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BEYOND THE WATER COOLER: SPEECH AND THE WORKPLACE IN AN ERA OF SOCIAL MEDIA

Ann C. McGinley & Ryan P. McGinley-Stempel***

“In democracy it’s your vote that counts; in feudalism it’s your count that votes.”

-Mogens Jallberg¹

I. INTRODUCTION: DEMOCRACY IN THE WORKPLACE

Few would dispute the proposition that free speech and association play an important role in the operation of a healthy democracy. This is particularly true in the American context,² where an elected republic “of the people, by the people, for the people”³ owes its foundation to a Constitution that protects these principles.⁴ Consequently, attempts by public officials to interfere with free speech or association have, by and large, been deemed constitutionally infirm.⁵ Workplaces, however, are

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1. Daniel Schugurensky, *Foreword* to PAUL R. CARR, *DOES YOUR VOTE COUNT?: CRITICAL PEDAGOGY AND DEMOCRACY*, at xvi (2011).

2. Even though American government operates as a republic, it nonetheless relies on and subscribes to self-governance, a fundamental tenet of democracy. See Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 66 (2011).

3. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *available at* http://avalon.law.yale.edu/19th_century/gettyb.asp.

4. See U.S. CONST. amend. I.

5. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding city ordinance banning residential sign stating “For Peace in the Gulf” violated the resident’s right to free speech); *Texas v.*

an important exception to some extent. Although the First Amendment grants some protection to public workers to voice their views on “matters of public concern,”⁶ even that protection has narrowed with recent Supreme Court cases.⁷ Moreover, the U.S. Constitution does not directly touch private actors, and in the employment context, this means that few Americans enjoy protections from discharge for engaging in speech.⁸ This is problematic because just as a civil society loses its efficacy when speech is restricted, so too does democracy in the workplace founder when employees believe that they cannot speak their views about their work either at the office or outside of it.

The workplace occupies a more robust role in the average person’s life today than previously, and it has expanded to locations beyond the four walls of our offices or plants. Time spent working has increased substantially over the last several decades.⁹ As a result, the relationships developed among co-workers place a close second to those among family members.¹⁰ Ironically, recent studies demonstrate that as

Johnson, 491 U.S. 397 (1989) (holding that flag burning is protected speech under the First Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that public schools cannot censor speech unless facts existed at the time that could have reasonably led school officials to forecast substantial disruption of, or material interference with, school activities).

6. See *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 563-64, 574 (1968) (holding that teacher’s critical statements of the local school board and district superintendent were protected because they spoke to school funding).

7. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that statements by public employees made pursuant to their official duties have no First Amendment protection); *City of San Diego v. Roe*, 543 U.S. 77 (2004) (holding that the First Amendment did not protect police officer’s online selling of explicitly sexual videos because they did not deal with a matter of public concern, and even though speech occurred outside of work, the speech was detrimental to the employer and the employer had a right to discharge the officer because of the speech).

8. See *Prysak v. R.L. Polk Co.*, 483 N.W.2d 629, 634 (Mich. Ct. App. 1992) (holding that a private employer was not bound by provisions in the United States and Michigan Constitutions guaranteeing freedom of speech because neither extends to private conduct); *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1355 (Ill. 1985) (rejecting a public policy claim against a private sector employer based on the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution and the right to privacy under the Illinois Constitution). But see *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896, 899 (3d Cir. 1983) (permitting a district manager to sue based on the policy of the First Amendment to the U.S. Constitution and similar provisions of the Pennsylvania Constitution after being discharged for his refusal to participate in a lobbying effort in support of a bill before the state legislature).

9. See Porter Anderson, *Study: U.S. Employees Put in Most Hours*, CNN.COM (Aug. 31, 2001, 2:07 AM), <http://archives.cnn.com/2001/CAREER/trends/08/30/ilo.study/>; see also CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 23 (2003).

10. See ESTLUND, *supra* note 9, at 24; Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 3 (2000) (“[T]he workplace is the single most important site of cooperative interaction and sociability among adult citizens outside the family.”).

employees spend more time together than in the past, workplace conversations have become more superficial than in earlier years.¹¹ Rafael Gely and Leonard Bierman argue, however, that conversations enabled by modern technology allow workers to connect with one another and with the outside world.¹² Thus, workers, who now work longer and harder than in previous years, can further develop their workplace relationships and their relationships with others through use of modern technology. Because the workplace, which is one of the only locations where we encounter diverse views and lifestyles, serves as an incubator for cooperation and civility, it encourages the “bridging ties” that Robert Putnam argues are critical to a properly functioning civil society.¹³ Consequently, as “working” hours increasingly fill our “waking” hours, American civil society will depend more and more on democratic exchanges that take place in the workplace and online. The trend to work harder and longer hours, when paired with the exponential rise of social media platforms (and their corresponding use),¹⁴ means that there is vanishingly little space for free exchange of ideas that truly falls outside the purview of the workplace.

Unions can bargain for protection from speech-related termination, but union membership has been on a steady decline.¹⁵ And, every state except Montana is an employment-at-will jurisdiction.¹⁶ Absent an

11. See Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 289 (2007).

12. See *id.* at 302.

13. Though Putnam distinguishes between “bridging” and “bonding” associations, he still views them both as falling under the broader category of “social capital,” a term encompassing voluntary associations, which have languished in recent times. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19-25 (2000). Estlund makes a persuasive argument that the workplace, precisely because it is *not* voluntary, better encourages the development of “bridging ties” among co-workers of different backgrounds who might otherwise not participate in the same activities outside of the office. See ESTLUND, *supra* note 9, at 125 (“[T]he law’s capacity to compel racial integration, together with the capacity of authorities within the workplace to compel people to get along with each other, help to make workplace associations distinctively important in a diverse democratic society.”).

14. See Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 264-67 (2012); see also Josh Bernoff, *New 2008 Social Technographics Data Reveals Rapid Growth in Adoption*, EMPOWERED (Oct. 20, 2008), <http://forrester.typepad.com/groundswell/2008/10/new-2008-social.html>.

15. Union members constituted only 11.8% of the American work force in 2011. Thirty-seven percent of public workers are union members, but only 6.9% of workers in the private sector belong to unions. See Steven Greenhouse, *Union Membership Rate Fell Again in 2011*, N.Y. TIMES (Jan. 27, 2012), <http://www.nytimes.com/2012/01/28/business/union-membership-rate-fell-again-in-2011.html>.

16. *The At-Will Presumption and Exceptions to the Rule*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/labor/at-will-employment-overview.aspx> (last

individual contract or a collective bargaining agreement, state laws, state or federal whistleblower laws, or judicially created exceptions to the employment-at-will doctrine, there is scant protection from discharge or other discipline based on employee speech.¹⁷ Consequently, the vast majority of American workers, who are employed “at-will,” maintain little job security. Moreover, even though as a nation we profess to honor free speech as one of our most important values, in the employment context, the law often willingly restricts employee speech in favor of the employer’s interests in efficient management.¹⁸ This is not to say that employers have no legitimate interest in curtailing some of the speech of their employees. They do have important interests to protect. Few would debate an employer’s right to maintain security with regard to its confidential and proprietary information, intellectual property, and information such as release dates or pending reorganizations.¹⁹ Most agree that employers can control employee speech that severely or pervasively harasses other employees because of their race, color, religion, sex, disability, national origin or age.²⁰ But because of the employment at will doctrine, which places no restrictions on employers’ rights to discipline or fire employees, courts have permitted employers to curtail not only employee free speech at work but also employee behavior and speech outside of work.²¹

Because of the rapid advances in technology that allow employees to voice opinions to a broader audience in different formats, speech concerns have become even more important to employers and employees. In an era of rapidly changing technology and new social media sources,²² courts have been reluctant to interpret state statutes

visited Nov. 29, 2012). The Montana Wrongful Discharge from Employment Act of 1987 (WDEA) created a cause of action for employees who are terminated without good cause. *See* MONT. CODE ANN. § 39-2-904 (2011) (describing the grounds for bringing a wrongful discharge claim).

17. *See* Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1491-95 (1996).

18. *See* Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 306 (2012).

19. *See Employee Facebook Posting Protected in Some Cases*, BAKERHOSTETLER (Feb. 17, 2011), http://www.bakerlaw.com/files/Uploads/Documents/News/Newsletters/Health%20Law%20Update/2011/3_HLU_February_17.pdf.

20. *See* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2306 (1999).

21. *See, e.g., City of San Diego v. Roe*, 543 U.S. 77 (2004) (stating that the employer did not violate the employee’s First Amendment rights when it fired him for actions taken outside of the workplace).

22. By social media, the authors are referring to all means used for communication over the internet, including, but not limited to, Facebook, Twitter, etc. Social media is defined by the

broadly or to recognize common law exceptions to the employment-at-will doctrine that would protect employee free speech rights either at work or, if outside of work, pertaining to the workplace.²³ In the context of e-mail use, for example, courts have given employers broad authority to discipline employees based on their speech.²⁴ These cases rely either on the employer's ownership of the e-mail system or on the employee's voluntary use of the e-mail system to engage in speech that was unauthorized and unrelated to work.²⁵ Employees, consequently, have virtually no protection based on privacy or speech rights when the speech takes place on the employer's e-mail system.

The phenomenon of social media has further blurred the line between the personal and the workplace. Facebook, Twitter, and other social media provide fora for employees to voice their opinions during their free time outside of work, using media not owned by the employer.²⁶ The question, then, becomes whether employers have the right to discipline employees for speech conveyed in these media even though employees use their own access to social media systems and express their opinions outside of work. Once again, most courts find little or no protection for certain types of speech²⁷ and, in many cases, employers are empowered by the public nature of these media sources to engage in investigations of employee speech outside of work.²⁸ Employers have begun to write strict social media policies to give notice to their employees that they are not permitted to engage in certain types of speech about the employers on social media, even though the speech

Merriam Webster online dictionary as "forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)[.]" *Social Media Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Nov. 29, 2012).

23. See, e.g., *Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 543, 550 (N.J. 2000).

24. See, e.g., *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (granting a motion to dismiss because the employee had no expectation of privacy to communicate unprofessional statements to his supervisor through his employer's e-mail system).

25. See *id.*

26. See Michael Bologna, *Illinois Becomes Second State to Limit Employer Access to Social Media Accounts*, 17 Electronic Com. & L. Rep. (BNA) 1428 (Aug. 8, 2012).

27. See, e.g., *Blakey*, 751 A.2d at 543 (holding that even though electronic bulletin board did not have a physical location within the airport, it may be sufficiently work related to create an employer's duty to remedy the harassment occurring on the bulletin board); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (holding that the First Amendment did not protect police officer's online selling of explicitly sexual videos because they did not deal with a matter of public concern, and even though the speech occurred outside of work, it was detrimental to the employer and the employer had a right to discharge the officer because of the speech).

28. See *Blakey*, 751 A.2d at 551-52.

takes place outside of the workplace.²⁹ Some employers even demand their employees' or applicants' Facebook passwords so that they can monitor employee speech outside of work.³⁰ However, these employer demands have resulted in a backlash. A number of states have banned an employer's request that applicants or employees provide their user name, passwords or other means of accessing personal accounts in social media.³¹ And, although up until very recently lawyers representing employers have advocated for strict policies banning certain types of speech, lawyers representing employers are now recognizing that this may be a treacherous area for employers.³²

Recently, a change has occurred that has caused considerable controversy in the world of employment lawyers. Beginning in 2010, the National Labor Relations Board (NLRB or "the Board") has taken the position that the National Labor Relations Act (NLRA) protects some employees from discipline for employee speech on social media.³³ And, by deeming some policies "over broad," it has in effect advised that some employer social media policies are illegal even when employers do not enforce the policies.³⁴ The Board has held that discipline of employees for statements made about their employment on social media may run afoul of rights provided by Section 7 of the NLRA, which protects concerted activity.³⁵ These opinions, although to

29. See C. Reilly Larson, *EEOC Lawyer Advises Careful Navigation of Issues in the Workplace*, BLOOMBERG BNA (Sept. 4, 2012), <http://www.bna.com/eeoc-lawyer-advises-n17179869380/>.

30. Daniel I. Prywes, *Should You Ask Job Applicants or Employees for Their Social-Media Passwords?*, 17 Electronic Com. & L. Rep. (BNA) 741 (Apr. 18, 2012).

31. See *Maryland Law Bars Employer Demands for Passwords; Other States Could Follow Suit*, 10 Digital Discovery & e-Evidence (BNA) 177 (May 10, 2012) (describing the new Maryland law that bans employers from asking for passwords and other information granting access to private accounts of applicants and employees, and an effort by the U.S. Congress to prohibit employers from demanding passwords and other means of access to personal accounts); Bologna, *supra* note 26 (discussing new Illinois law prohibiting employers from requiring applicants and employees to share user names and passwords for individual accounts); Laura Mahoney, *California is Latest State to Regulate Access to Employee, Student Social Media Accounts*, BLOOMBERG BNA (Oct. 1, 2012), <http://www.bna.com/california-latest-state-n17179869960/> (describing new California statute prohibiting employers from demanding passwords, etc. for individual accounts).

32. See BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* 173-75 (2007); Larson, *supra* note 29; Eric Raphan & Sean Kirby, *Access Denied: Employers Should Avoid Seeking Access to Social Media Accounts*, 139 Daily Lab. Rep. (BNA) I-1 (July 19, 2012).

33. See Steven Greenhouse, *Company Accused of Firing Over Facebook Post*, N.Y. TIMES (Nov. 8, 2010), http://www.nytimes.com/2010/11/09/business/09facebook.html?_r=0.

34. See *id.*

35. See *id.* Section 7 provides that "[e]mployees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

some extent limited in protecting the free speech rights of employees, apply to all employees covered by the NLRA, whether they work in a unionized workplace or not.³⁶ Thus, the NLRB position has the possibility of creating significant protection to a large class of employees, to expand employee speech rights outside of the workforce, and to restrict employer disciplinary options when employees engage in speech in social media. Given the importance of the potential of social media in creating an organizational tool for employees and unions, this protection may not only protect individual employees from discharge for speech, but may also expand workplace democracy in two ways. First, it may create important tools for employee communication when engaged in union organizing efforts, and may, in a sense, counteract the problems of access to workers created by earlier Supreme Court cases such as *Lechmere, Inc. v. NLRB*,³⁷ which banned a union from campaigning on employer property.³⁸ Second, even absent a union organizing campaign, social media permits employees to engage in speech on significant topics that deal with working conditions or with politics. These relationships, which take place outside of work, form a central part of our democracy.

Of course, because the source of this protection is the NLRA, there will be gaps in protection of individual employee speech. The NLRA does not necessarily protect employees' rights to engage in speech that does not qualify as concerted and protected.³⁹ Nor does it protect employees' privacy in all cases.⁴⁰ Thus, even employees working for private entities who are engaged in political speech that in the public workplace or town square would be protected by the First Amendment will not be protected from discharge unless the speech is of the type protected by the NLRA. This may leave a significant amount of employee speech unprotected. In other words, employers may be able to discipline employees for a broad range of speech occurring in social

29 U.S.C. § 157 (2006). Section 8(a)(1), in turn, makes it an "unfair labor practice" to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" 29 U.S.C. § 158 (2006).

36. See Monica F. Ramirez & Mark Simon, *The NLRA's Impact on Non-Union Employers*, DALL. BAR ASS'N, <http://www.dallasbar.org/content/nlra%E2%80%99s-impact-non-union-employers> (last visited Dec. 1, 2012).

37. 502 U.S. 527 (1992).

38. See *id.* at 527, 529-30.

39. See *Acting General Counsel Issues Second Social Media Report*, NAT'L LAB. REL. BOARD (Jan. 25, 2012), <http://www.nlr.gov/news/acting-general-counsel-issues-second-social-media-report> [hereinafter *Social Media Report*].

40. See Matthew W. Finkin, *Information Technology and Workers' Privacy: The United States Law*, 25 COMP. LAB. L. & POL'Y J. 471, 498-501 (2002) (discussing the Act's protection against employer monitoring of protected activity).

media without violating the NLRA. And, while the NLRB opinion is an important tool in protecting employee speech rights, it can create conflicts between employee rights to engage in concerted activities and the rights of individual employees not to be harassed by co-workers or supervisors based on characteristics such as race, gender, national origin or religion, which are protected by federal law.⁴¹ Moreover, even where there is no protection under federal law, many employers have created general anti-harassment and anti-bullying policies that do not rely on the protected characteristics of the individual victim.⁴² These policies, at times, may come into direct conflict with the NLRA protection of speech that is considered protected, concerted activity.

This article analyzes the multitude of issues concerning employees' use of social media outside of work and the clash between employers' interests in maintaining effective management control and the employees' interests in speech. Part II gives the background and analysis of the employment-at-will doctrine and the common law (and statutory) exceptions to the doctrine. It also discusses the potential application of these exceptions to discharges caused by speech that takes place on social media outlets. Part III analyzes the recent changes in interpretation of the National Labor Relations Act, which, in some instances, protects employee speech in social media. It discusses the limits of the employee rights as interpreted by the NLRB and analyzes the possible conflicts that NLRA rights may create with policies designed to protect employees from harassment based on characteristics protected by Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and other anti-discrimination statutes. It also discusses the potential conflicts of the NLRA with employer anti-bullying and general anti-harassment policies. Part IV makes recommendations about how to interpret the NLRA to protect employee speech that furthers democracy in the workplace, and proposes a new federal statute that protects employee speech that goes beyond the concerted activity protected by the NLRA. The proposal also considers the right of individuals to be protected from illegal harassment at work and the role that employers play in this protection. Finally, it recognizes employers' interests in maintaining efficiency, good relations among workers, and consumer respect for their products.

This article concludes that a targeted federal statute—one that

41. See *infra* Part III.A.1.

42. See Erin Binney, *Experts Recommend Workplace Bullying Policies*, HOME CHANNEL NEWS (Oct. 17, 2012), <http://homechannelnews.com/article/experts-recommend-workplace-bullying-policies>.

protects employees' interest in engaging in protected speech outside the workplace (particularly in the context of social media) as well as employers' duty to comply with Title VII and other anti-discrimination statutes—offers an attractive solution because it gives employers notice and is less vulnerable to inconsistency of the current regulatory landscape.

II. EMPLOYMENT-AT-WILL: BACKGROUND AND LIMITATIONS ON EMERGING EXCEPTIONS

Employment law today is “characterized by a complex system of constitutional, statutory, administrative, and common law rights and duties.”⁴³ But it was not always so complex. Before 1877, American employment law followed the English common law of master and servant, which carried a one-year presumption for any employment contract without an explicit duration.⁴⁴ In 1877, however, Horace Gray Wood's treatise on the subject declared otherwise, effectively establishing the employment-at-will doctrine.⁴⁵ Under this doctrine, an employer can terminate an employee without a contract for a fixed term at any time, for any reason, or no reason at all.⁴⁶

A. State Statutory and Common Law Exceptions to the At-Will Doctrine

In its current form, the doctrine is less harsh than it once was, thanks to the development of a few common-law exceptions.⁴⁷ The exceptions create state tort and/or contract causes of action for any discharge that (1) contravenes public policy, (2) breaches an express or implied contract, or (3) breaches an implied covenant of good faith and

43. 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 4 (4th ed. 2009).

44. *Id.* at 1; see also WILLIAM C. SPRAGUE, BLACKSTONE'S COMMENTARIES ABRIDGED 74 (9th ed. 1915).

45. HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). Wood noted that he was aware of “no instance in which, for many years, the [English] rule has been approved by any American court.” He went on to outline the American rule:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

Id.

46. See *id.*

47. For a more thorough analysis of the employment-at-will doctrine and exceptions to the doctrine, see McGinley, *supra* note 17.

fair dealing.⁴⁸ In practice, however, courts have narrowly circumscribed these exceptions, and although most states subscribe to at least one of these exceptions,⁴⁹ very few recognize all three.⁵⁰ Moreover, the protection granted to employees differs depending on the state law.⁵¹

Generally, courts have held that terminations violate public policy only when an employee is discharged for “(1) refusing to perform unlawful acts, (2) exercising legal rights, (3) reporting illegal activity (whistleblowing), and (4) performing public duties.”⁵² Often, this means that a public policy must be clearly expressed in a state statute or constitution to allow redress.⁵³ Moreover, certain constitutional rights, like freedom of speech, have generally not been extended to private sector employees.⁵⁴

Similarly, although employment handbooks, oral promises, and employer conduct can create implied contractual obligations, plaintiffs who allege that their handbooks or oral promises create protection from discharge must satisfy a number of conditions to maintain a cause of action under this line of reasoning.⁵⁵ Employment handbooks, for instance, must have sufficiently specific language, and employers can ordinarily disclaim any implied obligation with a clear, conspicuous, and unequivocal statement that employment is still at-will.⁵⁶

Many states have also created statutory exceptions to the at-will doctrine that prohibit employers from discharging employees for

48. See, e.g., Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 70-72 (2000).

49. Every state except Alabama, Florida, Georgia, Louisiana, Maine, Nebraska, New York, and Rhode Island observes the public policy exception to the at-will rule in some fashion. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV. (Bureau of Labor Statistics), Jan. 2001 at 3, 4. In addition, most states hold “that promises contained in an employment manual may bind an employer.” See, e.g., *O’Brien v. New England Tele. & Tele. Co.*, 664 N.E.2d 853, 847 (Mass. 1996).

50. Only about one-fifth of states, for example, permit the use of the implied covenant of good faith and fair dealing to fight an at-will termination. ROTHSTEIN, *supra* note 43, at 536. This doctrine varies considerably from state to state, and imposes a range of discharge requirements on employers from articulating “good cause” to merely honoring benefits accrued by at-will employees during their tenure. See, e.g., Teresa A. Cheek, *The Employment-at-Will Doctrine in Delaware: A Survey*, 6 DEL. L. REV. 311, 351-55 (2003).

51. See McGinley, *supra* note 17, at 1493.

52. ROTHSTEIN, *supra* note 43, at 550-51 (internal citations omitted).

53. See Margaret C. Hobday, *Protecting Economic Stability: The Washington Supreme Court Breathes New Life in the Public-Policy Exception to At-Will Employment for Domestic Violence Victims*, 17 WM. & MARY J. WOMEN & L. 87, 97-98 (2010).

54. *Prysak v. R.L. Polk Co.*, 483 N.W.2d 629, 634 (Mich. Ct. App. 1992).

55. See ROTHSTEIN, *supra* note 43, at 515.

56. See *id.* at 515, 517-18.

engaging in lawful off-duty conduct,⁵⁷ but these, too, have been narrow in both scope and substance. First, most of these statutes explicitly protect only against discrimination for cigarette smoking outside of work.⁵⁸ Second, although other statutes prohibit discharge based on the off-duty use of “lawful products,” they provide no protection with respect to “lawful activity” more generally.⁵⁹ A small handful of states go further, providing statutory protection for off-duty lawful conduct,⁶⁰ which would presumably encompass off-duty employee speech. However, courts have narrowly construed these statutes, particularly as they apply to the protection of off-duty speech.⁶¹

While these exceptions to the employment-at-will doctrine are numerous, they provide an uneven patchwork of protection for employee speech. In fact, because the exceptions are narrowly interpreted, they

57. As of 2008, twenty-eight states and the District of Columbia had statutes that prevent discharge based on an employee’s lawful off-duty activities. *See Off-Duty Conduct*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/labor/employee-off-duty-conduct.aspx> (last updated May 30, 2008).

58. Seventeen of these jurisdictions—Connecticut, the District of Columbia, Indiana, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Virginia, West Virginia, and Wyoming—have enacted “tobacco only” statutes. *See id.* These statutes merely protect the off-duty use of cigarettes. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-40s (West 2011) (prohibiting employers from requiring, as a condition of employment, “that any employee or prospective employee refrain from smoking or using tobacco products outside the course of his employment . . .”); D.C. CODE § 7-1703.03(a) (2001) (“No person shall refuse to hire or employ any applicant for employment, or discharge or otherwise discriminate against any employee with respect to compensation or any other term, condition, or privilege of employment, on the basis of the use by the applicant or employee of tobacco or tobacco products.”).

59. Eight jurisdictions—Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee, and Wisconsin—have adopted this approach. *Off-Duty Conduct*, *supra* note 57. These statutes tend to make an exception for non-profit organizations that, as one of their primary purposes or objectives, discourage the use of one or more lawful products by the general public. *See, e.g.*, 815 ILL. COMP. STAT. ANN. 55/5 (West 2005); MINN. STAT. ANN. § 181.938 (West 2006).

60. These states include California, Colorado, New York, and North Dakota. *Off-Duty Conduct*, *supra* note 57. By their plain terms, these are arguably the most robust of the off-duty activity statutes. *See, e.g.*, CAL. LAB. CODE § 96(k) (West 2011) (protecting discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises); COLO. REV. STAT. ANN. §24-34-402.5 (West 2008) (providing a civil action for damages to employees who are discharged “due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours” unless one of two exceptions applies); *see also* Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 10, 23 (2011) (discussing the state statutes prohibiting discrimination for off-duty conduct).

61. *See, e.g.*, *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1460, 1463 (D. Colo. 1997) (predicting, as a matter of Colorado state law, that the state’s off-duty conduct statute did not protect a Delta employee’s letter to a local newspaper complaining about working conditions because the statute’s bona fide occupational requirement exception contemplates an implied duty of loyalty to one’s employer).

provide weak protection to employees. Employers in most circumstances continue to have the right to fire employees based on their speech.⁶²

B. Federal Statutory Exceptions to the At-Will Doctrine

Federal statutory law also provides a number of exceptions to the employment-at-will doctrine. The employment discrimination statutes prohibit failure to hire, promote, or discharge based on an individual's membership in a protected class.⁶³ Ordinarily, these statutes will not affect an employer's ability to discipline based on speech, but there are two important exceptions in the statutes. First, the anti-discrimination statutes forbid retaliation for participating in an anti-discrimination suit or for opposing employer practices made illegal by the statute.⁶⁴ There is no requirement limiting the employee behavior or the employer retaliation to the workplace.⁶⁵ Thus, the anti-retaliation provisions of the anti-discrimination statutes protect employee speech on social media that opposes an employer's discriminatory behaviors so long as the statements are made in a good faith reasonable belief that an employer violated the anti-discrimination statute.⁶⁶

Second, the courts have interpreted the anti-discrimination statutes to prohibit harassment based on an individual's protected characteristics.⁶⁷ This interpretation actually permits some limitations on employee speech. For example, subject to certain defenses, under Title VII an employer will be liable for supervisor, co-worker, or customer speech that creates a hostile work environment that alters the

62. See generally, Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 114-19 (1995) (discussing free speech protections in both the private and public sector).

63. See 42 U.S.C. § 2000e-2(a)(1)(2006) (prohibiting employment discrimination based on race, color, religion, sex, and national origin).

64. See, e.g., *id.* § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

65. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 70 (2006) (holding that application of Title VII retaliation provision is not limited to employer's employment-related or workplace actions).

66. Cf. *id.* at 68. "In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal quotation marks omitted).

67. See, e.g., *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 395, 406 (1st Cir. 2002).

terms or conditions of employment and is based on employee's sex.⁶⁸ Speech or behavior that rises to the level of sexual harassment or harassment based on another characteristic protected by federal law does not necessarily have to occur in the workplace.⁶⁹ Employers who know or have constructive knowledge of harassment of an employee by co-workers or customers that occurs in social media may be liable for sexual or gender-based harassment.⁷⁰ And, if the harasser is a supervisor within the chain of command, the employer is strictly liable unless it can prove an affirmative defense.⁷¹ Title VII and the other anti-discrimination statutes, therefore, create an incentive for employers to prohibit certain types of speech at work and on social media, and to discipline employees who engage in this speech.⁷² Finally, as mentioned in the Introduction, the General Counsel of the National Labor Relations Board has recently interpreted the NLRA to provide protection to employees who engage in concerted protected speech on social media.⁷³ The next Part discusses this protection at length.

III. THE NATIONAL LABOR RELATIONS ACT: PROMISING PROTECTIONS FOR EMPLOYEE SPEECH?

In spite of Title VII's countervailing incentives for employers to curb speech in the workplace, federal protections still hold more promise for encouraging democracy in the workplace than their state

68. *E.g., id.* at 395.

69. *See, e.g., id.* at 409-10 (approving the consideration of behavior outside the four walls of the workplace in the evaluation of plaintiff's hostile working environment claim). *But see* *Gowesky, M.D. v. Singing River Hosp. Sys.*, 321 F.3d 503, 510-11 (5th Cir. 2003) (declining to consider behavior occurring outside the workplace because "[A] harassment claim, to be cognizable, must affect a person's working environment.").

70. *See, e.g., Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77, 85-86 (D.P.R. 2010) (considering evidence of social media harassment as part of a hostile work environment claim, but granting summary judgment to defendant travel agency). *Cf. Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538, 552 (N.J. 2000) (holding that electronic bulletin board was so closely related to workplace environment and beneficial to employer that continuation of harassment on forum should be regarded as part of the workplace).

71. The affirmative defense is not necessary if there is a tangible employment action that occurs as a result of the harassment. This would ordinarily not be the case in a speech case, but it could conceivably happen. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

72. Eugene Volokh argues that some harassing speech by employers is protected by the First Amendment and should not be circumscribed by federal law. *See Eugene Volokh, Comment, Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1848-49 (1992); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 635 (1997). No courts have adopted this viewpoint.

73. *See supra* text accompanying note 33.

counterparts. The NLRA protects employees against discharge or other discipline when the claim involves conduct or speech that is protected and “concerted activity” under Section 7.⁷⁴ Section 7 grants employees, in both union and non-union shops, the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁷⁵ Section 8(a)(1), in turn, makes it an “unfair labor practice” to interfere with rights granted by section 7.⁷⁶

Many employers understand that the NLRA governs behavior in private unionized workplaces, or if not unionized, workplaces that are in the midst of a union drive.⁷⁷ What many employers and employees may not know is that Section 7 applies to the concerted action of all employees, whether in unionized workplaces, or whether or not they are engaged in a union campaign.⁷⁸ The General Counsel of the National Labor Relations Board (“GC”) has recently interpreted as unfair labor practices discharges of some employees because of statements made on social media.⁷⁹

The law, according to the GC, protects speech of employees using social media tools when it constitutes concerted activity for the purpose of collective bargaining or other mutual aid or protection.⁸⁰ Thus, an employer who discharges an employee based on speech on Facebook, Twitter, or another social media tool will commit an unfair labor practice if the speech itself is a concerted activity and is protected and the employer knows of the concerted nature of the speech.⁸¹ Moreover, as the GC explained, an employer can violate the Act if it has certain policies that limit or chill employee speech on the Internet, even if the

74. 29 U.S.C. § 157 (2006).

75. In its entirety, Section 7 states:

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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8] of this title.

Id.

76. Section 8 declares that it is an unfair labor practice for employers “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].” *Id.* § 158(a)(1).

77. See *id.* § 158(a)(2) (employers cannot “dominate or interfere with the formation or administration of any labor organization”).

78. See *Bravo v. Dolsen Cos.*, 888 P.2d 147, 150-51 (Wash. 1995).

79. See Am. Med. Response of Conn. Inc., Case 34-CA-12576, Advice Memorandum, at 13 (Oct. 5, 2010), available at <https://www.nlrb.gov/case/34-CA-12576> [hereinafter Am. Med. Memo].

80. See *id.* at 9-10.

81. See *id.*

employer is not enforcing the policies.⁸²

A. Concerted, Protected Activity

1. Defining “Concerted” and “Protected” in the Social Media Context

While all speech on social media could be construed as “concerted” in the sense that the media is public and engaged in by multiple persons,⁸³ the GC has declined to do so and has considered the nature of social media as well as previous cases under the NLRB in determining where to draw the line between protected and non-protected speech.⁸⁴ Following Board precedent, the GC noted that an individual can be engaged in concerted activity if he or she engages in the activity “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”⁸⁵ The question about whether the activity is concerted is a factual one.⁸⁶ The Board will find concerted activity when record evidence demonstrates group activities whether or not they are “specifically authorized.”⁸⁷ Moreover, individual activities that are the “logical outgrowth of concerns expressed by the employees collectively” are concerted under the Act.⁸⁸ Finally, “[c]oncerted activity also includes ‘circumstances where individual employees seek to initiate or to induce or to prepare for group action’ and where individual employees bring ‘truly group complaints’ to management’s attention.”⁸⁹ On the other hand, comments made “solely by and on behalf of the

82. See *id.* at 11. There are a number of Advice Memoranda from the General Counsel to the Regional offices regarding social media. This is because the General Counsel has instructed all regional offices to send all of their social media cases to the Office of the General Counsel before filing charges against the employer. See *Social Media Report*, *supra* note 39.

83. See Jon Hyman, *Is the NLRB Backing Off Its Position on Social Media as Protected, Concerted Activity?*, LEXISNEXIS LAB. & EMP. COMMENT. BLOG (Jan. 10, 2012, 3:10 AM), http://www.lexisnexis.com/community/labor-employment-law/blogs/labor-employment-commentary/archive/2012/01/10/is-the-nlrbacking-off-its-position-on-social-media-as-protected-concerted-activity.aspx?utm_source=twitterfeed&utm_medium=twitter (suggesting that the NLRB policy does not always prohibit an employer from dismissing an employee for speech on the internet).

84. See *JT’s Porch Saloon & Eatery, Ltd.*, Case 13-CA-46689, Advice Memorandum, at 2 (July 7, 2011), available at <https://www.nlr.gov/case/13-CA-46689> [hereinafter *JT’s Porch Saloon Memo*].

85. *Id.* (quoting *Meyers Industries (Meyers II)*, 281 N.L.R.B. 882, 885 (1986)).

86. *JT’s Porch Saloon Memo*, *supra* note 84, at 2.

87. *Id.* (quoting *Meyers II*, 281 N.L.R.B. at 886).

88. *JT’s Porch Saloon Memo*, *supra* note 84, at 2-3 (internal quotation marks omitted).

89. *Id.* at 3 (quoting *Meyers II*, 281 N.L.R.B. at 887).

employee himself” or “mere griping,” are not concerted.⁹⁰ And, comments made on the Internet, even if concerted, are not protected if they are not linked to terms or conditions of employment.⁹¹

Making the distinction between concerted, protected activity and speech that is not concerted or protected is sometimes tricky because the analysis is heavily fact-dependent, and different people may interpret the facts differently.⁹² The GC recently asked the regional offices of the NLRB to submit all of their social media speech cases to the GC for advice before filing a charge.⁹³ This has enabled the GC to interpret the law and its application to particular fact patterns and to write advice memoranda explaining the GC’s analysis of the law.⁹⁴ These memoranda function as a screen for the regional offices, and, similar to opinions in common law, are instructive to employers and employees who wish to assure that their behaviors are legal under the NLRA.⁹⁵ Moreover, in an effort to make the law more transparent, the GC has periodically written reports explaining its social media advice over the past two years.⁹⁶

a. No “Concerted” Activity

In a number of cases, the GC has found that employee comments on social media were individual comments that were not protected, concerted activity. One case dealt with a crime reporter who had tweeted about murder victims.⁹⁷ His employer, the *Arizona Daily Star*, found his tweets insensitive and embarrassing to the newspaper and fired

90. Wal-Mart, Case 17-CA-25030, Advice Memorandum, at 3 (Jul. 19, 2011), *available at* <https://www.nlr.gov/case/17-CA-46689> [hereinafter Wal-Mart Memo].

91. The Board in *Amcast Automotive of Indiana, Inc.*, 348 N.L.R.B. 836 (2006), for example, announced that “[f]or an employee’s activities to be protected under Section 7 of the Act, the activity must bear some relation to employees’ interests as employees.” *Id.* at 838 (internal quotation marks omitted).

92. See, e.g., *Meyers Indus. Inc. (Meyers I)*, 268 N.L.R.B. 493, 497 (1984).

93. See *Social Media Report*, *supra* note 39 (“Given the new and evolving nature of social media cases, the Acting General Counsel has asked all regional offices to send cases which the Regions believe to be meritorious to the agency’s Division of Advice in Washington D.C., in the interest of tracking them and devising a consistent approach.”).

94. See, e.g., Memorandum from the Office of the General Counsel of the NLRB, Report of the Acting General Counsel Concerning Social Media Cases, OM 11-74 (Aug. 18, 2011), *available at* <http://www.nlr.gov/news/acting-general-counsel-releases-report-social-media-cases> [hereinafter Memorandum from the GC, 2011].

95. See *id.*

96. See *Social Media Report*, *supra* note 39.

97. See *Lee Enters., Inc.*, Case 28-CA-23267, Advice Memorandum, at 1 (Apr. 21, 2011), *available at* <https://www.nlr.gov/case/28-CA-23267>.

the reporter.⁹⁸ The GC concluded that the reporter's behavior was neither protected nor concerted because it did not relate to the terms or conditions of his employment or seek to involve other employees in employment related issues.⁹⁹

In another case, *JT's Porch Saloon & Eatery, Ltd.*,¹⁰⁰ the charging party, a bartender, had a conversation with a fellow bartender in which he complained that the employer's policy that waitresses may not share their tips with bartenders.¹⁰¹ The two agreed that the policy "sucked."¹⁰² A few months later, the charging party had a Facebook conversation with his stepsister who asked him about how his night at work had gone.¹⁰³ "He responded with complaints that he hadn't had a raise in five years and that he was doing the waitresses' work without tips."¹⁰⁴ He also referred to the employer's customers as "rednecks" and "stated that he hoped they choked on glass as they drove home drunk."¹⁰⁵ He did not discuss this posting with any other employee, nor did any other employee respond to the posting.¹⁰⁶ The employer fired the bartender, allegedly because of the comments he made about customers.¹⁰⁷ The GC decided that the employee's posting taken as a whole was not concerted activity because, although he discussed terms and conditions of employment, he did not discuss the posting with a fellow employee before or after the posting and there had been no employee meetings or attempts to initiate group action concerning the tipping or raise policies.¹⁰⁸ Neither the bartender nor anyone else attempted to take the complaints to management.¹⁰⁹ Furthermore, the bartender's online conversation occurred in response to his stepsister's question about his work night, a conversation that did not grow out of his isolated complaints months earlier to his co-worker.¹¹⁰

In a third case, *Martin House*,¹¹¹ the employer was a non-profit

98. *Id.* at 1, 6.

99. *Id.* at 6.

100. *JT's Porch Saloon Memo*, *supra* note 84.

101. *Id.* at 1.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1, 2.

106. *Id.* at 2.

107. *Id.*

108. *Id.* at 3.

109. *Id.*

110. *Id.*

111. *Martin House*, Case 34-CA-12950, Advice Memorandum, at 1 (Jul. 19, 2011), available at <https://www.nlr.gov/case/34-CA-12950>.

residential facility for homeless people, many of whom had psychiatric illnesses.¹¹² The charging party was fired for engaging in a discussion on Facebook with two friends while she was at work on the overnight shift.¹¹³ On her Facebook wall, she made light of the patients' psychiatric problems.¹¹⁴ The GC concluded that the speech was not concerted or protected because the charging party did not communicate on her Facebook account to any other employees; in fact no other employees were "friends" on her Facebook site.¹¹⁵ Moreover, she never discussed her Facebook posts with other employees, and the posts did not relate to her terms or conditions of employment.¹¹⁶

Finally, in *Wal-Mart*,¹¹⁷ the charging party posted comments on his Facebook page that complained about working conditions at Wal-Mart.¹¹⁸ Certainly, the posts included criticism of terms or conditions of employment. According to the GC, however, the posts did not constitute concerted activity because there was no evidence that the charging party was doing any more than expressing an "individual gripe," and there was no suggestion that he sought to initiate group action.¹¹⁹ Moreover, only two other employees responded.¹²⁰ Both responses – one asking why he was so "wound up" and another saying that he should "hang in there" – appeared to suggest that the employees saw his comments as only asking for emotional support.¹²¹

In *MONOC*,¹²² the GC advised the regional office not to file a charge even though the employer, a non-profit company comprised of fifteen acute care hospitals, had disciplined hospital employees,

112. *Id.*

113. *Id.*

114. *See id.* at 2.

115. *Id.* at 3.

116. *Id.*

117. Wal-Mart Memo, *supra* note 90.

118. The posts stated:

Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit! . . . [The Assistant Manager] is being a super mega puta! It's retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price. . . . that's false advertisement if you don't sell it for that price . . . I'm talking to [Store Manager] about this shit cuz if it don't change walmart can kiss my royal white ass!

Id. at 1-2.

119. *Id.* at *3.

120. *Id.*

121. *Id.* at 3-4.

122. MONOC, Cases 22-CA-29008, 22-CA-29083, 22-CA-29084, 22-CA-29234, Advice Memorandum, at 1 (May 5, 2010), available at <http://www.nlr.gov/case/22CA29008> [hereinafter MONOC Memo].

including the acting president of the union, for comments made on her Facebook page during negotiations of the company's first union contract.¹²³ The disciplined employees included a registered nurse and paramedic, a paramedic, and an emergency medical technician.¹²⁴ While Deborah Ehling, the nurse-paramedic and union acting president, clearly used Facebook to engage in protected concerted activities,¹²⁵ there were some comments on Facebook that did not merit protection; these unprotected comments, according to the GC, caused the hospital to discipline Ehling and the other two employees.¹²⁶ The comments, according to the GC, raised questions concerning the type of patient care these employees gave to the patients.¹²⁷ Because these particular comments were unprotected, the GC concluded, MONOC did not act unreasonably when it disciplined the employees and reported them to the state agency.¹²⁸ The GC's conclusion that the employer had not disciplined the employees for the protected speech was based on evidence submitted by the employer of treatment of other employees in comparable situations.¹²⁹ One comparable employee who had engaged in protected speech on MySpace a few years earlier—which criticized the employer and supported the union campaign—was not disciplined.¹³⁰ Another comparable employee, a paramedic, had posted a banner at her work post that stated, "Be nice to Me or I May Circle the Block a Few More Times."¹³¹ She also left a poster in the ambulance that stated, "Just Because It's Your Emergency Doesn't Mean It's Mine."¹³² According to the employer, this employee had been disciplined more severely than the employees in the case at hand because her derogatory comments occurred at work.¹³³

123. *Id.* at 2-4, 8.

124. *Id.* at 2.

125. *See id.* at 2 ("[Ehling] uses her Facebook page to communicate information regarding bargaining and other Union activities and to criticize management policies.").

126. *See id.* at 8 ("While other postings on Ehling's Facebook page clearly involved protected communications regarding terms and conditions of employment and ongoing labor disputes, the specific comments cited by the Employer as the basis of the employees' suspensions did not involve Section 7 concerns and were in no way related to the postings that did.").

127. *Id.*

128. *See id.* at 9 ("[T]he evidence supports the Employer's assertion that it felt bound to report conduct that indicated an inappropriate attitude and possibly inappropriate conduct in the administration of patient care.").

129. *See id.* at 8.

130. *Id.*

131. *Id.* at 4.

132. *Id.*

133. *See id.* at 4-5. In other cases, the GC concluded that similar employee speech that occurred on Facebook was not concerted. *See, e.g.,* Intermountain Specialized Abuse Treatment

MONOC is problematic because it appears that the GC took the employer's word that its reason for disciplining the union members, including the acting president of the union, was for their unprotected comments.¹³⁴ The case is also difficult to judge because the comments themselves have been deleted due to Freedom of Information Act (FOIA) exemptions.¹³⁵ A few responses from the employer comprise the only evidence the reader has about the employee comments.¹³⁶ One employer response indicated that the employer became concerned that the employees might withhold care if they were personally offended by the patients.¹³⁷ The employer also stated that the employees were suspended due to "disparaging written comments made by you regarding patients and patient care that were brought to our attention."¹³⁸ A third employer response stated that the employees' comments showed "a disregard for patient safety and an attitude at odds with the compassion one usually associates with the nursing profession."¹³⁹ There was also, evidently, a comment that Ehling made on her Facebook page that made reference to the Holocaust Museum shootings.¹⁴⁰ It appears that the employer was justifiably concerned about these comments; in response, it sent letters to the state Board of Nursing and the Office of Emergency Medical Services asking for advice, and it sent the employees for psychological testing.¹⁴¹ On the other hand, there was an ongoing battle between the union and the employer with many unfair labor practices asserted by both sides, which raises questions about the employer's

Center, Case 27-CA-065577, Advice Memorandum, at 3, 4-5 (Dec. 6, 2011), *available at* <http://www.nlr.gov/case/27CA065577> [hereinafter Intermountain Memo] (concluding that statements made on Facebook were not protected because they were merely an expression of a personal gripe and did not seek to induce coworkers to engage in group action); TAW, Inc., Case 26-CA-063082, Advice Memorandum, at 2-3 (Nov. 22, 2011), *available at* <http://www.nlr.gov/case/26CA063082> (concluding that charging party's comment on Facebook accusing her employer of fraud was not protected because the auditor of the company concluded that the company's behavior was appropriate and conveyed this message to the charging party).

134. See *MONOC* Memo, *supra* note 122, at 8.

135. See *id.* at 3. The specific FOIA exemptions invoked were (b)(6) and (b)(7)(C), which both protect public disclosure of private information. See 5 U.S.C. § 552(b)(6) (2006) (exempting "personnel and medical . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); *id.* § 552(b)(7)(C) (exempting "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .").

136. See *MONOC* Memo, *supra* note 122, at 3-4.

137. *Id.* at 3.

138. *Id.* at 4 (internal quotation marks omitted).

139. *Id.*

140. See *id.*

141. See *id.* at 3-4.

motive for disciplining Ehling and her colleagues.¹⁴² It seems that it would have been more appropriate for an administrative law judge to make the findings of fact concerning the motivation and intent of the employer when it disciplined the employees.

b. “Concerted Activity”

In a few important recent cases the GC took the position that the employer had discriminated against employees for engaging in concerted, protected activities on social media. In *American Medical Response of Connecticut, Inc.*,¹⁴³ the charging party, Dawnmarie Souza, an eleven-year veteran paramedic and union member, worked for a company that provided emergency medical services in New Haven, Connecticut.¹⁴⁴ As a result of a citizen complaint, Souza’s supervisor asked her to write up a report.¹⁴⁵ Knowing that the report might be the first step toward disciplinary action, Souza asked to have a union representative help her fill out the report.¹⁴⁶ Her supervisor refused and Souza did not completely fill out the report but wrote on the report only that she had requested and was denied a union representative.¹⁴⁷ Later that day, Souza posted comments on her Facebook page concerning her confrontation with her supervisor.¹⁴⁸ The comments, to which other employees responded, included reference to her supervisor as a “dick,” “scumbag,” and a “17” (American Medical Response (“AMR”) code for psychiatric patient).¹⁴⁹ Souza was suspended from work the following day and terminated at the beginning of the next month.¹⁵⁰ The termination letter stated that AMR had received complaints from the emergency staff of a local hospital, and also stated that Souza had refused to fill out the requested report, and, finally, that Souza had posted derogatory remarks about her supervisor on Facebook.¹⁵¹

The GC concluded that AMR had violated Souza’s *Weingarten* rights when it refused to allow her a union representative to fill out the

142. *Id.* at 2.

143. Am. Med. Memo, *supra* note 79, at 1.

144. *Id.* at 2.

145. *Id.* at 3.

146. *See id.*

147. *Id.*

148. *See id.*

149. *Id.*

150. *Id.* at 4.

151. *Id.* at 4-5.

incident report.¹⁵² *Weingarten* rights permit an employee to have a union representative present at any investigatory interview that the employee reasonably believes may result in discipline.¹⁵³ The GC concluded that filling out an incident report was the same as an investigatory interview for purposes of *Weingarten* because AMR uses the incident report as the first step of the investigation and the reports can lead to discipline.¹⁵⁴ The employer violated Section 8(a)(1) of the National Labor Relations Act by denying Souza a union representative to help her fill out the report and by threatening to suspend her for failing to fill out the report without a representative.¹⁵⁵ Souza's comments on Facebook, moreover, were protected, concerted activity. According to the GC, "[i]t is well established that the protest of supervisory actions is protected conduct under Section 7,"¹⁵⁶ and it was clear that the employer knew about the protected activity because it referred to it in the termination letter.¹⁵⁷

In *Karl Knauz Motors*,¹⁵⁸ the charging party was a salesman at a BMW dealership who was terminated for comments and photos posted on his Facebook page.¹⁵⁹ The comments dealt with two events. First, the employer had held a sales event in which BMW served what the charging party and other sales personnel believed to be inadequate food and beverages.¹⁶⁰ The second event involved an accident at a Land Rover store owned by the employer and adjacent to the BMW dealership.¹⁶¹ A child had accidentally driven a new Land Rover into an artificial pond in front of the Land Rover dealership.¹⁶² The GC argued that the comments and pictures the employee posted on Facebook, in which he criticized the employer for serving inadequate food and drink, were protected because the employee and other employees had complained to the employer that the sales promotion was inadequate and they were concerned that a poorly run event would affect their sales

152. *Id.* at 6.

153. *See* NLRB v. J. Weingarten Inc., 420 U.S. 251, 267 (1975).

154. Am. Med. Memo, *supra* note 79, at 7 ("There is no meaningful distinction between an employer orally asking an employee questions concerning a complaint and requiring the employee to produce a written statement describing the events.").

155. *Id.* at 8.

156. Memorandum from the GC, 2011, *supra* note 94, at *5.

157. *See* Am. Med. Memo, *supra* note 79, at 5, 9-10.

158. Karl Knauz Motors, Inc., Case 13-CA-46452 (Sept. 28, 2011) (ALJ decision), available at <http://www.nlrb.gov/case/13ca46452>.

159. *Id.* at 1-2, 7.

160. *See id.* at 3-4.

161. *Id.* at 3.

162. *Id.* at 3.

commissions.¹⁶³ In its memorandum of August 18, 2011 the GC stated:

We concluded that the employee was engaged in concerted activity . . . when he posted the comments and photographs regarding the sales event on his Facebook page. As noted, before the event, several employees were displeased with the planned food choices, and after the meeting, the employees discussed this frustration among themselves. At the event, the employee took photographs to document the event and capture his coworker's frustration. He told his coworkers that he would put the photographs on Facebook, and in doing so, expressed the sentiment of the group. The Facebook activity was a direct outgrowth of the earlier discussion among the salespeople that followed the meeting with management.

Although the employee posted the photographs on Facebook and wrote the comments himself, we concluded that this type of activity was clearly concerted. We found that he was vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting. Further, we concluded that this concerted activity clearly was related to the employees' terms and conditions of employment. Since the employees worked entirely on commission, they were concerned about the impact the Employer's choice of refreshments would have on sales, and therefore, their commissions.¹⁶⁴

The ALJ agreed that the Facebook postings regarding the sales event were protected, concerted activities, but he concluded that the employer fired the employee for the unprotected activity of posting the Land Rover photographs rather than the comments and photos on the BMW sales event.¹⁶⁵ The GC transferred the case so that it could continue before the National Labor Relations Board.¹⁶⁶ The Board upheld the ALJ's decision and concluded that the speech on Facebook concerning the sales event was protected, but also agreed that the employee was not fired for that speech.¹⁶⁷

In *Hispanics United of Buffalo, Inc.*,¹⁶⁸ the General Counsel

163. Memorandum from the GC, 2011, *supra* note 94, at *6-7.

164. *Id.* at *6.

165. Karl Knauz Motors, Inc., Case 13-CA-46452, at 9 (Sept. 28, 2011) (ALJ decision), available at <http://www.nlrb.gov/case/13ca46452>.

166. Karl Knauz Motors, Inc., Case 13-CA-46452 (Sept. 28, 2011) (transfer order), available at <http://www.nlrb.gov/case/13ca46452>.

167. Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 2012 WL 4482841, at *1-2 (Sept. 28, 2012).

168. *Hispanics United of Buffalo, Inc.*, Case 3-CA-27872 (Sept. 2, 2011) (ALJ decision),

brought a charge before the NLRB.¹⁶⁹ An administrative law judge found that the charging parties had engaged in concerted protected activity.¹⁷⁰ In this case, the respondent, Hispanics United of Buffalo (“HUB”), is a non-profit corporation that renders social services—including advocacy for domestic violence victims as well as housing and employment-related assistance—to clients in Buffalo.¹⁷¹ The organization fired five employees based on comments made on Facebook.¹⁷² The ALJ found that an employee of HUB, Lydia Cruz-Moore, had criticized the work ethic of other HUB employees.¹⁷³ She communicated frequently with Mariana Cole-Rivera, one of five discharged employees.¹⁷⁴ Cruz-Moore told Cole-Rivera that she was going to lodge her criticism with the Executive Director, Lourdes Iglesias.¹⁷⁵ In response, Mariana Cole-Rivera, while out of work on a Saturday, posted a message on her Facebook page stating that Lydia Cruz “feels that we don’t help our clients enough at HUB I about had it! My fellow coworkers how do u feel?”¹⁷⁶ This posting resulted in posts by the four other coworkers who were eventually fired.¹⁷⁷ They include complaints about work conditions and expectations.¹⁷⁸ Lydia Cruz-

available at <http://www.nlr.gov/case/3ca27872>.

169. *Id.* at 1.

170. *See id.* at 9.

171. *Id.* at 1.

172. *Id.* at 1, 4-6.

173. *Id.* at 4.

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* at 4-5.

178. Sample posts include:

By Damicela Rodriguez:

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

By Ludimar Rodriguez:

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

By Yaritza Campos:

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

By Carlos Ortiz de Jesus:

I think we should give our paychecks to our clients so they can “pay” the rent, also we can take them to their Dr’s appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching tv, and also we can go to do their grocery shop and organized the food in their house pantries... (insert sarcasm here now)

By Mariana Cole-Rivera:

Lol. I know! I think it is difficult for someone that [is] not at HUB 24-7 to really grasp and understand what we do[...].I will give her that. Clients will complain especially when they ask for services we don’t provide, like washer, dryers stove and refrigerators, I’m proud to work at HUB and you are all my family and I see what you do and yes,

Moore responded on Facebook, “Marianna stop with ur lies about me. I’ll b at HUB Tuesday[.]”¹⁷⁹ In response, Mariana Cruz-Rivera posted, “Lies? Ok. In any case Lydia, Magalie [Lomax, HUB’s Business Manager] is inviting us over to her house today after 6:00 pm and wanted to invite you but does not have your number i’ll inbox you her phone number if you wish.”¹⁸⁰

Lydia Cruz-Moore complained to Lourdes Iglesias, HUB’s Executive Director, about the posts.¹⁸¹ Iglesias met with five of the employees who had posted and fired them, telling them that their posting constituted harassment and bullying and violated HUB’s anti-harassment policy.¹⁸² She also told them that Lydia Cruz-Moore had a heart attack as a result of the Facebook postings.¹⁸³ The ALJ concluded that the comments the employees made on Facebook were concerted, protected activities, and that it was irrelevant whether the employees were trying to initiate changes in their working conditions.¹⁸⁴ Concerted activity for “mutual aid and protection that is motivated by a desire to maintain the status quo” is also protected under Section 7.¹⁸⁵ Even assuming that it would be necessary to prove that the employees who were ultimately fired were trying to initiate changes in the working conditions, the ALJ concluded that the charging parties were taking their first step toward taking action to defend themselves from accusations about their work, which they believed Cruz-Moore would take to management.¹⁸⁶ The ALJ rejected the argument that the employer fired the charging parties in order to enforce its anti-harassment policy.¹⁸⁷ He concluded that there was no evidence that the other employees were harassing Lydia Cruz at all, and, in particular, no evidence that they were harassing her on the basis of any protected characteristic mentioned in HUB’s anti-harassment policy.¹⁸⁸ He also concluded that there was no evidence that

some things may fall thru the cracks, but we are all human :) love ya guys

Id. at 5.

179. *Id.* at 6.

180. *Id.*

181. *Id.* at 6.

182. *Id.*

183. *Id.*

184. *Id.* at 8.

185. *Id.*

186. *Id.* at 8-9.

187. *See id.* at 10.

188. *Id.* at 10. HUB had a policy against sexual harassment, but also a policy against other types of harassment that states:

Hispanics United of Buffalo will not tolerate any form of harassment, joking remarks or other abusive conduct (including verbal, nonverbal, or physical conduct) that demeans or

Cruz-Moore's health problems were in any way related to the Facebook posts.¹⁸⁹ The case was transferred to and continued before the National Labor Relations Board, which has yet to render a decision.¹⁹⁰

In a memorandum dated August 18, 2011, the Acting General Counsel of the NLRB discussed social media and how it interacts with the National Labor Relations Act.¹⁹¹ This memorandum makes clear that while much employee speech on social media is not protected under the National Labor Relations Act, speech is protected under certain conditions. It comments on the HUB case, explaining:

We decided that the Facebook discussion here was a textbook example of concerted activity, even though it transpired on a social network platform. The discussion was initiated by the one coworker in an appeal to her coworkers for assistance. Through Facebook, she surveyed her coworkers on the issue of job performance to prepare for an anticipated meeting with the Executive Director, planned at the suggestion of another employee. The resulting conversation among coworkers about job performance and staffing level issues was therefore concerted activity. . . .

[T]he coworker sought input from a fellow employee about her dispute with the advocate after the advocate indicated that they should have the Executive Director settle their differences. The coworker had reason to believe that the advocate's action would result in a discussion with management about employees' responsibilities and performance and could result in discipline. The comments of the other employees in response to the coworker's initial Facebook posting were directly related to criticisms of job performance and staffing/workload issues. Thus, because the Facebook postings directly implicated terms and

shows hostility toward an individual because of his/her race, color, sex, religion, national origin, age, disability, veteran status or other prohibited basis that creates an intimidating, hostile or offensive work environment, unreasonably interferes with an individual's work performance or otherwise adversely affects an individual's employment opportunity.

Id.

189. *Id.*

190. See *Hispanics United of Buffalo, Inc.*, Case 3-CA-27872 (Sept. 2, 2011) (transfer order), available at <http://www.nlr.gov/category/case-number/03-ca-027872>. See also *Hispanics United of Buffalo*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/category/case-number/03-ca-027872> (last visited Dec. 7, 2012) (showing docket activity).

191. See Memorandum from the GC, 2011, *supra* note 94. The memo defines social media as "various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications." *Id.* at 1.

conditions of employment and were initiated in preparation for a meeting with the Employer to discuss matters related to these issues, we concluded that the Facebook conversation was concerted activity for “mutual aid or protection” under Section 7.¹⁹²

Hispanics United is an interesting case because it raises the potential conflict between employee protected speech rights under the NLRA and employees’ rights not to be harassed based on protected characteristics under Title VII, the ADEA, the ADA, and other anti-discrimination statutes. It also raises questions about whether employers can rely on general anti-bullying and anti-harassment policies in the workplace to justify firing employees for otherwise protected activities under the NLRA. It appears in this case that the Facebook posts, if tolerated by the employer, would not create employer liability under Title VII or other federal anti-discrimination statutes. There is no evidence that the behavior occurred because of any protected characteristic of Lydia Cruz-Moore such as gender, race, age, color, national origin, disability, or religion. Moreover, the posts seem insufficient, absent additional evidence, to meet the “severe or pervasive” standard established under the anti-discrimination statutes to prove that the behavior created a hostile work environment.¹⁹³ And, the employer’s policies in this case prohibit harassment based on protected characteristics, but do not appear to prohibit general harassment or bullying.¹⁹⁴ Thus, it appears that the ALJ’s conclusion is correct vis-à-vis this particular policy.

But how should an ALJ decide a case like this if the Facebook comments are more severe or pervasive and create a hostile working environment for the victim based on a characteristic protected by the federal civil rights laws? Under these circumstances, there would be a direct conflict between the NLRA and Title VII, the ADEA or the ADA.¹⁹⁵ As the Supreme Court has noted, Title VII encourages voluntary employer preventive action in order to avoid liability.¹⁹⁶

192. *Id.* at 3.

193. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 17 (1993) (reaffirming that Title VII is violated when the workplace is permeated with “discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment”).

194. *See Hispanics United of Buffalo, Inc.*, Case 3-CA-27872, at 10 (Sept. 2, 2011) (ALJ decision), available at <http://www.nlr.gov/case/3ca27872>.

195. *See* National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2006); Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2006); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12113 (2006).

196. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

Particularly in the area of hostile work environments based on protected characteristics, the Supreme Court has taken this policy very seriously.¹⁹⁷ In essence, it created an affirmative defense for employers who create policies and procedures to prohibit, investigate, and prevent hostile work environments and whose employees unreasonably fail to report the harassing behavior to the employer before filing a lawsuit.¹⁹⁸ In doing so, the Supreme Court emphasized the importance of employer efforts to prevent discriminatory harassing behavior.¹⁹⁹

It seems, then, that the Supreme Court would expect the NLRB to consider the important policies of Title VII²⁰⁰ when it determines whether an employer may discipline an employee for speech on social media that also potentially creates a hostile work environment based on race, sex, gender, national origin, color, age, disability or religion. Given the policies of Title VII, the Supreme Court would likely conclude that social media behavior—comments, photographs, videos, etc.—that would otherwise create a hostile work environment based on an employee's membership in a protected class, would not be protected activity under Section 7 of the NLRA. The GC of the NLRB has taken the position that if the posting includes a racially discriminatory statement that causes an uproar in the workplace, the behavior will not be protected because of the Section 7 exceptions from protection of concerted activity that is opprobrious.²⁰¹

But an employer's zero tolerance anti-harassment or anti-bullying policy is another matter. Many employers create these types of policies that go well beyond Title VII and state law.²⁰² Often, employers seek to control behavior before federal or state law comes into play and to create a more comfortable place to work for all employees.²⁰³ These policies,

197. *See id.*

198. *See id.* at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) ("When no tangible employment action is taken, a defending employer may raise an affirmative defense While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance . . . the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.").

199. *See id.* at 805-08.

200. We refer to Title VII in this paragraph but the same arguments are applicable to the ADEA and the ADA because both have been interpreted like Title VII to prohibit harassment based on an employee's protected characteristic that creates a hostile work environment that alters the terms or conditions of employment. *See Brennan v. Metro. Opera Ass'n, Inc.*, 192 F.3d 310, 318 (2d Cir. 1999) (ADEA); *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 719-20 (8th Cir. 2003) (ADA).

201. *See Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 26 (D.C. Cir. 2011).

202. *See, e.g., Hispanics United of Buffalo, Inc.*, Case 3-CA-27872, at 10 (Sept. 2, 2011) (ALJ decision), available at <http://www.nlr.gov/case/3ca27872>.

203. *See Kerin Stackpole, Proactive Employee Engagement with Social Media Guidelines*,

which restrict employee behavior beyond that required by federal or state law, should yield to the NLRA Section 7 protection of concerted activity. In fact, as discussed below, the GC has interpreted many broad social media policies as violative of the NLRA even if they are not enforced.²⁰⁴ This result is not necessarily problematic because the NLRA itself has limits and will strip concerted behavior of protection if it is “opprobrious.”²⁰⁵ Whether the behavior is hostile toward another employee in an egregious fashion should be a factor for the ALJ to consider in determining whether the speech will lose its protection. The next subpart discusses what types of behavior and speech lose their protection as concerted activity under the National Labor Relations Act.

2. Lost Protection for Concerted Activity? Opprobrious Comments

Even concerted activity that an employer knows about may not be protected if it is “so egregious as to remove the employee’s conduct from the protection of the Act.”²⁰⁶ In making this determination, the Board considers four factors (known as the *Atlantic Steel* factors): “(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.”²⁰⁷ The GC has agreed that the *Atlantic Steel* test applies to speech that takes place on social media, and that application of factors two and four is straightforward.²⁰⁸ The GC also states, however, that given the context, the test should be somewhat modified to consider not only the disruption to the workplace discipline but also to consider the alleged disparagement of the employer’s products and services.²⁰⁹ In *American Medical Response of Connecticut, Inc.*,²¹⁰ the GC concluded that use of

SOCIAL MEDIA MONTHLY (Oct. 8, 2012), <http://thesocialmediamonthly.com/proactive-employee-engagement-with-social-media-guidelines/>.

204. See Memorandum from the Office of the General Counsel of the NLRB, Report of the Acting General Counsel Concerning Social Media Cases, OM 12-59, at 3 (May 30, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd> [hereinafter Memorandum from the GC, 2012].

205. See *infra* Part III.A.2.

206. Am. Med. Memo, *supra* note 79, at 9 (citing *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979)).

207. *Atl. Steel*, 245 N.L.R.B. at 816.

208. Wolters Kluwer Fin. Serv., Inc., Case 18-CA-64873, Advice Memorandum, at 4 (Nov. 28, 2011), available at <http://www.nlr.gov/case/18-CA-064873> [hereinafter Wolters Kluwer Memo].

209. *Id.* at 4-5.

210. Am. Med. Memo, *supra* note 79, at 9. The Hartford regional office of the NLRB

the terms “dick,” “17,” (AMR code for a psychiatric patient) and “scumbag” in reference to the charging party’s supervisor on her Facebook page “was not so opprobrious as to lose the protection of the Act.”²¹¹ Applying the four-factor test, the GC stated:

[W]e conclude that Souza’s conduct was not so opprobrious as to lose the protection of the Act. As to the first factor, the Facebook postings did not interrupt the work of any employee because they occurred outside the workplace and during the non-working time of both Souza and her coworkers. As to the second factor, the comments were made during an online employee discussion of supervisory action, which is . . . protected activity. Regarding the third factor, although Souza called Filardo a “17,” “dick,” and “scumbag,” the name-calling was not accompanied by any verbal or physical threats, and the Board has found more egregious name-calling protected. The fourth factor strongly favors a finding that the conduct was protected; Souza’s Facebook postings were provoked by Filardo’s unlawful refusal to provide her with a Union representative for the completion of the incident report and by his unlawful threat to discipline her. Considering these factors, we conclude that Souza did not lose the protection of the Act.²¹²

The GC noted that in other cases, the NLRB has found that calling a supervisor a “liar and a bitch,” a “fucking son of a bitch” and an “egotistical fuck” did not destroy the protection of the communication.²¹³

Moreover, the GC has concluded that activity does not lose its protection because it is defamatory unless the statement is maliciously false.²¹⁴ Thus, employees who responded to a Facebook posting of a former employee that criticized their employer’s tax withholding

ultimately filed a complaint against the respondent in this case alleging that the employee was discharged unlawfully because she was engaged in protected activity when she posted comments about her supervisor and responded to comments from her co-workers. The case was settled, and the company agreed to revise an overly-broad policy. *See Settlement Reached in Case Involving Discharge for Facebook Comments*, NAT’L LAB. REL. BOARD (Feb. 8, 2011), <http://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments>.

211. Am. Med. Memo, *supra* note 79, at 9.

212. *Id.* at 9-10 (footnotes omitted). The ALJ in *Hispanics United* also concluded that the employees’ statements did not lose protection of the Act and placed emphasis on the fact that the posts were not made at work or during work hours. *Hispanics United of Buffalo, Inc.*, Case 3-CA-27872, at 9 (Sept. 2, 2011) (ALJ decision), available at <http://www.nlr.gov/case/3ca27872>

213. Am. Med. Memo, *supra* note 79, at 10, n.19 (citing *Stanford N.Y., LLC*, 344 N.L.R.B. 558, 558-59 (2005) and *Alcoa Inc.*, 352 N.L.R.B. 1222, 1225-26 (2008)).

214. Memorandum from the GC, 2011, *supra* note 94, at 10.

practices were protected.²¹⁵ According to the GC, there was no valid basis to presume that the employees' statements were defamatory, much less malicious.²¹⁶ Finally, the employer's threats to file a lawsuit against the employees were unlawful activities that interfere with employees' Section 7 rights.²¹⁷ Because the employer did not file a lawsuit but merely threatened to do so, the threat had no First Amendment protection, and even if there were a reasonable basis for the potential legal action, the threats were unlawful.²¹⁸

The GC's analysis of the first factor favors employees who post comments on social media so long as the employees access the social media from their own computer or smart phone and not during working hours.²¹⁹ In most of the recent cases where the GC concluded that the behavior or comments on social media were protected, the GC found that the comments were not so opprobrious as to remove their protection.²²⁰ This is in large part, it appears, because the behaviors occurred outside of work and on systems not owned by the employer, and there was no suggestion that the comments affected the employees' work performance. Thus, it seems that once considered protected, the employee comments made on social media will not ordinarily lose the protection unless they are particularly hostile.²²¹ But this analysis may change depending on the audience, and on the type of comments made. While employees often communicate via social media outside of work, social media postings have the capability of reaching a much larger audience and of harming the employer if its services or products are disparaged.²²² Whether the NLRB will in the future take into account the public nature of the comments is unclear. The GC does not mention this as a factor, but it is possible that in the future comments made on social media such as Facebook to one's "friends" will be protected whereas the same comments made on YouTube to a large audience might not be. The GC seems not to have anticipated this question, but if the comments go "viral" on the Internet, employers will likely argue that

215. *Id.* at 7-10.

216. *Id.* at 9.

217. *Id.*

218. *Id.*

219. *See, e.g., id.*

220. *See, e.g.,* Am. Med. Memo, *supra* note 79, at 9.

221. *See* Memorandum from the GC, 2011, *supra* note 94, at 9.

222. *See* Christopher M. Leh, *Reducing Employer Risk Concerning Employee Social Media Use - Disparagement*, DIGITAL WORKPLACE BLOG (July 26, 2010), <http://www.digitalworkplaceblog.com/electronic-communications/reducing-employer-risk-concerning-employee-social-media-use—disparagement/>.

they harmed the company's reputation in a way that may have financial effects. Moreover, given the GC's view that a modified test is appropriate where the speech takes place on social media,²²³ and the public nature of speech on social media, in the future the NLRB may consider speech opprobrious if it is openly disparaging of the employer's products or services or of its customers or clients.

There is at least one case where the GC concluded that the speech on Facebook was so opprobrious as to lose its protection. In that case, the charging party, an employee at Detroit Medical Center, posted racist comments about his fellow workers on Facebook, which caused a significant uproar in the workplace.²²⁴ As a result, the employer suspended the charging party, and, following the suspension, placed the charging party on probation.²²⁵ The GC found the comments on Facebook were not protected.²²⁶ Even though the subject matter of the speech dealt with working conditions and ordinarily would have been protected, the employee's use of racial stereotypes removed it from the Act's protection.²²⁷ The GC stated:

[A]lthough the subject of the Charging Party's Facebook "discussion" implicated Section 7 concerns, the other *Atlantic Steel* factors weigh against protection. The location of the discussion – on Facebook – resulted in wide circulation of the Charging Party's comments among his coworkers and weighs against protection because those comments caused a major disruption in the workplace. The nature of his "outburst" also weighs against protection because of his use of racial stereotypes and slurs, following directly upon a perceived threat, significantly increased racial tension in the workplace. Employees were extremely upset by his comments, and several complained about them to the Employer. Finally, his conduct was not provoked by an unfair labor practice. In these circumstances, we conclude that on balance, his Facebook activity lost the protection of the Act.²²⁸

3. Employer Surveillance of Social Media

Under the NLRA, it is also unlawful for employers to engage in

223. See Wolters Kluwer Memo, *supra* note 208, at 4-5.

224. Detroit Med. Ctr., Case 7-CA-06682, Advice Memorandum, at 4-5 (Jan. 10, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458084ffc5>.

225. *Id.* at 3.

226. *Id.* at 5.

227. *Id.*

228. *Id.* at 5.

surveillance or give the impression that they are engaging in surveillance of employees' Section 7 activities.²²⁹ This surveillance or even an impression of surveillance is unlawful because it discourages employees from engaging in union activity and creates the fear that employers are "peering over their shoulders."²³⁰ An employer creates the impression that it is engaging in surveillance when "the employee would reasonably assume" from the employer's behavior and statements that the employer is engaged in surveillance activities.²³¹ The Board considers employer revelation of "specific information about a union activity that is not generally known" without revealing its source to indicate that the employer is creating the impression that it is engaging in surveillance of union activities.²³² But, where the employer explains that it received its information from other employees, especially absent evidence that the employer solicited the information, the employees cannot reasonably conclude that the employer is engaged in surveillance of union activities.²³³ Thus, it appears that the GC would not approve of an employer whose management befriended an employee on Facebook for the purpose of investigating comments made about the employer's workplace. It would, however, consider an employer's action based on comments made on Facebook appropriate if the employer received the posts from another employee without soliciting the information, and if the employer notified the target that the source of the information was another employee.²³⁴

In *Bridgestone Firestone South Carolina*,²³⁵ for example, the manager's plant-wide letter, which thanked the "many team members who have chosen to provide information," did not create an impression of unlawful surveillance because it reported that employees had voluntarily provided information to the employer.²³⁶ In *MONOC*, the GC concluded that the employer neither engaged in surveillance nor gave the impression that it had engaged in surveillance because it

229. MONOC Memo, *supra* note 122, at 9 (citing Stevens Creek Chrysler Jeep Dodge, Inc., 353 N.L.R.B. 1294, 1296 (2009)).

230. MONOC Memo, *supra* note 122, at 9 (quoting *Flexsteel Indus.*, 311 N.L.R.B. 257, 257 (1993)) (internal quotation marks omitted).

231. MONOC Memo, *supra* note 122, at 9 (quoting *Flexsteel*, 311 N.L.R.B. at 257) (internal quotation marks omitted).

232. MONOC Memo, *supra* note 122, at 9 (quoting *Flexsteel*, 311 N.L.R.B. at 257).

233. See MONOC Memo, *supra* note 122, at 9. See also *Bridgestone Firestone S.C.*, 350 N.L.R.B. 526, 527 (2007).

234. See MONOC Memo, *supra* note 122, at 10.

235. *Bridgestone*, 350 N.L.R.B. at 526.

236. *Id.* at 526-27.

obtained Ehling's Facebook page and e-mails from other employees without soliciting them, and told Ehling that another employee had provided the information to MONOC.²³⁷ Moreover, the GC concluded, Ehling knew that viewing her Facebook page was limited only to her "friends" and therefore knew that the employer did not engage in direct surveillance.²³⁸ The letter of suspension sent to Ehling and her co-workers referenced comments "brought to" the employer's attention, language that appears to disavow direct surveillance.²³⁹ Finally, MONOC's labor attorney told the union's attorney that other employees had forwarded Ehling's e-mails to managers.²⁴⁰ All of these communications were sufficient to preclude the employees' reasonable belief that the employer was engaged in surveillance.²⁴¹

B. Social Media Policies

Just a few years ago, lawyers advised employers to establish broad social media policies to protect companies from statements and photographs posted by employees on Facebook and other social media.²⁴² This advice, however, now appears questionable, given the GC's newest reaction to social media and other policies limiting employee speech.²⁴³ The GC has consistently advised that ambiguous broad policies that curtail speech on social media, absent limiting language, violate the NLRA.²⁴⁴ Rules, however, that "clarify and restrict their scope by including examples of clearly illegal or unprotected conduct" are often lawful.²⁴⁵ These examples are important because work rules can violate workers' rights even if the employer does not enforce them if they "would reasonably tend to chill employees in the exercise of their Section 7 rights."²⁴⁶ The Board uses a two-step test to determine whether a policy fits this definition. First, it violates the NLRA if the rule explicitly restricts the employees' Section 7 protected

237. MONOC Memo, *supra* note 122, at 10.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. See Mark Herrmann, *Inside Straight: Why Your Four-Month-Old Social Media Policy is Obsolete*, ABOVE THE L. (Oct. 31, 2011, 10:16 AM), <http://abovethelaw.com/2011/10/inside-straight-why-your-four-month-old-social-media-policy-is-obsolete/>.

243. See, e.g., *supra* Part III.A.3.

244. See Memorandum from the GC, 2012, *supra* note 204, at 3.

245. *Id.*

246. Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

activities.²⁴⁷ Even if it does not explicitly restrict employees' Section 7 rights, a policy is unlawful if, "[i] employees would reasonably construe the language to prohibit Section 7 activity[, ii] the rule was promulgated in response to union activity[, or [iii] the rule has been applied to restrict the exercise of Section 7 rights."²⁴⁸

*American Medical Response of Connecticut, Inc.*²⁴⁹ is a good example. The company had two policies that prohibited offensive language and behavior. The Standards-of-Conduct policy prohibited "[u]se of language or action that is inappropriate in the workplace whether racial, sexual, or of a general offensive nature" and "[r]ude or discourteous behavior to a client or coworker."²⁵⁰ The Blogging and Internet Posting Policy stated:

Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.²⁵¹

The GC concluded that both of these policies violated Section 7 rights.²⁵² Even though the employer did not use the Standards-of-Conduct policy to justify the discipline of Dawnmarie Souza, the GC found that the policy was unlawful because employees would reasonably construe the general nature of the provisions to prohibit Section 7 activity.²⁵³ While such a provision may be saved if there is language limiting the provision's scope and removing ambiguity, the employer's Standards-of-Conduct policy here contained no limiting language.²⁵⁴ However, a broad "savings clause" that merely states that the employer's

247. See *Sears Holdings (Roebucks)*, Case 18-CA-19081, Advice Memorandum, at 4 (Dec. 4, 2009), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45802d802f> [hereinafter *Sears Memo*].

248. *Id.* (quoting *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646, 647 (2004)).

249. See *Am. Med. Memo*, *supra* note 79.

250. *Id.* at 5.

251. *Id.*

252. *Id.* at 12-14.

253. *Id.* at 12.

254. *Id.*

policy will be administered in compliance with Section 7 of the NLRA is inadequate to save the provision.²⁵⁵

Moreover, the GC concluded that the first provision of the Blogging and Internet Policy violates the law because it restricts Section 7 rights and would prohibit an employee from engaging in protected activity.²⁵⁶ For example, the GC noted that such a provision would prohibit employees from posting photographs on social media of employees carrying picket signs with the company's name or wearing a t-shirt with the company logo while engaged in a protest against the company.²⁵⁷ The second provision of the Blogging and Internet Policy, like the provision in the Standards-of-Conduct policy, is unlawful because it is a broad rule that prohibits protected activity and has no limiting language.²⁵⁸

In another case, the employer's Internet/blogging policy, which was included in the employee handbook, stated that the employer supported a free exchange of ideas.²⁵⁹ But it also prohibited Internet blogging, chat room discussions, e-mail, text messages, or other forms of communication in which an employee revealed confidential or proprietary information about the employer or engaged in "inappropriate discussions" about the company, management and/or coworkers.²⁶⁰ The GC advised that employees could reasonably interpret the portion of the policy banning "inappropriate discussions" to ban protected Section 7 activity.²⁶¹ Because this term was so broad and "would commonly apply to protected criticism of the Employer's labor policies, treatment of employees, and terms and conditions of employment," and because the employer never limited or gave examples to help define the broad terminology, the GC concluded that employees would reasonably interpret the policy to prohibit employees from discussing terms and conditions of employment.²⁶² Therefore, the policy was unlawful.²⁶³

The GC also dealt with three guidelines in a social media policy of a supermarket chain.²⁶⁴ The first guideline, which prohibited employees from pressuring other employees to connect or communicate through

255. See Memorandum from the GC, 2012, *supra* note 204, at 8.

256. Am. Med. Memo, *supra* note 79, at 13.

257. *Id.*

258. *Id.* at 13-14.

259. See Memorandum from the GC, 2011, *supra* note 94, at 11.

260. *Id.*

261. *Id.* at 12.

262. *Id.*

263. See *id.*

264. *Id.* at 22.

social media was law, according to the GC, because it could not be interpreted to restrict protected activities.²⁶⁵ It merely prohibited the specific conduct of pressuring or harassing co-workers to join them on a social network.²⁶⁶ However, a second guideline that prohibited employees from revealing any personal information on social media was unduly broad and would restrict the employee Section 7 rights to discuss terms or conditions of employment.²⁶⁷ A third guideline that prohibited use of the employer's logo or photographs of the employer's stores was also unlawful because it would restrain employees from engaging in protected activity.²⁶⁸ Like the Blogging Policy in *American Medical Response*, this guideline would prevent employees from posting pictures of employees carrying a picket sign that stated the employer's name, or wearing t-shirts portraying the employer's logo in a protest involving terms or conditions of employment.²⁶⁹

By contrast, the GC concluded that a similar policy by Sears was lawful.²⁷⁰ The policy stated that certain subjects that may not be discussed by employees in social media include the following:

- Company confidential or proprietary information
- Confidential or proprietary information of clients, partners, vendors, and suppliers
- Embargoed information such as launch dates, release dates, and pending reorganizations
- Company intellectual property such as drawings, designs, software, ideas and innovation
- *Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects*
- Explicit sexual references

265. *Id.*

266. *Id.*

267. *See id.*

268. *Id.*

269. *See id.*

270. *See* Sears Memo, *supra* note 247.

- Reference to illegal drugs
- Obscenity or profanity
- Disparagement of any race, religion, gender, sexual orientation, disability or national origin[.]²⁷¹

The intent of the policy is not to restrict the flow of information but to “minimize the risk to the Company and its associates.”²⁷² The union began to organize a broader group of service technicians, and the campaign used numerous forms of online media.²⁷³ These service technicians were concerned about whether the “disparagement” clause (italicized above) applied to their online discussions, but they continued to discuss the union campaign and the relative merits of unionization online.²⁷⁴ The employer did not enforce this provision of the policy against those engaging in the online discussions, but the union filed a charge challenging the entire policy.²⁷⁵ The GC, however, gave advice only as to the “disparagement” portion of the policy presumably because the other portions of the policy are legitimate and obviously do not restrict Section 7 rights.²⁷⁶ The GC concluded that given the Board’s emphasis on the context of policies, the italicized policy above could not reasonably be interpreted to ban online discussions about terms or conditions of employment.²⁷⁷ The memorandum reminded readers that the NLRB places emphasis on a reasonable reading of the rule, which includes a reading of the context.²⁷⁸ Since the policy, taken as a whole, demonstrated that the employer did not intend to restrict Section 7 activities and the employees could not reasonably read it to do so, the GC concluded that the complaint about the provision should be dismissed.²⁷⁹

The GC also advised that an employer policy that included specific examples of prohibited conduct is lawful.²⁸⁰ This policy prohibited “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful

271. *Id.* at 3 (alteration in original) (footnote omitted).

272. *Id.* at 2.

273. *See id.* at 1-2.

274. *Id.* at 3.

275. *Id.*

276. *See id.* at 6-7.

277. *See id.*

278. *See id.* at 5-6.

279. *Id.* at 7.

280. *See* Memorandum from the GC, 2012, *supra* note 204, at 19.

conduct.”²⁸¹ A courtesy policy entitled “Be Respectful” was also lawful because it provided examples of egregious conduct so that employees would not reasonably construe the policy to prohibit Section 7 conduct.²⁸² For example, the policy advised employees to avoid discussion online that “could be viewed as malicious, obscene, threatening or intimidating.”²⁸³ It also prohibited “harassment or bullying,” defined as including “offensive posts meant to intentionally harm someone’s reputation,” or “posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.”²⁸⁴

IV. EMPLOYEE DISCIPLINE, SOCIAL MEDIA AND SOCIAL MEDIA POLICIES: A PROPOSAL FOR FEDERAL LEGISLATION

The GC’s advice memoranda and its reports demonstrate that the NLRA has an important role to play in protecting employee speech in social media, and that both employers and employees should be aware of the extent and limitation of these protections. First, social media provides an important medium for union organizing, and it is vital to the union movement that unions and employees have access to these tools in order to accomplish their goals.²⁸⁵ In *Lechmere, Inc. v. NLRB*,²⁸⁶ the United States Supreme Court significantly reduced the access that union members have to employees by permitting employers to prohibit unions from distributing pamphlets on the employer’s private property in most instances.²⁸⁷ Many scholars have argued that *Lechmere* unreasonably restricted union access to employees by making it much more difficult and expensive for unions to give information to employees.²⁸⁸ Social media sources can erase these disadvantages, and perhaps even improve employee access to information that unions hope to convey during the

281. *Id.* at 20 (internal quotation marks omitted).

282. *Id.*

283. *Id.* (internal quotation marks omitted).

284. *Id.* (internal quotation marks omitted).

285. See LAB. PROJECT FOR WORKING FAMILIES ET AL., NEW APPROACHES TO ORGANIZING WOMEN AND YOUNG WORKERS: SOCIAL MEDIA AND WORK FAMILY ISSUES (2010), available at <http://laborcenter.berkeley.edu/workingwomen/newapproaches10.pdf>.

286. 502 U.S. 527 (1992).

287. See *id.* at 540-41.

288. See, e.g., Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891, 907 (2006); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 203 MICH. L. REV. 518, 540-41 (2004); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1561-62 (2002).

organizing process.²⁸⁹

So too should social media be available to employees in the workplace, whether unionized or not, whether engaged in a union drive or not, to convey information and to discuss the terms and conditions of employment. Generally, the GC's advice memoranda appear to understand and respect this new reality in the workforce.²⁹⁰ Social media, with certain limitations, provides a tool for organizing and communicating around workplace issues. It is inexpensive and democratic.

Nonetheless, the GC advice memoranda illustrate the NLRA's limitations in protecting employee speech. First, even though social media itself is, in essence, a group activity, the GC did not assume that discussion through social media was sufficient to make the activity concerted under the statute.²⁹¹ In nearly every case where the GC recommended that there was a valid claim, there were other employees who also engaged in the speech.²⁹² Thus, the action apparently did not become concerted until other employees got involved. This is not necessary under the NLRB rules, and if it appears that the intent of the first employee is to speak on behalf of other employees or to gather information from other employees about their views, future cases may find a violation if the first employee is disciplined even absent any response by other employees. But it seems that, as a practical matter, the regional offices will determine intent of the charging parties and may decline to file complaints where that intent is not clear or should be a question of fact for the administrative law judge. It seems likely that some employee speech that should be protected under the NLRA will not find protection.

Another limitation is the GC's willingness to interpret the facts in the light most favorable to the employer in some cases. In *Wal-Mart*, for example, the GC concluded that certain speech was not concerted but was merely personal griping.²⁹³ There was no question, however, that the employee who posted criticism of his employer on his Facebook page was discussing the terms or conditions of employment.²⁹⁴ The GC,

289. See G. Micah Wissinger, Note, *Informing Workers of the Right to Workplace Representation: Reasonably Moving from the Middle of the Highway to the Information Superhighway*, 78 CHI.-KENT L. REV. 331, 342-43 (2003).

290. See Wolters Kluwer Memo, *supra* note 208, at 4; Am. Med. Memo, *supra* note 79, at 6.

291. See Intermountain Memo, *supra* note 133, at 5; JT'S Porch Saloon Memo, *supra* note 84, at 3.

292. See, e.g., Am. Med. Memo, *supra* note 79, at 3-4, 6.

293. Wal-Mart Memo, *supra* note 90, at 3.

294. See *id.* at 1-2.

however, concluded that the employee did not intend to join in a group action, and supported this position with the responses of the other employers, which the GC interpreted as comfort to the employee rather than as a discussion of terms or conditions of employment and concerted behavior.²⁹⁵ Similarly, in *MONOC*, even though the employees' speech occurred during a union drive and the first speaker on Facebook was the union representative, the GC appears to have given more credence to the employer's argument that it did not discipline the employees for the speech that was protected.²⁹⁶

Underscoring the above limitations is that the NLRA protects concerted, not individual action.²⁹⁷ Thus, many comments made by employees in social media will not be protected because their intent at the time may be to let off steam, not to engage in concerted behavior. Nonetheless, letting off steam is an important first step to concerted activity.

Finally, the NLRA does not protect employee privacy and speech rights that do not involve concerted, protected activity.²⁹⁸ Thus, employers will still be able to discipline employees for much of their speech on social media. To some extent, this makes sense. Employers should have the right to punish employees who reveal trade secrets or proprietary information, or who denigrate the employer's products (assuming there is no whistleblower protection).²⁹⁹ But when the speech occurs outside of the workforce and does not detract from the employees' performance of job duties, there is a policy question as to whether employers' interests should outweigh those of employees. Absent separate legislation granting employees some protection for social media speech, the employment-at-will doctrine will likely prevail in these cases.

On the other hand, the GC advice memoranda and reports take a strong position with reference to social media policies. Employers should know now that broad, general social media policies are unlawful under the NLRA, even if employers do not enforce the policies in a way that would intrude upon Section 7 rights.³⁰⁰ If the policies themselves or portions of those policies, when read in context, tend to chill employee

295. *Id.* at 3.

296. *MONOC* Memo, *supra* note 122, at 8.

297. *See supra* notes 74-75 and accompanying text.

298. *See supra* notes 74, 89-91 and accompanying text.

299. *See supra* note 19 and accompanying text.

300. *See supra* note 82 and accompanying text.

speech, those policies violate the Act.³⁰¹ Thus, employers should look seriously at their general anti-harassment and anti-bullying policies which, though well-intended, may be illegal under Section 7 if they prohibit Section 7 concerted and protected activity or can reasonably be interpreted to do so.³⁰² In order to save these policies, employers should specifically define the type of behaviors prohibited, making clear that those behaviors do not include Section 7 protected conduct.

But interpretations of the NLRA are insufficient to protect employees from discipline based on a large percentage of their speech and from illegal harassment in the workplace.³⁰³ Therefore, it appears that a new federal statute is necessary to protect individual speech rights in social media from employer discipline and to assure at the same time that employees receive appropriate protections from harassment under the anti-discrimination statutes. This new statute is necessary for two reasons. First, the NLRA speech rights may at times conflict with employee rights to work free from harassment based on their membership in classes protected by the anti-discrimination laws.³⁰⁴ And second, neither the NLRA nor other statutes protect employees from employer discipline resulting from speech that does not constitute concerted, protected speech.³⁰⁵ This Article explains the potential conflict between application of the NLRA and the anti-discrimination statutes.³⁰⁶ The conflict may arise where speech that is otherwise protected under Section 7 violates an employer's anti-harassment policy created to avoid illegal harassment under the anti-discrimination statutes.³⁰⁷ The Supreme Court has encouraged employers to adopt anti-harassment policies by creating an affirmative defense if the employer proves that it has a policy and the aggrieved employee has failed to report the harassment pursuant to the policy.³⁰⁸ Problems can arise if the employer disciplines an employee pursuant to its anti-harassment policy for discussions in social media that make disparaging remarks about

301. See *supra* note 82 and accompanying text.

302. See Lawrence E. Dubé, *NLRB's Solomon Tackles Social Media Cases, Gives Wal-Mart Policy Revision Green Light*, BLOOMBERG BNA (June 4, 2012), <http://www.bna.com/nlrbs-solomon-tackles-n12884909814>.

303. See *supra* pp. 112-14.

304. See *supra* note 197 and accompanying text.

305. See *supra* Part III.

306. See *supra* Part III.A.1.b.

307. See *supra* Part III.A.1.b.

308. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998).

race, gender or other protected characteristics.³⁰⁹ It is possible that the NLRB would find harassing speech to be protected under Section 7 even if it includes harassing speech based on race, gender or other protected characteristics. Another possibility is that an employer's anti-harassment policy may be illegal under the NLRA because it tends to chill employee speech.³¹⁰ One solution that the memoranda and reports discussed above suggest is for the policy to state specifically what behavior it covers and to make clear that sexually or racially harassing speech is covered but other speech is not.³¹¹ Nonetheless, the tension between the anti-discrimination statutes and the NLRA suggests that ad-hoc solutions are inadequate. Although the NLRA and the anti-discrimination statutes have coexisted peacefully thus far, they face inevitable conflict. Employers may find themselves in the untenable position of having to choose between avoiding liability under the anti-discrimination statutes and incurring liability under Section 8(a)(1) of the NLRA by monitoring and potentially stopping employee speech on social media.³¹² It is possible that speech that runs afoul of the anti-discrimination statutes could be held to violate the *Atlantic Steel* factors,³¹³ and therefore be removed from the protection of the NLRA.³¹⁴ The NLRA and the anti-discrimination statutes, however, protect different interests.³¹⁵ Moreover, although it is facially appealing to apply a *per se* rule excluding harassing or discriminatory behavior from the protection of the NLRA, such a rule might cast too broad a net, particularly before any cognizable claim even arises. Under such a regime, employers would still have an incentive to draft broad social media policies in order to create an affirmative defense when litigating Title VII discrimination claims. These policies, in turn, would likely be overinclusive. Such policies may not only discourage legitimate employee speech on social media that falls short of actionable discrimination claims, but may also dampen employee speech generally, even when such speech is completely unrelated to discrimination claims.

Consequently, we propose a federal statute that prohibits employers from disciplining employees for speech on social media when used

309. See *supra* Part III.A.1.b.

310. See *supra* note 246 and accompanying text.

311. See *supra* notes 280-84 and accompanying text.

312. See *supra* Part III.

313. *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979) (setting forth the four-factor test).

314. See *id.*

315. Compare 29 U.S.C. § 157 (2006) (protecting employee rights to organize, bargain collectively), with 42 U.S.C. § 2000e-2(a) (2006) (protecting employees from being discriminated against on the basis of characteristics of race, gender, sex, national origin or religion).

outside the office during non-work hours, unless the speech (i) constitutes illegal harassment under federal anti-discrimination law; (ii) reveals trade secrets or proprietary information; or (iii) disparages the employer's products or services. Under the statute, employers could assert social media policies as an affirmative defense to harassment claims, but only when such policies are narrowly tailored (and, perhaps, also explicitly affirm an employee's right to otherwise engage in protected speech on social media). Though admittedly broad, the statute would provide employees with an important safe harbor as the expansion of the workplace continues to alter our traditional conception of society. Indeed, as work plays a larger role in our lives and social media further blurs the line between work and personal activity, maintaining an effective civil society (and, in turn, an effective democracy) requires redefining the proper bounds of the employer-employee relationship. This statute does just that by creating a haven of protected speech for private employees in an area that is likely to occupy an increasing share of civil society in the coming decades. The statute would also re-characterize the employer-employee relationship established in *Lechmere*³¹⁶ by making it easier for unions to organize. At the same time, the proposed statute would give employers concrete notice of what constitutes impermissible interference with employee speech in social media while maintaining an affirmative defense when litigating discrimination claims.

Nonetheless, the proposed statute does raise some questions. One concern is that such a statute may merely shift the tax on an employee's freedom of speech to the hiring decision. If, for example, employers cannot easily dismiss employees for unpleasant Facebook posts once the employees are on the payroll, they might exact more scrutiny at the front-end of the process, thereby raising the cost of doing business and reducing the available number of jobs for such employees in the aggregate. Moreover, the statute might encourage employers to engage in snooping at the time of hiring. It is already clear that employers check social media before hiring applicants to assure that nothing turns up that is embarrassing or that would be damaging to the employer.³¹⁷ Equally concerning are the arguments that a statute will bring more confusion than clarity by, among other things, conceiving a parallel

316. See *supra* notes 286-88 and accompanying text.

317. See Larson, *supra* note 29 (stating that looking at a job candidate's posts may reveal that she is pregnant; and if she is not hired, the fact that the employer looked at the post may create problems); Prywes, *supra* note 30 (stating that many employers look at job applicants' public profiles on social media to determine their suitability for employment).

administrative regime to enforce it, and in so doing, proliferating complex case law about its application or, in the alternative, that it will be too limited by its specificity. To be sure, no statute can fully predict future developments, particularly in such a technologically-centric field, but a statute protecting employee speech that does not otherwise constitute illegal harassment, reveal trade secrets or proprietary information, or disparage the company³¹⁸ appears to be a workable solution.

V. CONCLUSION

This Article notes the important changes occurring in the workplace and in technology. It analyzes the current law protecting employees' speech in social media, and acknowledges that there are significant gaps in these protections, as well as potential conflicts between the NLRA and the anti-harassment statutes when it comes to policies prohibiting harassment or discipline of employees engaged in harassing other employees.³¹⁹ These gaps, the Article argues, can be filled by a new federal statute that protects employee rights to speech beyond that which constitutes concerted, protected speech under the NLRA, and also protects employee rights to work free of illegal harassment based on race, gender and other protected characteristics, as well as employers' rights to avoid public disparagement of their products and services by employees.³²⁰

318. See *supra* text accompanying notes 19, 299.

319. See *supra* Part III.

320. See *supra* Part IV.

