work concerns, whether on Facebook or through

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[137] *Id.*
[138] *NLRB's 'Facebook Firing' Complaint and Your Social Media Policy*, HR.BLR.COM (Dec. 6, 2010), http://hr.blr.com/HR-news/Unions/Unions/NLRBs-Facebook-Firing-Complaint-and-Your-Social-Me (quoting Attorney Anthony Haller of law firm Blank Rome's Philadelphia office).
[139] *Id.*
[140] *Id.*

"tweets," are presumed protected unless in violation of the afore-mentioned categories.[141] That presumption of legitimacy should apply particularly when the speech invites other co-workers to engage in discussion pertaining specifically to their wages, hours and working conditions. This new standard will isolate protected speech from unprotected speech.

On nearly any blog or social media site where employees discuss their jobs, some posts, examined individually, probably "disparage" the employer or its products without explicitly connecting the criticism to a labor dispute.[142] This creates an analytical challenge for the NLRB, and uncertainty for employees, and employers. The presence of a comment feature on most blogs and online posts arguably implicitly invites others to participate in the discussion, but to find the speech protected, a court should have to find that the speech at least implies that co-employees are the intended audience. That should not be a difficult threshold for courts to cross.

Today, as social media use continues to rise, employers should take care to avoid infringing on employees' rights. In drafting and implementing policies, employers should make their legitimate business objectives clear. Beyond stating that employees should refrain from engaging in "inappropriate or unacceptable conduct" and that employees are prevented from divulging "confidential information and trade secrets," those policies should be more akin to guidelines than hard and fast rules. In past cases, the NLRB has indicated that a particular social media policy might have survived scrutiny, if it had included examples and guidelines of prohibited conduct.

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141 "Tweet" refers to a comment published on Twitter, which is then viewable by followers of the account. Twitter, https:// support.twitter.com/articles/15367-how-to-post-a-twitter-update-or-tweet# (last visited Mar. 20, 2013).
142 Scott, *supra* note 68, at *17.

Employees should be made aware that social media blogs and posts are public and access is easily available. A sound policy should incorporate language that assures employees that the intent of the policy is not to infringe upon employees' Section 7 NLRA right. The employee should be made aware that they are allowed to engage in protected activity and collective action related to their wages, hours and working conditions. Further, both employers and employees would be safeguarding their rights if employees were to routinely include a disclaimer on their social media page that an employee's views, positions and opinions expressed on social media are those of the employee and not the employer. Most importantly, employers need to advise employees to use their best judgment and exercise personal responsibility when posting on social media. The NLRB has repeatedly indicated that a particular policy might have been lawful if it had included specific examples of prohibited conduct.

Employers should do social media training.[143] This training could inform employees of their professional responsibilities and that those responsibilities apply to social media too.[144] Training could better alert employees to what the company's interests are. A starting point can be protecting trade secrets, avoiding SEC violations or protecting employee safety. The training would explain what each section of the given policy means and how it applies specifically to employees. The employer could then explain why any restrictions in the policy are important to the company.

Knowledge is power. With appropriate employee training programs, the promulgation of clear social media policies and the cultivation of work environment policies and the cultivation

[143] Sharlyn Lauby, *Tips for Updating Your Company's Media Policy*, MASHABLE (Oct. 6, 2012), http://mashable.com/2012/10/06/social-media-policy-update/.
[144] *Id.*

that promote healthy channels of communication, both employer and employee interests can be accommodated.

VI. CONCLUSION

The NLRB cases demonstrate that the Board is taking care to ensure that employers are not implementing policies that unnecessarily infringe on unionized employees' First Amendment rights. The general message in those cases is that policies involving employer rules prohibiting employee speech on social media sites are against the NLRA. Blogs and social media sites will continue to add new twists to established concerted activity doctrine, and courts will have to strike the balance between employee and employer rights. Courts should strongly protect all employee bloggers as they engage in legitimate concerted activity, but they should also require that bloggers bear some responsibility in exercising those rights by identifying themselves as employees and screening comments for obvious falsehoods and confidentiality breaches. Existing standards of protection against interference with protected rights should extend readily into the blogging context.

Still, the on-site, off-site distinction needs to be finessed. Special latitude should be afforded employees' off-site speech. With education comes power. Employers need to communicate to employees the circumstances under which they may be lawfully punished for their on-line speech. Open and clear lines of communication can help deter employees from making improper statements, as well as protect against employer overreaching. Courts can be trusted to resolve the more ambiguous or gray-area cases, provided that they do so within a spirit of speech protective values.