SOCIAL MEDIA: WHAT CONTROL DO EMPLOYERS HAVE OVER EMPLOYEE SOCIAL MEDIA ACTIVITY IN THE WORKPLACE?

Social media is becoming pervasive in the workplace, both as a means for employees to remain connected with their family, friends and network members, as well as a channel through which companies can market, advertise and communicate with potential customers and clients. The use of social media comes with inherent risks, however, including the public nature of communications, decreases in productivity and potential data

security concerns. As a result, many employers have instituted social media policies, which serve to prohibit particular types of employee activity.

The legal framework surrounding the use of social media in the workplace, however, is in its nascent stages as new, and as yet unexplored, issues come to the fore. Frequently, what employers may consider reasonable restrictions on employee activity may be unlawful. This comment will explore this new legal question and consider how employers can develop effective and lawful social media policies. More specifically, it will consider how the National Labor and Relations Board has reviewed social media policies in a series of recent cases and will provide guidance for employers in crafting their social media programs.

I. INTRODUCTION

Advances in technology in recent years have led to significant changes in the way individuals communicate, relay information and share knowledge. This is evident through the widespread use of technological devices such as smartphones and tablets, as well as through discussions on social media networks such as Facebook and Twitter. While many of these devices and forms of media originated as entertainment, their prevalence in daily life has led to their increasing use in the employment setting.[1] Companies have begun to take advantage of these media both externally to advertise and market their products and internally to expand knowledge sharing and appeal to their younger and more tech-savvy employees.[2]

These opportunities, however, come with a number of risks, to include distraction from work activities and an associated loss of productivity.[3] In a 2011 survey of 4500 professionals in the information technology sector, 89% reported a noticeable reduction in productivity resulting from increased use of social media in the workplace.[4] Employees may begin discussions, incite comments, and even harass their fellow employees via this new, subtler medium.[5] Beyond these internal factors, company use of social media leads to concerns regarding data security, the

---

1. Lothar Determann, *Social Media @ Work – A Checklist for Global Businesses*, 11 PRIVACY & SECURITY L. REP. 487, 487-88 (2012).

2. *Id.* at 488.

3. *Id.*

4. *Id.*

5. *Id.*

sharing of trade secrets and greater exposure to potential criminal schemes, such as phishing and other illegal activity.[6]

In the midst of this social media revolution and the resultant concerns, employers have begun instituting policies to address their employees' social media use and the nature of what is being posted.[7] Often, these policies permit employers to reprimand or take action against employees who identify their company or post negative or harassing comments about their employer or co-workers.[8] Such policies have recently caught the attention of the National Labor Relations Board (hereafter "NLRB") as being "overbroad" and for violating workers' rights to engage in "concerted activities."[9]

This comment will consider how the NLRB is interpreting the National Labor Relations Act to apply to social media and how employers can craft protective social media policies without infringing upon their employees' rights. It will do so by first considering the right to concerted activity protected by the NLRA. It will then review the early application of the Act to recent social media cases and evaluate the factors that make certain policies and associated disciplinary measures unlawful. It will conclude by consolidating the available guidance and case law in order to outline the parameters of a lawful and robust social media policy in the workplace.

II. BACKGROUND: HISTORICAL APPLICATION OF THE NLRA

A. *The Right to "Concerted Activity"*

The National Labor Relations Act (NLRA) protects employees' rights to participate in "concerted activities" under Sections 7 and 8 of the Act.[10] Section 7 protects the actual right of employees to gather and form collective groups or unions for mutual benefit and provides, in pertinent part:

> 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

---

6. *Id.*
7. *Id.*
8. *See* Roger Brice, Samuel Fifer & Gregory Naron, *Social Media in the Workplace: The NLRB Speaks*, 24 INTELL. PROP. & TECH. L.J. 13, 13 (2012).
9. *Id.* at 13-14.
10. *Id.* at 13.

> of collective bargaining or other mutual aid or protection . . . .[11]

The rights in Section 7 are not limited to the formation of unions or collective action groups, but also extend to activities undertaken by more than one employee for the mutual benefit of others.[12] This includes the right of employees to have open discussions regarding work-related issues, "wages, and other terms and conditions of employment."[13]

The courts have interpreted an employee's activity to be "concerted" when it is "engaged in, with or on the authority of other employees, and not solely by and on behalf of the employee himself."[14] This rule was clarified in a series of cases dubbed by the courts as *Meyers I* and *Meyers II*.[15] In the *Meyers* cases, a truck driver's complaints to state officials that their truck was unsafe were found not to constitute concerted activity because the comments were made by the individual only.[16] Had the truck driver joined with other co-workers, the same complaint would have constituted protected activity, for which he could not be lawfully dismissed.[17]

Once the activity in question is determined to be concerted, it is protected from interference by Section 8(a)(1), which provides:

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.[18]

In determining whether a Section 8 violation has occurred, courts consider whether the rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."[19] The courts have interpreted "chill" to mean inducing "caution and timidity" or to "retard, diminish, and make uncomfortable" the employees' intended activity.[20] In this way, actions that prevent employees

---

11. 29 U.S.C. § 157 (2012).
12. Brice, *supra* note 8, at 13.
13. *See* Hispanics United of Buffalo, Inc., No. 3-CA-27872 (N.L.R.B. Sept. 2, 2011); *See also* Echostar Tech., L.L.C., No. 27-CA-066726 (N.L.R.B. Sept. 20, 2012).
14. Meyers Indus., 268 N.L.R.B. 493, 497 (1984).
15. Prill v. NLRB, 835 F.2d 1481, 1483-84 (D.C. Cir. 1987).
16. *Id.* at 1482-84.
17. *Id.* at 1484.
18. 29 U.S.C. §158(a)(1) (2012).
19. Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).
20. *Echostar*, slip op. at 13.

from gathering collectively or expressing joint concerns regarding their work situation are considered protected.[21]

If the rule expressly restricts Section 7 rights, it is clearly unlawful.[22] If the violation is not explicit, however, the inquiry revolves around whether:

1) employees could 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.[23]

The test of a Section 8 violation does not require that the employer display intent nor that they be successful in preventing the employees' concerted activity; rather, it is necessary that the action have the potential to interfere with an employee's Section 7 rights.[24] This often leads to a finding of a policy being overbroad in that it encompasses activity that could potentially be protected concerted activity in addition to the activity that may be lawfully prohibited.[25] In *Echostar Technologies*, for example, an employer policy prohibiting "disparaging or defamatory comments about EchoStar, its employees . . . ." was found to be overly broad because it made no exception for the Section 7 protected statements and comments not encompassed by this rule.[26] "Disparaging" statements, which may be critical of an employer are protected under the NLRA if they relate to "an ongoing labor dispute" and are "'not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.'"[27] Although the General Counsel stated that "defamatory" comments could be proscribed, because the rule did not provide for comments which are only "disparaging" and not both "disparaging and defamatory" to be prohibited, the rule was found to be unlawful.[28]

B. *What is Lawfully Prohibited Behavior Under the NLRA?*

Although the NLRA seems to prevent employers from exercising any type of control over employee behavior, the Act does allow employers to restrict conduct that "addresses legitimate business concerns" and does not support an employers'

---

21. *See id.*

22. Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, 646 (2004).

23. *Id.* at 647.

24. EMPC LABOR, *Conduct having tendency to interfere with exercise of rights is unlawful*, 10 EMP. COORD. LAB. REL. § 26:3, at 1, 5 (2012).

25. *See Martin Luther*, 343 N.L.R.B. at 646.

26. *Echostar*, slip op. at 16.

27. *Id.* (quoting Am. Golf Corp., 330 N.L.R.B. 1238, 1240 (2000)).

28. *Echostar*, slip op. at 15-16.

"goals and objectives."[29] Employers may also prohibit employees from making deliberately false or defamatory comments.[30] Such rules, however, must be presented in a clear and easily understandable context so as to avoid being found overly ambiguous and thereby unlawful.[31]

In *Martin Luther Mem'l Home*, for example, a rule prohibiting the use of profane and harassing language was found lawful because its purpose was to maintain order in the workplace and it did not explicitly or implicitly prohibit Section 7 activity.[32] The court recognized an employer's right to "prohibit serious, employment-related misconduct" but also to put in place proactive regulations to protect it from civil liability, which could result from potential harassment or malicious conduct among its employees.[33]

As mentioned above, while Section 7 protects employees' collective criticism of their employer, employers may lawfully restrict their employees from making defamatory comments or statements which are deliberately or maliciously false.[34] The key to this inquiry is to determine whether the statements were made with "knowledge of their falsity or with reckless disregard of their truth" or whether they are "'merely false' union propaganda."[35] An employee may still make a statement, which may be found to be false, as long as it is not intentionally misleading.[36] The policy statement, therefore, cannot be evaluated in isolation, but rather, must be considered in context.[37]In *Echostar*, for example, the employment policy prohibiting certain comments was embedded in a 22-page handbook, leading the Board to find that a reasonable employee would not read the rule in isolation but rather in context of the "whole rules and the topics covered in the handbook in which the rules in question are covered."[38] It must be considered, therefore, whether a phrase relates back to an associated part of the rule, and whether in light of that context, the ambiguity regarding

---

29. *Lafayette Park Hotel*, 326 N.L.R.B. at 826.

30. *See Echostar*, slip op. at 19.

31. *See id.* at 13-14 (stating that in a 22-page employee handbook, a rule must be read in the context of the surrounding applicable sections).

32. *Martin Luther*, 343 N.L.R.B. at 646.

33. *Id.* at 647.

34. *See Echostar*, slip op. at 19.

35. *See id.* (citing Radisson Muehlebach Hotel, 273 N.L.R.B. 1464 (1985)).

36. *See id.*

37. *Id.* at 13.

38. *Id.*

protected activity would be resolved in the mind of a reasonable employee.[39]

In order to avoid any ambiguities, many employers include a savings clause meant to serve as a catch-all to ensure that their policies are not construed as interfering with Section 7 protected rights.[40] These frequently take the form of statements to the effect that nothing in the rule is meant to interfere with legally protected rights.[41]Unfortunately, these savings clauses do not make an otherwise coercive or restrictive rule lawful, nor do they effectively clarify a rule that is otherwise overbroad.[42] This is because the savings clause would not inform employees of which conduct is or is not protected by the rule and could therefore still "chill" employees from engaging in protected concerted activity.[43]

An action, such as termination of an employee for excessively harsh or critical remarks, however, will not be considered interference with protected activity if the employer is unaware that the statement was part of a plan to organize employees.[44] The employer must have knowledge that the statement being made is on behalf of a collective group and not just the individual employee.[45] In addition, the determination of whether an employer's action infringes upon an employee's protected rights is conducted on a case-by-case basis and involves consideration of the employee's actions at the time of their otherwise protected activity.[46] A number of tests have developed, through the NLRB's case holdings, which may aid employers in determining what prohibitions will be considered lawful.[47] These include the four-factor *Atlantic Steel* test, the *Jefferson Standard* test and the *Wright Line* test, which will be discussed in further detail below.[48]

---

39. *Id.* at 14.

40. *See, eg., id.* at 20; *Flagler Hospital*, No. 12-CA-27031, 2011 WL 5115074, at *2-3 (N.L.R.B. May 10, 2011).

41. *Echostar*, slip op. at 20.

42. *Id.*

43. *Id.* at 20-21.

44. *NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 840-41 (2d Cir. 1953).

45. *Id.*

46. *Hispanics United*, slip op. at 9.

47. *See* Kay H. Hodge, *Unfair Practices Under the Labor Relations Act*, ST045 ALI-ABA 17, 98-99 (2012).

48. *Id.*

C. *Testing the Limits of Protected Conduct:* Atlantic Steel, *the Jefferson Standard and* Wright Line

In certain situations, an employee's conduct may be found so egregious as to lead to their loss of protection under the NLRA.[49] This can be found by applying the following factors laid out in *NLRB v. Atlantic Steel Co.*: "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."[50] To reach a decision, the Board must evaluate and balance each of these factors.[51]

In *Atlantic Steel*, an employee was discharged after yelling profanities at their manager on the production floor.[52] In applying the above factors, the board found that the employee's termination was warranted because the incident occurred on the production floor rather than in a grievance or assembly meeting, and while the employee's question about overtime was a legitimate and protected question, the employer promptly answered it.[53] Nevertheless, the employee reacted with a profane outburst in a work setting where such conduct was regularly not condoned.[54] This random outburst, in conjunction with the employee's past record of poor work activity led to a finding of valid termination not in violation of the NLRA.[55] While the *Atlantic Steel* test does not assist employers in crafting a more user-friendly and lawful rule, it does provide some recourse in circumstances where employee behavior is egregious or grossly inappropriate.[56]

Similarly, if an employee makes statements against their employer that constitute "insubordination, disobedience or disloyalty", such statements will not be protected.[57] This test, known as the "Jefferson Standard" arose in a case where nine technicians working for a television broadcast company distributed a leaflet criticizing the station's programming and alleging the company viewed its local audience in a very negative light.[58] In applying this test, the NLRB held that "a sharp, public

---

49. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979).
50. *Id.*
51. *Id.*
52. *Id.* at 817.
53. *Id.*
54. *Id.*
55. *Id.* at 817.
56. *See id.* at 816.
57. NLRB v. Local Union No. 1229, Int'l Bhd. Of Elec. Workers, 346 U.S. 464, 474 (1953).
58. *Id.* at 468-70.

disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income," did not qualify as protected concerted activity.[59] These acts were not in response to a pending labor dispute; there was no discussion of wages, labor hours or working conditions; and the policies under attack were those of finance and public relations within management's scope of responsibility, not the workers'.[60] The Board found this to be a clear example of for-cause discharge, in which employees were simply attacking their employer's reputation with no intent to impact their working conditions or initiate any concerted activity.[61] Discharge for such actions, meant solely to harm an employer and alienate customers, will be considered a lawful and appropriate measure.[62]

This is further supported by the "Wright Line" test, a method for analyzing the true motive or reason behind the discharge of an employee in order to determine whether it was lawful.[63] According to the Wright Line test, the General Counsel must first prove that union animus was a substantial factor in the decision to terminate employment.[64] This is achieved by showing that the employee was participating in protected concerted activity of which the employer had knowledge and that the employer was openly opposed to or against the union activity.[65] Once the General Counsel meets this initial burden of proof, the employer must then show, by a preponderance of the evidence, that they would have taken the same disciplinary action even in the absence of the employee's protected activity.[66]

In *Wright Line*, a shop inspector, who also served as a leading union advocate, was discharged for inputting erroneous task completion times on his time card.[67] In applying the Wright Line test, the Board found that the shop inspector was considered an "admirable" employee, who had worked for the company for over 10 years, with no prior incident.[68] The discharging manager was openly opposed to the union and

---

59. *Id.* at 471.
60. *Id.* at 476.
61. *Id.* at 476-77.
62. *Id.*
63. Wright Line, a Div. of Wright Line, Inc., 251 N.L.R.B. 1083, 1089 (1980).
64. *Id.*
65. *See* Dish Network Corp., No. 16-CA-62433, 2012 WL 5564372, at *8 (N.L.R.B. Nov. 14, 2012).
66. *Wright Line*, 251 N.L.R.B. at 1089.
67. *Id.*
68. *Id.* at 1090.

expressed his negative opinion of the shop inspector's union participation.[69] In addition, the type of time card error in question was a frequent occurrence among the employees, which had previously resulted in no disciplinary action.[70] These findings led the Board to determine that the shop inspector's discharge was motivated by his protected activities and was thereby unlawful.[71]

In *Wright Line*, the employer clearly encroached upon the employee's protected activity; however, the *Wright Line* test also serves as a tool in enabling employers to terminate employees for disciplinary and behavioral issues.[72] Even if their termination involves some protected activity, as long as the protected activity is not the primary motive for discharge, employers can still lawfully discipline disruptive or otherwise problematic employees.[73]

III. ANALYSIS: APPLICATION OF THE NLRA TO SOCIAL MEDIA CASES

A. *Unlawful Discharge Infringing Upon Section 7 Protected Rights*

Application of the NLRA to social media communications is evolving, as the NLRB adapts the current NLRA provisions to the new technological workplace.[74] In a majority of situations the NLRB has found that the NLRA applies to employer policies and actions taken in response to social media activities, which might violate employee rights to concerted activity.[75] In *Hispanics United of Buffalo, Inc.*, the first published decision by an NLRB judge involving Facebook postings, the NLRB expanded the application of the NLRA to employee social media activity in both unionized and non-unionized organizations.[76] This case shed light on the application of the NLRA to social media cases, as

---

69. *Id.*

70. *Id.*

71. *Id.* at 1090-91.

72. *See, e.g.*, Karl Knauz Motors, Inc., No. 13-CA-046452, 2012 WL 4482841, at *3 (N.L.R.B. Sept. 28, 2012) (utilizing the *Wright Line* test to determine that an employee would still have been discharged notwithstanding his protected activity).

73. *Id.* at *1.

74. L. Camille Hebert, *Employers' Duty to Negotiate Over Electronic Monitoring and Surveillance*, 1 EMP. PRIVACY LAW § 8A:40 (2012).

75. *Id.*

76. Lawrence E. Dubé, *In First NLRB Social Media Ruling, ALJ Holds Facebook Posting Firings Violated Labor Act*, PRIVACY LAW WATCH, Sept. 2011.

previous social media cases to date had ended in settlement or dismissal.[77]

1. *Hispanics United of Buffalo, Inc.*

In *Hispanics United*, the NLRB judge found that five workers at the non-profit Hispanics United of Buffalo, Inc. ("HUB") were engaged in concerted activities protected under Section 7 of the NLRA when they posted comments to a coworkers' Facebook page.[78] The subsequent termination of all five employees was, therefore, in violation of the NLRA.[79]

In HUB, an employee posted a Facebook comment in response to the criticism of her group's work efforts from a domestic violence advocate (DCA) who visited HUB once a week.[80] The comment, addressed to her fellow employees, was as follows: "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB[.] I about had it! My fellow coworkers, how do [yo]u feel?"[81] This posting rapidly elicited a series of indignant, negative responses from four co-workers, which Cruz-Moore subsequently read and shared with HUB management.[82] Shortly thereafter, the five employees involved in the postings were told that Cruz-Moore had suffered a heart attack as a result of their harassment and that HUB would have to pay compensation for her illness.[83]

In considering whether these Facebook postings constituted concerted activity, the Board found it irrelevant that the employees were not attempting to address their work conditions or that they had not previously communicated their concerns to their HUB supervisor.[84] The Board stated that these Facebook communications were indistinguishable from traditional discussions "around the water cooler" and would be treated as such.[85] They relied on previous case law, which held that an employer violates a protected right by disciplining employees for exercising this right, regardless of whether or not their discussions were entered into with the intent of inducing collective action.[86]

---

77. *Id.*
78. *Hispanics United*, slip op. at 8.
79. *Id.* at 9.
80. *Id.* at 4.
81. *Id.*
82. *Id.* at 5-6.
83. *Id.* at 6.
84. *Id.* at 8.
85. *Id.*
86. *Id.*

Nevertheless, the court found that the posting employees in this case were taking the first step toward collective action in defending themselves because Cruz-Moore's behavior could have led to their reasonable belief that she would take her productivity complaints to management.[87] Any further development of this group action was prevented, however, by their termination by the HUB supervisor.[88] The fact that all five employees were discharged at the same time lent further proof that they were viewed as a collective group acting jointly, rather than several individuals acting in a singular capacity.[89]

The HUB supervisor tried to argue that the employees had engaged in misconduct during their otherwise protected activity and thereby lost their protected status.[90] She invoked the four-factor test previously applied in *Atlantic Steel*[91] for this analysis; however, the Board found the employees' conduct was not so egregious as to lose protection under the Act.[92] First, the Facebook postings were made outside of work, after working hours, and on personal computers.[93] Second, the nature of the subject matter was their coworker's criticism of their job performance rather than a complaint about their employer's labor practices.[94] Third, there were no "outbursts" involved, and the fourth factor was inapplicable, as the Facebook comments were not in response to employer practices.[95]

Moreover, HUB did not have a clear social media policy in place, but rather relied on their "zero tolerance" policy regarding harassment.[96] HUB also had a policy against sexual harassment, as well as a general policy against harassment in the workplace; however, the Board found that neither policy applied as there was no harassment in this case.[97] There was also no causal relation between Cruz-Moore's health and the Facebook comments posted by the five employees.[98] The Board ultimately

---

87. *Id.* at 8-9.

88. *Id.*

89. *Id.* at 9.

90. *Id.* at 9-10.

91. *See Atl. Steel Co.*, 245 N.L.R.B. at 816 (outlining the four factors for determining egregious conduct: 1) the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by an employer's unfair labor practice).

92. *Hispanics United*, slip op. at 9-10.

93. *Id.* at 9.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 9-10.

98. *Id.* at 10.

determined that the HUB supervisor was simply looking for a way to reduce the workforce, and the termination of these employees for their Facebook postings provided a convenient avenue.[99]

While *Hispanics United* suggests that social media activities will be considered equivalent to traditional forms of employee communications and similarly protected, it sheds little light on what type of social media policies employers may use to lawfully protect their interests.[100] It does, however, delineate that the NLRA applies to non-unionized as well as unionized companies and serves to clarify that communications, which may be considered a precursor to collective activity, are protected under the NLRA.[101]

2. *Costco Wholesale Corp.*

The Board further refined its view on social media policies in the recent case of *Costco Wholesale Corp.*[102]In *Costco*, the Board invalidated an employee social media policy, which stated, in pertinent part:

> All employees are responsible for communicating with *appropriate business decorum* . . . . Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, *defame any individual or damage any person's reputation*, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment . . . . Sensitive information such as membership, *payroll*, confidential financial, credit card numbers, social security numbers, or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval.[103]

In considering whether this policy infringed upon the rights of Costco's employees, the Board considered whether the rule would chill employees from seeking to engage in Section 7

---

99. *Id.*

100. *See id.* at 8.

101. *Id.* at 9.

102. Costco Wholesale Corp., No. 34-CA-012421, 2012 WL 3903806, at *13 (N.L.R.B. Sept. 7, 2012).

103. *Id.* at 12 (emphasis added).

protected activities.[104] As the Board has found in the majority of social media cases, Costco's policy did not explicitly prohibit NLRA protected Section 7 activity; rather, the Board had to determine whether the policy implicitly[105] prohibited such conduct.[106] In proceedings by the lower Board, the judges determined that employees would reasonably interpret this policy as seeking to establish and maintain order in the workplace; however, the NLRB differed in its judgment.[107] In this proceeding, the Board found that the policy terms prohibiting employees from making damaging or defaming statements were overly broad and could be understood to also prohibit communications protected under Section 7.[108] Furthermore, communications that might "damage any person's reputation" are not defined anywhere in the handbook and could be construed to include a broad number of protected statements.[109]

Similarly, the requirement that employees communicate with "appropriate business decorum" was unaccompanied by any narrowing language or clarification as to what constitutes "appropriate" conduct.[110] While Costco argued that this policy protected their right to maintain a civil and orderly work environment, this desire did not mitigate the lack of clarity inherent in the current policy or override the need to exclude protected activities.[111]

Lastly, the section of the rule prohibiting disclosure of payroll information was also found unlawful because there was no limiting or defining language to distinguish employee wages and hours from company-related sensitive business items.[112] Costco argued that the rule would reasonably be construed to include only confidential business details related to payrolls, particularly as the word payroll was listed among numerous other non-Section 7 items, such as "social security numbers,"

---

104. *Id.* at 2.

105. *See Martin Luther*, 343 N.L.R.B. at 646-47 (outlining the test for determining whether a policy implicitly violates the NLRA: 1) employees could 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).105.

106. *Id* at 2.

107. *Id.*

108. *Id.* at 5; *see also, Echostar*, slip op. at 15-16 (explaining that although defamatory statements about one's employer could be prohibited, statements that are simply damaging and not defaming are protected unless they occur in conjunction with significant misconduct).

109. *Costco*, 2012 WL 3903806, at *1.

110. *Id.* at 24.

111. *Id.* at 1.

112. *Id.* at 21.

"credit card numbers," and "confidential financial" information.[113] However, another part of the rule referred to "payroll" alongside terms encompassing all employee-related information, not just the confidential business items.[114] When read in full context, an employee would have significant difficulty distinguishing what payroll items could and could not be discussed in the workplace and could, therefore, reasonably conclude that the rules restricted their expression of Section 7 communications.[115] In making its determination, the Board reiterated that where employee work rules are unclear or could potentially infringe upon protected employee rights, such ambiguities need to be resolved in favor of the employees required to adhere to them.[116]

3. *American Medical Response of Connecticut, Inc.*

But how far does protection for Section 7 activities extend? In *American Medical Response of Connecticut, Inc.* (hereafter "AMR"), a paramedic, Dawnmarie Souza, was discharged for her inflammatory and disparaging Facebook comments about her employer.[117] Following a complaint by a patient's family member, Souza's supervisor asked her to complete an incident report describing the situation and warned that she may be disciplined.[118] Souza was denied the presence of a union representative, which led to an argument with her employer regarding her right to union representation.[119] Souza later submitted the requested incident report and then posted critical comments on her personal Facebook page, expressing her displeasure with her supervisor and his treatment of her.[120] These included calling him a "17," a company code for a psychiatric patient, as well as a "dick" and a "scumbag."[121] Souza's post elicited a thread of responses from current and former employees.[122]

---

113. *Id.* at 22.

114. *Id.*

115. *Id.* at 21; *see also Echostar,* slip op. at 24 (stating that in order to be found lawful, a rule must be clearly unambiguous to a reasonable employee when read in the full context presented by the employer).

116. *Costco*, 2012 WL 3903806, at *15.

117. Am. Med. Response of Conn., No. 34-CA-12576, 2010 NLRB GCM LEXIS 63, at *6–7 (N.L.R.B. Oct. 5, 2010).

118. *Id.* at *5.

119. *Id.* at *5-6.

120. *Id.* at *6.

121. *Id.* at *6-7.

122. *Id.*

The following day, Souza was suspended from work and terminated shortly thereafter.[123] Among the reasons listed for her discharge was violation of the company's social media policy, which prohibited employees from making "disparaging, discriminatory, or defamatory comments" about their supervisors or the Company.[124] The Board determined that Souza's attempts to invoke her right to union representation and her discussion of supervisory actions with coworkers on Facebook constituted protected Section 7 activities.[125] As this was a prima facie case of a rule prohibiting protected activities, the Board applied the *Wright Line* test and held that AMR had not met its burden of proving that Souza would have been discharged in the absence of her protected communications.[126]

Due to the highly critical nature of the comments, the Board next applied the four-factor *Atlantic Steel* test to determine whether her remarks were so egregious as to lose protection under the NLRA.[127] First, the Facebook discussions were not disruptive to the work environment as they took place from Souza's personal computer on non-working time.[128] Second, the subject matter involved an employee discussion of supervisory action.[129] The nature of the outburst, the third factor, while it included negative name-calling, did not include verbal or physical threats.[130] Lastly, Souza's actions were very clearly provoked by her supervisor's unwillingness to provide her with a union representative to assist in the completion of her incident report.[131] In light of these factors, the Board found that Souza's comments were not sufficiently opprobrious to lose the protection of the Act.[132]

B. *Lawful Discharge Involving Social Media*

If posting comments such as "dick" and "scumbag" cannot be prohibited, what employee social media activities can employers regulate?[133] One example of such activity is when an employee posts inappropriate non work-related tweets to a work Twitter

123. *Id.* at *7.
124. *Id.* at *9-10.
125. *Id.* at *16-17.
126. *Id.*
127. *Id.* at *17.
128. *Id.* at *18.
129. *Id.*
130. *Id.*
131. *Id.* at *18-19.
132. *Id.* at *19.
133. *See, e.g., id.* at *6.

account.[134] Case law also suggests that the more removed an employee's conduct is from the workplace setting and workplace topics, the more latitude an employer will have to discipline inappropriate conduct.[135] In some instances, even communications involving Section 7-type topics may be prohibited if they are made solely to vent an employee's frustrations and not to induce collective action.[136] In addition, even if an employee takes part in protected Section 7 activities but also engages in clearly unlawful conduct, they can still be lawfully discharged, as long as the reason for discharge is not the protected communication.[137] The *Atlantic Steel* factors, the *Jefferson Standard* test and the *Wright Line* test may also aid employers in determining whether a policy will be found lawful.[138]

1. *Lee Enterprises, Inc.*

In *Lee Enterprises, Inc.*, for example, the Arizona Daily Star newspaper discharged one of its reporters for his continuing inappropriate and unprofessional tweets, even after several discussions with management about ceasing such posts.[139] The newspaper encouraged its reporters to open Twitter accounts in 2009 in order to progress the use of social media for disseminating news to the public.[140] The employee reporter opened an account under his personal name, but clearly identified himself as an employee with the Daily Star and included links to the newspaper's website.[141] A few months later, the employee posted a tweet mocking the newspaper's copy

---

134. Letter from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Cornele A. Overstreet, Regional Director, Region 28 (Apr. 21, 2011) (2011 WL 1825089).

135. *See* Robert J. Baror, *Employers Beware the NLRB and Social Media,* 54 No.4 DRI for Def. 34, *6 (2012) (suggesting that employers have a theoretical "safe harbor" when disciplining employees for inappropriate social media communications not related to working conditions or management policies; the further removed from the physical workplace the social media conduct, the more likely it is to be found lawful).

136. *See, e.g.*, letter from Barry J. Kearney, Assoc. Gen. Counsel, NLRB, to Ray Kassab, Acting Reg'l Dir. Region 7, (Jan. 10, 2012) (2012 WL 1795803) (holding that while an employee's complaints about union performance addressed protected Section 7 topics, they were not protected because he was merely attempting to elicit sympathy and not collective action; his comments were found egregious and disruptive).

137. *See e.g., Karl Knauz Motors,* 2012 WL 4482841, at *1 (holding that even though an employee participated in protected communications, he could still be discharged for separately posting photos of a potentially dangerous vehicle mishap at an adjacent dealership, which bore no relation to his work conditions).

138. *See* Hodge, *supra* note 47, at *35.

139. *See* Kearney, *supra* note 134, at *1.

140. *Id.*

141. *Id.*

editors as being "the most witty and creative people in the world."[142] This was in response to a series of sports department headlines which concerned the reporter and which he had mentioned to the Executive Editor; however, the reporter did not express these concerns to his coworkers or request their input.[143]

Upon learning of these posts, the reporter's management prohibited him from venting his concerns or making any statements about the newspaper in an open online forum.[144] In response, the reporter continued to tweet but refrained from making public comments about the Daily Star.[145] A few months later, however, he posted a series of highly inappropriate tweets, including comments such as "You stay homicidal, Tucson" and "Hope everyone's having a good homicide Friday."[146] The reporter then posted a critical tweet calling a neighboring news station's reporters "stupid TV people" following their misspelling of a word in an online post.[147] This resulted in the neighboring station filing a complaint with the Daily Star's Reader Advocate who shared the reporter's posts with his management.[148] As a result, the reporter was discharged for his derogatory comments and their damaging effect on the goodwill and reputation of the company.[149]

The Board found this termination to be lawful because it was based on the employee's offensive and unprofessional remarks and did not encompass Section 7 protected activity.[150] The employee reporter was acting in an individual capacity and did not share his grievances with other employees or attempt to induce concerted action in response to labor conditions.[151] In addition, the reporter received multiple warnings to refrain from posting inappropriate subject matter, but he failed to adhere to them.[152]

The Board also found the rule to not be overly broad, even though the employer's statements could be construed as involving protected activities.[153] In each communication session

142. *Id.* at *2.
143. *Id.*
144. *See* Kearney, *supra* note 134, at *2.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at *2-3.
149. *See* Kearney, *supra* note 134, at *4.
150. *Lee Enterprises,* 2011 WL 1825089, at *5-6.
151. *Id.* at *4-6.
152. *Id.* at *4.
153. *Id.* at *5.

with the reporter, his managers warned him to stop tweeting a particular type of negative material and provided specific examples of the posts in question.[154] The discussions were held directly with the reporter and involved informal guidelines attuned to the specific situation, rather than broadly promulgated, company-wide policies.[155] When taken in the context of the reporter's conduct, these discussions could be clearly understood as pertaining solely to his inappropriate tweets.[156]

While the NLRA provides significant protection for employee communications and potentially offensive comments, *Lee Enterprises* indicates that employees will not be protected when making abusive comments that are entirely unrelated to their work activities.[157] In addition, policies specifically developed to address a particular employee's conduct and communicated directly to that employee will not be considered overbroad, even if the verbiage might otherwise appear to encompass protected conduct.[158] In such communications, the scope and extent of the rule can be clearly discerned from the context of the situation.[159] Furthermore, this case indicates that informal work rules, not broadly promulgated among all employees may be less likely to be found unlawful due to their specific application.[160] The case also suggests that the further removed from the workplace an employee's offensive or inappropriate conduct may be, the more likely it will be for an employer to successfully regulate their employees' social media behavior.[161] For example, because the *Lee Enterprises* reporter tweeted inappropriate and scandalous comments entirely unrelated to his work conditions, wages, etc., his employer had far more latitude to terminate his employment for misconduct than if he had posted more negative comments criticizing his work conditions.[162]

2. *Detroit Medical Center*

The NLRA will also not protect employee actions that involve egregious comments, even if made in conjunction with

---

154. *Id.*

155. *Id.* at *5-6.

156. *Id.* at *6.

157. Baror, *supra* note 135.

158. Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 1005-06 (2012).

159. *Id.* at 1006.

160. *Id.*

161. Baror, *supra* note 135.

162. *See id.*

protected Section 7 activities.[163] Although employees are given considerable latitude, as seen in *American Medical Response* with the use of words such as "dick" and "scumbag," *Detroit Medical Center* provides guidance as to the limits of tolerance.[164] In *Detroit Medical Center*, an employee was disciplined for using racial stereotypes and posting offensive comments about his coworkers, which built up racial tension in the work environment.[165]

In this case, the tensions stirred when the charged party, who had previously been accused of racist conduct by his fellow employees, was promoted to a supervisory-type position.[166] Upon hearing about the promotion, the employee's coworkers posted a complaint that the promotion violated contractual provisions and should be revoked.[167] The significant response resulted in the charged party's demotion back to his previous technical position, following which he posted several disparaging comments on Facebook calling his coworkers "sorry ass whining people" and "little worker bees."[168] A fellow employee also reported that following his demotion, the charged employee verbally threatened her, saying "people better know what they're doing around here because payback's a bitch"; however, the charged employee denied having made these comments.[169] He then posted two further Facebook messages calling his coworkers "jealous ass ghetto people" and "poor lazy piece of shit workers" who had stolen his opportunity for work advancement.[170] He also criticized the union's performance and their support of "lazy" workers.[171] Although the charged employee was attempting to elicit his coworkers' sympathy, only one fellow employee replied that they "LIKE" this post.[172]

The charging party's locker was subsequently vandalized with graffiti and a threatening message was written warning him to cease his racial statements.[173] Several employees also complained to management and shared the Facebook postings

163. *Atl. Steel Co.*, 245 N.L.R.B. at 816.
164. Detroit Medical Center, No. 7-CA-06682, 2012 WL 1795803, at *1.
165. *Id.*
166. *Id.* at *1-2.
167. *Id.* at *1.
168. *Id.*
169. *Id.* at *2.
170. *Id.* at *1-2.
171. *See id.* at *2.
172. *Id.*
173. *Id.*

with them.[174] When questioned by his management and an HR liaison, the charged party stated that he was simply venting and had not meant anything racial by his comments; however, this was still found to be in violation of the employer's social media policy, which prohibited the posting of defamatory comments about employees on social media sites.[175] Furthermore, the policy specified that prohibited conduct included "[m]aking or publishing a maliciously false statement concerning an employee . . ." and participating in "[d]isorderly and/or disruptive conduct . . . that may adversely affect the tranquil atmosphere of the healthcare environment."[176] The employee's management found that he had violated these provisions and caused significant disruption in the work environment, resulting in a three-day suspension and placement on probationary status for a year.[177]

In considering the lawfulness of this disciplinary action, the Board found that the charged employee's actions were not protected Section 7 activity.[178] The employee's verbal threat toward his coworker clearly had no related purpose to concerted collective action, and his posts were not made to elicit fellow employees' support in opposition to unfair labor practices or work conditions.[179]Although the Facebook postings included references to union activity and performance, the employee admitted that he was simply venting about his coworkers, not attempting to organize them to act against the union or company management.[180]Furthermore, the employee lost any potential protection under the Act due to his comments being highly offensive and including racial stereotypes.[181]

Applying the *Atlantic Steel* test, the Board found these comments to be opprobrious and a serious disruption to the work environment.[182] The location of the postings on Facebook enabled broad dissemination among his coworkers and resulted in significant racial tensions.[183] The nature of the outburst involving racial stereotypes and offensive language also weighed heavily against protection, and his conduct was not in response

---

174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at *3.
179. *Id.*
180. *Id.* at *2-3.
181. *Id.* at *3.
182. *Id.*
183. *Id.*

to any management practices, compensation concerns or labor issues.[184] Even though the subject matter involved Section 7 protected activities, the Board found the employee's comments sufficiently egregious to lose the protection of the Act.[185]

The Board also applied the *Jefferson Standard* to determine whether the charged employee's postings had a negative reputational effect upon the Detroit Medical Center's work products and services.[186] Due to the comments being posted on Facebook and having a broader audience than the internal company employees and management, third parties could have easily viewed these postings.[187] However, the employee's postings involved only coworker activities, with no discussion of management, nor any disparaging remarks regarding management practices.[188] The reputational damage for Detroit Medical Center was therefore minimal.[189] Consideration of the *Jefferson Standard*, however, highlights the distinct nature of social media postings and the fact that, whether intended or not, online postings have broad viewership both within and outside the company.[190] Employees making comments, therefore, should consider who exactly their intended audience is and who may have access to view their postings.

3. *Karl Knauz Motors, Inc.*

The opprobrious nature of the postings in *Detroit Medical Center* rather clearly indicated conduct that loses protection under the NLRA; however, in many cases, the situation is more ambiguous.[191] In *Karl Knauz Motors, Inc.*, Robert Becker, a BMW salesman was discharged for making two disparaging Facebook postings critical of his employer.[192] The first posting involved Becker's displeasure with the dealership's handling of a high profile promotional event to introduce a new vehicle model.[193] Becker participated in a meeting in which he and his coworkers collectively complained that the food being provided for the event

---

184. *Id.*
185. *Id.*
186. *Id.*
187. *Detroit Medical Center*, 2012 WL 1795803, at *3.
188. *Id.*
189. *Id.*
190. *Id.*
191. *See id.*
192. Samantha Barlow Martinez, *Cyber-Insubordination: How an Old Labor Law Protects New Online Conduct*,49-FEB HOUS. LAW. 16, 18 (2012) (referencing *Karl Knauz Motors*, 2012 WL 4482841,at *1).
193. *Karl Knauz Motors*, 2012 WL 4482841,at *7.

– a hot dog cart, chips and cookies – was inappropriate and inadequate for the introduction of a new luxury vehicle model.[194] Several coworkers also voiced concerns that as the "bread and butter store in the auto park," they should serve higher quality food and treat this important event with more care; however, their employer did not make any changes.[195] The event handling was not on par with the brand's image and customer perceptions of the vehicle quality - a factor that could negatively affect sales and the salespeople's commissions.[196] Becker's supervisor failed to make any changes in response to these concerns, and following the event, Becker posted critical remarks on his Facebook account.[197] He stated that he was "happy to see that Knauz went '[a]ll Out' for the most important launch of a new BMW in years," and that "[t]he 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."[198] The posting elicited several comments from Becker's relatives and friends and a subsequent discussion thread.[199]

In conjunction with this event posting, however, Becker posted pictures of a Land Rover incident, which took place at an adjacent dealership.[200] The incident occurred when a customer's 13-year-old son inadvertently pressed the gas pedal on a showroom vehicle and drove it into a small pond, throwing the salesperson into the water.[201] Becker, who could see the incident from the BMW facility, took several pictures of the vehicle in the pond, the wet salesperson and the 13-year-old holding his head.[202] He later posted the photos to his Facebook page with the caption "This is your car: This is your car on drugs."[203] Several employees of both the BMW and Land Rover stores responded to these postings with mocking commentary.[204]

Becker's management team responded by holding a meeting to discuss the Facebook postings and to inform him that some disciplinary action would be forthcoming.[205] Becker's direct

---

194. *Id.* at *7-8.
195. *Id.* at *8.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at *11.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at *12.
205. *Id.*

supervisor initially stated that the Land Rover incident postings might be acceptable; however, the BMW event postings were the main reason for management's displeasure.[206] In a later meeting, however, the company vice president stated that the BMW postings were merely "comical."[207] The Land Rover postings were the real point of concern because they made "light of an extremely serious situation . . . somebody was injured and . . . doing that would just not be accepted." [208] Becker's employment was terminated thereafter, with the Land Rover posting indicated as the main reason for his discharge.[209]

In determining whether this discharge was lawful, the Board had to first determine which of the postings was the primary reason for Becker's termination before considering whether the alleged violation was a protected concerted activity.[210] In reviewing the BMW event postings, the Board took into account the pre-event comments by Becker and his fellow employees expressing concern about the food items being served.[211] Although this consisted of singular comments by individual employees rather than a collective group, it was still protected concerted activity.[212] In reaching this conclusion, the Board relied on the rule in *Meyers II*, which states that activities undertaken by a single employee with the intent of inducing group action or which represent the group's collective concerns are concerted activities.[213] The activities were considered protected, as the negative impact to the BMW "brand" could potentially affect the commissions of the salespeople.[214] Although Counsel for BMW argued that neither Becker nor his fellow employees stated compensation concerns during the meeting, this is not a requirement of protected concerted activities.[215]

The final question is whether the mocking and sarcastic tone of the Facebook comments rose to the level of disparagement necessary to deprive them of protection under the Act.[216] Utilizing a *Jefferson Standard* - type analysis, the administrative judge considered several far more severe instances of

---

206. *Id.*
207. *Id.* at *13.
208. *Id.*
209. *Id.* at *13-14.
210. *Id.* at *16.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at *17.
216. *Id.* at *17.

disparagement, which maintained the Act's protection, such as using profane language to describe the company or making disparaging remarks about a company's senior management.[217] As Becker's tone was far less extreme, his comments did not lose protection.[218]

The Land Rover postings, however, were not protected activities, as they were posted solely by Becker with no prior discussion or consultation with other employees.[219] They also bore no connection to traditionally protected subject matter, as they did not involve wages, terms and conditions of employment or unfair labor practices.[220] The administrative judge found the testimony of BMW's management credible in establishing that the Land Rover posting was the main cause for Becker's discharge.[221] He applied the *Wright Line* test, which seeks to determine whether an employee would still be discharged in the absence of the protected activity.[222] Further analysis was unnecessary, however, because the General Counsel failed to prove that the Land Rover postings constituted concerted activity requiring the Act's protection.[223] Robert Becker's discharge, therefore, was a lawful regulation of employee social media activities.[224]

C. *Employee Use of Company Information*

Employers may assume that they can restrict employee use of company information when promulgating their social media policies; however, if the employee is engaging in protected, concerted activity, such rules may also be found unlawful.[225] Rules requiring employees to seek employer or fellow employee permission prior to posting company-related information and rules restricting the sharing of confidential information can be found unlawful if they encompass information relevant to

---

217. *Id.*; *see also*, NLRB v. Local Union No. 1229, 346 U.S. at 475 (outlining the *Jefferson Standard* and holding that disparaging attacks of a company's policies intended to damage or harm its reputation did not constitute protected activity).

218. *Karl Knauz Motors*, 2012 WL 4482841, at *17.

219. Barlow Martinez, *supra* note 192, at 18.

220. *Id.*

221. *Id.*

222. *Karl Knauz Motors*, 2012 WL 4482841, at *18.

223. *Karl Knauz Motors*, 2012 WL 4482841, at *10.

224. *Id.*

225. *See, e.g.*, Gen. Motors, LLC, No. 07-CA-53570, 2012 NLRB LEXIS 304 (N.L.R.B. May 30, 2012) (discussing whether various aspects of GM's social media policy violate Section 8).

protected concerted activities.[226] Prohibitions against the use of company logos and trademarks may also be found unlawful, if they prevent employees from utilizing them for protected communications.[227]

1. Requesting Permission to Post Information

In *General Motors*, for example, the administrative judge found unlawful a rule stating "When in doubt . . . DO NOT POST. Check with GM Communications or GM Legal to see if it's a good idea."[228] The administrative judge held that such provisions requiring employees to check with employers or seek permission prior to posting information are unlawful because they can be reasonably understood as requiring permission prior to posting anything, including information related to Section 7 activities.[229] Similarly, the General Motors rule requiring that employees obtain permission from coworkers prior to posting information related to their pay or compensation was found invalid because it could prevent protected discussions of wages and work terms and conditions.[230]

Employers also may not restrict employees from contacting third parties, the media or government agencies or require that employees obtain permission prior to engaging in such communications.[231] In *Dish Network Corp.*, a rule in the social media policy stated, "Unless you receive prior authorization . . . you must direct inquiries to the Corporate Communications Department. Similarly, you have the obligation to obtain written authorization of the Corporate Communications Department before engaging in public communications regarding DISH Network . . . ."[232] This rule was found unlawful because it could interfere with employees' rights to seek assistance from third

---

226. *See, e.g.*, *Dish Network*, 2012 WL 5564372, at *7 (holding unlawful a social media policy requiring employees to seek written authorization prior to communicating any company-related information); *see also*, *Gen. Motors*, 2012 NLRB LEXIS 304, at *4-5 (holding that a confidential information rule prohibiting discussion of "performance, compensation, or status in the company" could chill employees from engaging in communications regarding unfair compensation and work conditions).

227. *See, e.g.*, *Pepsi Cola Bottling Co.*, 301 N.L.R.B. 1008, 1019-1020 (1991) (holding unlawful a rule that prohibited employees from wearing company logos outside of work, as it could be understood as restricting the use of company logos during protests or other protected activities); *see also*, Stant USA Corp., No. 26-CA-24098, 2011 WL 7789839, at *3 (N.L.R.B. Oct. 13, 2011) (holding unlawful a social media policy restricting the use of company trademarks or logos in online posts).

228. *Gen. Motors*, 2012 NLRB LEXIS 304, at *5.

229. *Id.*

230. *Id.*

231. *Dish Network*, 2012 WL 5564372, at *7-8.

232. *Id.* at *6.

parties outside of their internal work environment regarding wages and labor terms and conditions.[233] An adjacent rule prohibiting contact with government agencies was similarly found unlawful because it could be construed as prohibiting labor-related communications between employees and the NLRB, a definite infringement upon Section 7 rights.[234]

2. Confidentiality Provisions

Confidentiality provisions are also problematic in that they are often ambiguous and may restrict protected communications.[235] In *General Motors*, the social media policy prohibited posting of any "non-public company information on any public site," to include a number of listed topics, such as "financial performance of the company," information not previously disclosed by "authorized" company representatives and personal details and compensation information related to other employees.[236] These provisions raised concerns due to their potential tendency to chill employees' engagement in their protected Section 7 activities.[237] Employees could reasonably interpret this rule to restrict communications involving their compensation and employment conditions, particularly because it prohibits discussion of coworker "performance, compensation, or status in the company."[238]

Similarly, in *Stant USA Corp.*, a rule restricting employees from sharing "confidential and proprietary" information about the company and its employees was found overly broad, particularly when read in conjunction with other provisions in the rule.[239] The provision in question stated that employees may not share "confidential and proprietary information about the Company, its associates, customers, contractors or subcontractors, or suppliers. This includes information about trademarks, upcoming product releases . . . and any other information that has not been publicly released by the Company."[240] Employees could reasonably construe this provision as encompassing communications to coworkers and third parties

233. *Id.* at *7.

234. *Id.* at *7-8.

235. *See* Stant USA Corp., No. 26-CA-24098, 2011 WL 7789839, at *2 (N.L.R.B. Oct. 13, 2011).

236. *See Gen. Motors*, 2012 NLRB LEXIS 304, at *1.

237. *Id.* at *4.

238. *Id.* at *4.

239. *Stant*, 2011 WL 7789839, at *2.

240. *Id.* at *1.

related to employment conditions, compensation and the need to engage in collective group action protected by Section 7.[241]

Although the rule is specific in enumerating what constitutes confidential information, the list includes topics which may be pertinent to concerted activity or the seeking of union representation, such as the "numbers of employees" and the "number of products sold."[242] Furthermore, the provision ends with the all-encompassing phrase "and any other information that has not been publicly released by the Company."[243] This overly broad phrase expands the scope of confidential and proprietary information, which employees could interpret as banning a multitude of topics, to include those related to Section 7 activity.[244]

This provision is accompanied by two other rules requiring that employees respect their coworkers' privacy by seeking permission prior to posting a quote or other potentially private information about them.[245] As seen previously, rules requiring employees to seek permission without a legitimate business justification and with no specification as to what is considered private information, are overly broad.[246] When taken in context of the full rule, therefore, these confidentiality provisions could reasonably tend to chill an employee's decision to engage in concerted activities and are unlawful.[247]

3. Restricting the Use of Company Trademarks and Logos

Restricting the use of company trademarks and logos in online communications is another area which employers must approach carefully.[248] Company trademarks are protected under Section 32 of the Lanham Act, which imposes liability for trademark infringement or commercial use without the consent of the owner.[249] Employees, however, retain the right to use their employer's trademark or logo for noncommercial purposes in the

---

241. *Id.* at *2.

242. *Id.* at *1-2.

243. *Id.* at *1.

244. *Id.* at *2.

245. *Id.* at *1.

246. *Gen. Motors*, 2012 NLRB LEXIS 304, at *5.

247. *Stant*, 2011 WL 7789839, at *2; *see also*, *Lafayette Park Hotel*, 326 N.L.R.B. at 826 (stating the test for a violation of Section 8 activity as being one that would reasonably tend to chill employees in the exercise of their Section 7 rights).

248. *See Gen. Motors*, 2012 NLRB LEXIS 304, at *5.

249. *Id.*

course of their Section 7 activities in order to inform their audience of which company's labor practices are in question.[250]

In *Stant USA Corp.*, for example, the rule stated that "Stant logos and trademarks may not be used without the Company's written consent."[251] This provision was found overly broad because employees could reasonably understand it to prohibit their use of the company's trademark or logo in online communications related to their wages and working conditions.[252] Employees need to be able to use their employers' name, trademark and logo in union pamphlets, posted photos, cartoons and any other depictions relevant to the communication of Section 7 related matters.[253] Even though employers have a relevant business interest in protecting their trademarks from infringement, this interest does not outweigh the right of employees to engage in Section 7 activities.[254]

In *General Motors*, however, the NLRB provided employers a measure of flexibility in their rulemaking, so as to protect these legitimate business interests to some degree.[255] The rule stated that employees may not "incorporate GM logos, trademarks or other assets in your posts."[256] The Board first considered the precedent in *Pepsi Cola Bottling Co.*, in which the rule prohibited employees from wearing uniforms or displaying company logos or trademarks during non-working hours while engaging in union activity.[257] This rule was found unlawful because it significantly interfered with employees' rights to engage in protected concerted activities.[258] Furthermore, the company had provided no legitimate business justification sufficient to outweigh the Section 7 concerns.[259] While the *Pepsi Cola* case is frequently extrapolated to apply to the protection of trademark and logo use in the social media context, the Board declined to rely on it in the case of General Motors.[260] Instead, the Board applied *Flamingo Hilton-Laughlin*,[261] a later case, in which they upheld a rule prohibiting employees from wearing hotel uniforms off the

250. *Id.* at *6.
251. *Stant*, 2011 WL 7789839, at *2.
252. *Id.* at *3.
253. *Id.*
254. *Id.*
255. *See Gen. Motors*, 2012 NLRB LEXIS 304, at *5.
256. *Id.* at *3.
257. *Id.* at *6.
258. *Id.*
259. *Id.*
260. *Id.*
261. Flamingo Hilton-Laughlin, 330 N.L.R.B. 287 (1999).

company premises during non-working hours.[262] This case distinguished *Pepsi Cola*, in which the rule expressly prohibited employees from wearing company uniforms during union activity; whereas, *Flamingo Hilton-Laughlin* did not involve any specific union or concerted employee activity.[263]

In the case of General Motors' policy, there was no evidence that the logo and trademark rule sought to prevent union-related activity nor was it promulgated with anti-union sentiment.[264] Furthermore, General Motors argued that due to their Facebook and Twitter accounts being open to the general public, the purpose and intent of the policy was to prevent confusion among customers as to whether postings were official General Motors communications or unofficial postings by employees or third parties.[265] The Board held that this was a legitimate business purpose that did not interfere with Section 7 protected activities and was thereby lawful.[266]

This interest in avoiding confusion among customers and maintaining control over official communications was also seen in *Stant USA Corp.*[267] While several sections of the rule were found invalid, the Board did not question the provisions relating to representation of the company and the need to obtain CEO permission prior to speaking on behalf of the company.[268] Therefore, the rule stating "[i]f you identify yourself as a Stant employee, include clear disclaimers that the views you represent are yours alone and do not represent the views of Stant" was valid and bore no relation to protected activities.[269]

D. *Drafting Valid Social Media Guidelines: The Walmart Policy*

What then are the key components to a valid and lawful social media policy? Recent NLRB rulings suggest that the key component to a robust and lawful social media policy is specificity.[270] Rules and guidelines that would be otherwise

---

262. *Gen. Motors*, 2012 NLRB LEXIS 304, at *6.

263. *Id.*

264. *Id.*

265. *Id.* at *3.

266. *Id.* at *6.

267. *See Stant*, 2011 WL 7789839, at *1-2.

268. *Id.*

269. *Id.*; *see also*, Walmart, No. 11-CA-067171, 2012 WL 1951766, at *3, *5 (N.L.R.B. May 30,2012) (stating that a rule requiring employees to clarify that their social media postings are not representing or being made on behalf of Walmart is lawful).

270. *See, e.g.*, *Walmart*, 2012 WL 1951766, at *2 (holding that "rules that clarify and restrict theirs scope by including examples of clearly illegal or unprotected conduct" were

construed as overly broad or ambiguous have been found to be lawful in cases that provide examples and clearly outline the type of behavior being restricted.[271] Each rule or guideline must also be considered in and of itself and cannot be made unambiguous through broad, all encompassing statements, such as savings clauses.[272]

A recent case, in which the NLRB found Walmart's amended social media policy entirely lawful provides a good reference for employers.[273] In considering the Walmart social media policy, the Board found that several provisions of a type which had been deemed overly broad in previous cases, were lawful due to the specificity of Walmart's policy.[274] This was because Walmart listed several examples, which clearly outlined what type of non-Section 7 activity was prohibited.[275]

For example, a rule stating that "inappropriate postings" were prohibited was found lawful.[276] While such a rule would normally be considered overly broad and tending to chill employees in the exercise of their Section 7 rights, Walmart included several examples of inappropriate postings, such as "discriminatory remarks, harassment, and threats of violence" to distinguish the prohibited activities from protected concerted activity.[277] The Board went even further in *General Motors* by reviewing whether the wording was descriptive enough to show that Section 7 activities were not included.[278] The General Motors policy stated that "offensive, demeaning, abusive or inappropriate remarks are as out-of-place online as they are offline."[279] The Board held that the strongly negative adjectives indicated that egregious conduct was prohibited and not potential concerted activity.[280]

---

lawful); *but see*, *Stant*, 2011 WL 7789839, at *2 (holding that a rule which provided specific examples but concluded with a broad, potentially ambiguous statement including "and any other information" was unlawful).

271. *See Walmart*, 2012 WL 1951766, at *2.

272. *See, e.g.*, *Gen. Motors*, 2012 NLRB LEXIS 304, at *8 (illustrating that the NRLB will evaluate each guideline within a social media policy individually for ambiguity and potential encroachment upon protected Section 7 rights, notwithstanding the presence of a savings clause).

273. *Walmart*, 2012 WL 1951766, at *3.

274. *Id.* at *2.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Gen. Motors*, 2012 NLRB LEXIS 304, at *7.

279. *Id.*

280. *Id.*

Another section of Walmart's policy requiring employees to "Be Respectful" and "Always be fair and courteous . . . " was considered lawful because it distinguished respectful conduct from the prohibited egregious conduct.[281] The unacceptable conduct consisted of "offensive posts meant to intentionally harm one's reputation" and posts fostering hostility "on the basis of race, sex, disability, religion . . . . "[282] The Board had previously found unlawful two similar rules in *Stant USA Corporation.*[283] They required employees to "Be respectful" and prohibited "name calling, unfounded statements, or behavior that will reflect negatively" because such broad terms could apply to criticism of employer labor practices or work conditions.[284] However, in a later part of the same section, the Board found lawful a rule against the posting of material that was "defamatory, pornographic, proprietary, harassing, libelous or creating a hostile work environment" because the rule delineated the prohibited behavior and could not be construed by employees as restricting their protected rights.[285]

In contrast to the *Costco*, *General Motors*, and *Stant USA Corp.* cases, Walmart's confidentiality in social media rule was found lawful.[286] The rule in question stated that employees should "maintain the confidentiality of Walmart trade secrets and private or confidential information."[287] It is well established that employees have no protected right in their employer's trade secrets; however, the confidentiality provisions were also found to not apply to protected activity because of the multiple examples clarifying what constituted a prohibited disclosure.[288] These included "information regarding . . . processes, products, know-how and . . . internal reports, policies . . . or other internal business-related" information.[289]

Another critical component of the Walmart social media policy, which the Board has regularly found *lawful*, was the prohibition against conduct that "adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers . . . . "[290] A

281. *Walmart*, 2012 WL 1951766, at *4.
282. *Id.* at *2, *4.
283. *Stant*, 2011 WL 7789839, at *1, *3.
284. *Id.* at *1.
285. *Id.*
286. *Walmart*, 2012 WL 1951766, at *2.
287. *Id.*
288. *Id.*
289. *Id.* at *5.
290. *Id.* at *4.

similar rule was found lawful in *Stant USA Corp.*, which stated that "[s]ocial media activities should not interfere with your job at Stant."[291] This rule was lawful because it involved the employer's legitimate interest in maintaining an orderly and productive workplace and did not encroach upon protected concerted activities.[292]

A later section of the Walmart rule further restricted employees from using social media "while on work time or on equipment we provide . . . . Do not use Walmart email addresses to register on social networks, blogs or other online tools utilized for personal use."[293] This harkens back to the representation component discussed in *Stant USA Corp.* and not communicating on behalf of the company; it was lawful because it protects a legitimate business interest.[294]This concept is important for both employers and employees to remember with regards to social media policies.[295] The Board will balance the interests of the employer against that of the employee; when employee social media activity occurs on personal employee time, outside working hours, the Board will provide significant latitude for employee conduct.[296] However, during working hours, the employer has a legitimate interest in fostering work effort and limiting social media use.[297]

Lastly, the Walmart policy did not include a savings clause.[298] As stated previously, while a savings clause is intended to be an all-encompassing final statement meant to prevent a finding of unlawfulness, if the other components of the social media policy are overbroad or ambiguous, a savings clause will not serve to make a rule lawful.[299] Walmart's provisions were weighed individually, and the rule was found lawful as a whole because each individual provision was lawful.[300] In contrast, the General Motors social media policy contained several lawful and

---

291. *Stant*, 2011 WL 7789839, at *1.

292. *Id.* at *3.

293. *Walmart*, 2012 WL 1951766, at *5 (section entitled "Using social media at work").

294. *See Stant*, 2011 WL 7789839, at *1; *see also, Gen. Motors*, 2012 NLRB LEXIS 304, at *3.

295. Sprague, *supra* note 158, at 1001.

296. *Id.*; *but see, Lee Enterprises*, 2011 WL 1825089, at *5-6 (holding that inappropriate tweets made by an employee outside of work on a work account were not lawful).

297. Sprague, *supra* note 158 at 1001.

298. *Walmart*, 2012 WL 1951766, at *3-5.

299. *See Gen. Motors*, 2012 NLRB LEXIS 304, at *8.

300. *Walmart*, 2012 WL 1951766, at *3-5.

several unlawful rules.[301] Even though the policy concluded by stating that it would comply with all applicable laws, including Section 7, this alone could not resolve the problematic language in the overly broad clauses.[302] Employees would still be confused regarding what they could and could not do and might thereby be chilled from engaging in Section 7 conduct.[303] For this reason, a savings clause holds little weight in ensuring validity, and the rules themselves must be lawful.[304]

IV. A SOCIAL MEDIA POLICY CHECKLIST FOR EMPLOYERS

1. Review your social media policy to ensure it is not overly broad and could not be interpreted as chilling the exercise of Section 7 rights.[305]

2. Consider whether the policy rule serves a legitimate business interest.[306]

3. Understand that employees have significant leeway to criticize management, make disparaging remarks and use negative or harsh language.[307]

4. However, understand that you are protected from egregious or opprobrious conduct.[308]

5. Be aware that employee activity qualifies as concerted even if undertaken by an individual, as long as the individual represents the voice of the collective group, or the communication follows a previous concerted activity.[309]

6. BE SPECIFIC! Include examples of what types of activities are considered prohibited.[310] Ensure none of your examples involve potentially protected activities.[311]

---

301. *Gen. Motors*, 2012 NLRB LEXIS 304, at *8.
302. *Id.*
303. *Id.*
304. *See id.*
305. *See Lafayette Park Hotel*, 326 N.L.R.B. at 825.
306. *Gen. Motors*, 2012 NLRB LEXIS 304, at *5.
307. *See EchoStar*, slip op. at 16; *see also Am. Med. Response*, 2010 NLRB GCM LEXIS 63, at *7.
308. *See Atl. Steel Co.*, 245 N.L.R.B. at 816.
309. *See Karl Knauz Motors*, 2012 WL 4482841, at *16.
310. *See e.g., Walmart*, 2012 WL 1951766, at *1.
311. *Id.*

7. Do not use broad, all-encompassing phrases such as "offensive conduct" and "inappropriate discussions."[312]

8. Educate your employees on the social media policy, so as to provide further understanding and clarity.[313]

9. Don't rely on a savings clause; each component of a social media policy should be lawful in and of itself.[314]

V. CONCLUSION

Employers have a legitimate interest in trying to regulate employee use of social media in the workplace.[315] By applying the principles set forth in the Social Media Policy Checklist above, employers will be able to craft a robust social media policy or improve their current policies. While no policy can overcome all potential risks, by making guidelines as specific as possible and ensuring the restrictions do not encroach upon Section 7 activities, employers can establish a lawful policy to safeguard their business interests.[316]

Jessica Ireton

---

312. Edward G. Phillips, *A Primer for Nonemployment Lawyers Advising Clients on the NLRB's Treatment of Social Media Cases*, TENN. B.J., OCT. 2011, at 32.

313. Mark W. Peters, *Triaging Social Media in the Healthcare Workplace: Assessment, Analysis and Action*, AHLA SEMINAR PAPERS 44, Jun. 2011, at 4, 11.

314. *Gen. Motors*, 2012 NLRB LEXIS 304, at *8.

315. *See generally* Determann, *supra* note 1.

316. *Baror*, *supra* note 135, at 7.