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"FRIENDING" THE NLRB: THE CONNECTION BETWEEN SOCIAL MEDIA, "CONCERTED ACTIVITIES" AND EMPLOYER INTERESTS

Regina Robson*

*"Ain't it good to know that you got a friend?"*¹

I. INTRODUCTION

The National Labor Relations Board ("Board" or "NLRB")² made headlines in 2010 when it issued a complaint against an ambulance company for discharging an employee for criticizing her supervisor on the employee's Facebook page.³ *American Medical Response*⁴ arose when the employer requested the Charging Employee, Dawn Marie Souza, to complete an incident report related to a complaint made by a relative of a patient that Souza had transported to the hospital.⁵ The employer denied Souza's request for union representation when completing the report.⁶ Souza subsequently recounted the incident on her Facebook page, and indicated the degree of her displeasure by calling her supervisor a "scumbag" and other pejorative terms.⁷ Several of Souza's co-worker friends expressed sympathy and added additional

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1. CAROLE KING, *YOU GOT A FRIEND*, on TAPESTRY (CBS Mastersound 1971).

2. Unless the context indicates otherwise, as used herein, the term "NLRB" refers to the policy making aspects of the agency taken as whole, including the Office of the General Counsel. The term "Board" refers solely to the adjudicatory function of the NLRB.

3. BARRY J. KEARNEY, NLRB OFFICE OF THE GEN. COUNSEL, No. 34-CA-12576, ADVICE MEMORANDUM ON AMERICAN MEDICAL RESPONSE OF CONNECTICUT, INC., (Oct. 5, 2010), available at <http://www.nlr.gov/search/all/No.%252034-CA-12576> [hereinafter Oct. 2010 REPORT].

4. Complaint and Notice of Hearing, Am. Med. Response of Conn., Inc., No 34-CA-12576 (N.L.R.B. Oct. 5, 2010) available at <http://www.scribd.com/doc/41010696/American-Medical-Response-of-CT-NLRB-Nov-2010>.

5. Oct. 2010 REPORT, *supra* note 3, at 3.

6. *Id.*

7. *Id.*

epithets concerning the supervisor.⁸ Souza was later terminated for violating the employer's blogging and internet policy that, among other things, prohibited employees from making disparaging remarks when discussing supervisors.⁹

The NLRB's Office of the General Counsel issued an Advice Memorandum finding that the denial of union representation was an unfair labor practice and advising the regional office to file a complaint.¹⁰ The Advice Memorandum went further, however, and concluded that Souza's Facebook discussion with her co-workers constituted legally protected activity, and that the employer's internet and blogging policy was unlawful.¹¹

Widely misinterpreted in the popular press, the action was characterized as an assertion of blanket protection for employee off-duty postings.¹² Although the case ultimately settled,¹³ the NLRB's focus on the burgeoning use of social media in the workplace has only intensified.

Since 2011, the Office of the General Counsel has issued three memoranda (collectively "*Memoranda*") on the topic of social media.¹⁴ Two of the memoranda (the "*August 2011 Memorandum*")¹⁵ and the

8. *Id.* at 3-4.

9. *Id.* at 4-5 (prohibiting employees from "making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.").

10. *Id.* at 1.

11. *Id.*

12. See, e.g., Leo Standora, *National Labor Relations Board Backs Medic Fired Over Facebook Post*, N.Y. DAILY NEWS (Nov. 9, 2010, 4:00 AM), <http://www.nydailynews.com/news/money/national-labor-relations-board-backs-medic-fired-facebook-post-article-1.453077> (stating that the "case could set a precedent in the fight between employees and companies that fire them over online postings."); Ken Christian, *Connecticut Woman Fired for Comments She Made on Facebook*, WLBZ2 (Nov. 20, 2010, 5:28 PM), <http://www.wlbz2.com/news/regional/story.aspx?storyid=136137> (quoting an NLRB official, "She was on own her own time, on her own resources and that's what really makes the case different."); Julianne Pepitone, *Facebook Firing Test Case Settled Out of Court*, CNN MONEY (Feb. 8, 2011, 1:44 PM), http://money.cnn.com/2011/02/08/technology/facebook_firing_settlement/index.htm (noting that the case was "poised to test new legal ground").

13. Steve Musil, *Company Settles Facebook Firing Case*, CNET NEWS (Feb. 7, 2011, 9:57 PM), http://news.cnet.com/8301-1023_3-20030955-93.html.

14. LAFE E. SOLOMON, NLRB OFFICE OF THE GEN. COUNSEL, OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL ON SOCIAL MEDIA CASES, (Aug. 2011), available at <http://www.nlrb.gov/search/all/OM%252011-74> [hereinafter Aug. 2011 REPORT]; ANNE PURCELL, NLRB OFFICE OF THE GEN. COUNSEL, OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL ON SOCIAL MEDIA CASES, (Jan. 2012), available at <http://www.nlrb.gov/search/all/OM%2012-31> [hereinafter Jan. 2012 REPORT]; LAFE E. SOLOMON, NLRB OFFICE OF THE GEN. COUNSEL, OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL ON SOCIAL MEDIA CASES, (May 2012), available at <http://www.nlrb.gov/search/all/OM%2012-59> [hereinafter May 2012 REPORT].

15. Aug. 2011 REPORT, *supra* note 14.

"January 2012 Memorandum")¹⁶ describe the NLRB's application of the legal concept of "concerted activities" to social media communications, and one memorandum ("May 2012 Memorandum")¹⁷ is devoted entirely to a consideration of employer social media policies.

The *Memoranda* are the culmination of the NLRB's increasing interest in social media. Although there is no agreed upon definition of social media, for practical purposes, social media is the use of interactive or mobile platforms that permits "the creation and exchange of user-generated content."¹⁸

In April 2011, the NLRB's Office of the General Counsel issued a directive that all regions were required to submit cases involving social media to the Division of Advice.¹⁹ More than 129 cases involving some form of social media were submitted for review.²⁰ Thirty-five recent decisions²¹ each involving disciplinary action for social media activities or employer social media policies were discussed in the *Memoranda*.²²

16. Jan. 2012 REPORT, *supra* note 14.

17. May 2012 REPORT, *supra* note 14.

18. See, e.g. HUMAN RES. POLICY ASS'N, *CHRO GUIDE TO SOCIAL MEDIA: UNDERSTANDING THE IMPACT OF SOCIAL MEDIA ON HUMAN RESOURCES* 1 (2011) available at http://www.hrpolicy.org/downloads/2011/11-99_Social_Media_Guide.pdf (defining social media as "any interactive online or mobile platform designed to facilitate the two-way exchange of digital content and communication."); DLA PIPER, REPORT 4: KNOWING YOUR TWEET FROM YOUR TREND: KEEPING PACE WITH SOCIAL MEDIA IN THE WORKPLACE 8, in *SHIFTING LANDSCAPES: THE ONLINE CHALLENGE TO TRADITIONAL BUSINESS MODELS* (2011), available at http://www.dlapipershiftinglandscapes.com/export/sites/shifting-landscapes/downloads/Shifting_Landscapes_-_Social_Media.pdf (defining social media as "a group of internet-based websites and applications which allow the creation and exchange of user-generated content). Some have suggested that there are multiple categories of social media sites, with multiple websites within each category. 23 *Types of Social Media Sites*, ONBLOGGINGWELL.COM (Feb. 17, 2010), <http://onbloggingwell.com/23-types-of-social-media-sites/> (including among other types, blogs, social news, microblogging sites such as Twitter, podcasting communities, professional networks and wikis).

19. LAFE E. SOLOMON, NLRB OFFICE OF THE GEN. COUNSEL, GC 11-11, MANDATORY SUBMISSIONS TO ADVICE 1-2 (2011), available at [http://www.nlr.gov/search/all/GC%2011-11?f\[0\]=document_subtype_name%3AGC%20Memo](http://www.nlr.gov/search/all/GC%2011-11?f[0]=document_subtype_name%3AGC%20Memo).

20. Michael J. Eastman, *A Survey of Social Media Issues Before the NLRB*, LABOR, IMMIGR. & EMP. BENEFITS DIV. U.S. CHAMBER OF COMMERCE, 1 (2011) available at <http://www.uschamber.com/sites/default/files/Reports/NLRB%20Social%20Media%20Survey%20-%20FINAL.pdf>.

21. Because the *Memoranda* do not refer to specific case names or case numbers, it is possible that some of the cases are cited twice – once in the *August, 2011 Memorandum* or *January, 2012 Memorandum* and again in the *May, 2012 Memorandum*. In addition, the *August 2011 Memorandum* does not include pagination, making it difficult to succinctly identify cases. As a convenience, the author assigned page numbers to the *August, 2011 Memorandum*, with the cover page bearing the date August 18, 2011 being assigned page 1 and the following pages being labeled sequentially.

22. See generally Aug. 2011 REPORT, *supra* note 14; Jan. 2012 REPORT, *supra* note 14; May

The NLRB's selection of cases for inclusion in the *Memoranda* was not random.²³ All but two of the cases involved non-union workforces.²⁴ None of the cases arose in the context of a union organizing drive.²⁵ The majority of the decisions involved Facebook postings.²⁶ In effect, the NLRB is gearing up the formidable apparatus of the National Labor Relations Act ("NLRA" or "the Act")²⁷ to focus, not on the traditional areas of union-management conflict, but on the posts and tweets that emanate daily from an overwhelmingly non-unionized workplace.²⁸

Viewing employee off-duty use of social media through a labor law lens rather than the traditional employment law jurisprudence creates challenges.²⁹ Although it is settled law that the Act protects the rights of unorganized employees,³⁰ labor law has traditionally been distinguished by its concern for employees in the aggregate;³¹ its animating goal is the

2012 REPORT, *supra* note 14.

23. See generally Aug. 2011 REPORT, *supra* note 14; Jan. 2012 REPORT, *supra* note 14; May 2012 REPORT, *supra* note 14.

24. Only two of the cases dealing with employer misconduct mentioned the existence of a union. See Aug. 2011 REPORT, *supra* note 14, at 5 (discussing the request for union representation); Jan. 2012 REPORT, *supra* note 14, at 27 (noting that the employee's post to a newspaper website occurred in the context of an on-going labor dispute between the employer and the union).

25. See generally Aug. 2011 REPORT, *supra* note 14; Jan. 2012 REPORT, *supra* note 14; May 2012 REPORT, *supra* note 14.

26. Of the cases discussed in the *Memoranda*, one involved a warning to an employee concerning his tweets. Aug. 2011 REPORT, *supra* note 14, at 12-13. Two involved posting to a third party website. *Id.* at 15; Jan. 2012 REPORT, *supra* note 14, at 26. Lastly, one involved union misconduct in the posting of a YouTube video. Aug. 2011 REPORT, *supra* note 14, at 18-19).

27. 29 U.S.C. §§ 151-69 (2013).

28. Melissa Gonzalez, *Employer Social Media Policies Struck Down as NLRB Targets Non-Union Workplaces*, KCTV5.COM (Nov. 13, 2013, 1:47 PM), <http://www.kctv5.com/story/23958992/employer-social-media-policies-struck-down-as-nlr-b-targets-non-union-workplaces>.

29. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 264 (2003) (observing that the distinction between employment law which governs individual employees rights, and labor law, which governs collective rights, has sometimes prevented practitioners from viewing the workplace "holistically").

30. NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945) (noting that the Act was intended as a "grant of rights to the employees rather than as a grant of power to the union."); See also, Corbett, *supra* note 29, at 267 (calling the fact that the Act protects non-union employees "one of the best-kept secrets of labor law."); Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 939-40 n. 93 (1992) (noting that most workers—and quite a few lawyers—believe that the Act protects only organized employees and arguing that this view is sometimes reinforced by the behavior of the NLRB).

31. Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 688-89 (1997) (distinguishing employment law as focusing on individual rights from labor law which is focused on collective rights).

creation of conditions conducive—or at least not antithetical—to collective action.³² The protections of the Act attach, not only to union initiated activities, but “upstream” of such events, at the incipient stage of employee dissatisfaction that is a necessary predicate for collective action.³³ The determination of when communications “look toward” collaborative action³⁴ and when employer behavior interferes with or potentially chills the likelihood of collective action are dominant areas of inquiry under the Act.³⁵

Determining whether an untargeted post is the first rumble of collective activity or nothing more than a personal expression of frustration is complicated by the widespread use of social media that has changed the paradigm of workplace communications.³⁶ There was no mistaking the message of the heroine in the film *Norma Rae*³⁷ who stood on the workroom floor silently showing a sign reading “Union!” to her equally silent co-workers.³⁸ Would the context of a similar post, viewable by “friends” that include family, co-workers, former co-workers, high school chums, former college roommates, distant acquaintances and possibly “friends of friends” be equally clear, especially in the absence of responsive postings? Untethered to a physical location and without a “localized” audience, “Union!” could be seen as an invitation to co-workers to organize, an endorsement of same sex marriage, the name of a local soccer team, or the manifestation of a spiritual yearning for oneness with the universe.

This Article examines the NLRB’s double barrel effort to determine when social media communications constitute concerted activities, and to delineate the contours of a compliant employer social media policy. It analyzes the *Memoranda* in an effort to discern the operative principles that influenced recent decisions. It explores inconsistencies created by incompatible approaches in defining concerted action and in analyzing employer social media policies. It argues that further refinements to the NLRB’s approach to social media are necessary to equitably balance

32. See Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J.L. & PUB. POL’Y 489, 489-90 (2001) (observing that the original purpose of the Act was to create a “rough parity” between labor and management).

33. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962) (noting that legal protection was especially important when workers are not organized).

34. See *Mushroom Transp. Co., v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

35. See Corbett, *supra* note 29, at 287-95.

36. See *DLA PIPER*, *supra* note 18, at 9 (reporting that 39% of employers use social media for employee communication, 37% for employee engagement and 28% for team building).

37. *NORMA RAE* (20th Century Fox 1979).

38. *Id.*

employer interests and employee rights.

Section II describes the pre-cyber landscape that gives context to recent decisions. The NLRB's recent guidance on social media is positioned at the interstices of two distinct, but interrelated lines of judicial and administrative analysis: one focused primarily on employee interaction and the other focused on employer conduct.

Section 7 of the Act protects the right of employees "to engage in other concerted activities for the purpose of . . . mutual aid or protection."³⁹ Section II of this Article describes a decade's long struggle to define not only what "activities" are protected, but also the degree and quality of worker participation necessary to make such actions "concerted."

Section II also traces the NLRB's parallel efforts to ensure that workers are not "chilled" in exercising their right to engage in concerted action. Section 8 of the Act prohibits employers from taking action to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157"⁴⁰ Employers crafting policies and workplace rules pay a price for poor draftsmanship: disciplining employees pursuant to "overbroad" policies that could deter them from exercising their legal rights violates the Act—even if termination would have been justified pursuant to a properly drafted policy.⁴¹ It is against these distinct lines of analysis that separately treat employee behavior and employer policies that form the backdrop for the NLRB's treatment of social media in the workplace.

Section III "connects the dots" between earlier cases, decided in the context of a "bricks and mortar" workplace, and the decisions that are highlighted in the *Memoranda*. It contrasts the NLRB's nuanced approach in determining whether social media postings rise to the level of concerted action to its almost wholesale dismissal of employer social media policies. Section III also analyzes one of the few employer policies on social media that the NLRB found to be fully compliant.

Section IV explores the inherent challenges in applying traditional Section 7 jurisprudence to the unbounded interchanges that characterize social media. It discusses the way that social media is used and describes some of the nascent "conventions" that differentiate cyber communications from the break-room conversations of an earlier era.

Section IV also discusses the inconsistencies created by the

39. 29 U.S.C. § 157 (2013).

40. *Id.* § 158.

41. See *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646, 649 (2004).

NLRB's separate treatment of *disciplining* employees for the use of social media and *formulating policies* related to social media. While the *Memoranda* suggest that employers may discipline employees for postings that do not rise to the level of concerted action, the NLRB's inclination to discern a chilling effect in employer's social media policies may make it exceedingly difficult to construct a policy that gives meaningful notice of such disciplinary action. In effect, what the NLRB's discussion of concerted action has given to employers, its approach to employer social media policies has taken away.

The Article concludes that in balancing the rights of employers and employees, the NLRB has placed its thumb firmly on the employees' side of the scale. By endorsing only the most limited restrictions on employee use of social media, the NLRB may be far more effective than state employment laws in shielding employees from discipline for their off-duty postings. Until such time as the NLRB further refines its policies, employers must tread warily and employees will enjoy the protection of a powerful "friend" in their ongoing battle to insulate their social media exchanges from employer control.

II. THE PRE-CYBER CONTEXT OF THE LAW

The NLRA⁴² constitutes the infrastructure governing labor relations in the United States. Section 7 of the Act establishes and protects the right of employees to form private sector labor unions and guarantees the right to collective bargaining.⁴³ Section 8 proscribes a range of employer conduct that could interfere with the rights provided under Section 7.⁴⁴

Section 8 of the Act has been interpreted to prohibit employer policies whose *in terrorem* effect would discourage employee engagement in concerted activities.⁴⁵ The courts have consistently found that an employer policy that could reasonably be construed to discourage employee exercise of rights granted under the Act is an unfair labor practice⁴⁶—even if the employer rule is unwritten⁴⁷ or it was not

42. 29 U.S.C. §§ 151-169 (2013).

43. *Id.* § 157.

44. *Id.* § 158(a).

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

46. See *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1290 (6th Cir. 1998) (noting that employers may not enforce a rule that has the effect of discouraging employees from exercising protected rights); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000) (holding that a rule with the effect of prohibiting employee communications on a key term of employment violated the Act).

enforced.⁴⁸

The dual protections of Sections 7 and 8 of the Act underscore one of the Act's principle policy objectives: creating an environment where workers can exchange information, free from both the threat and reality of employer retaliation.⁴⁹ As one scholar noted, "[a]t its core, the NLRA is about communication and expression, which then give impetus for other action to improve the workers' lot."⁵⁰ It is the Act's implicit protection for communications that provides the basis for the social media cases.

A. "Concerted Activities" and "Mutual Aid"

Section 7 of the Act provides employees with the right "[t]o engage in concerted activities for the purpose of . . . mutual aid or protection."⁵¹ Neither the term "concerted activities," nor the phrase "mutual aid or protection" is defined in the Act. In 1978, the Supreme Court provided some guidance for determining the existence of "mutual aid or protection" in the case of *Eastex, Inc. v. NLRB*.⁵² *Eastex* arose when an employer attempted to stop distribution of materials critical of a presidential veto to increase the minimum wage.⁵³ Although holding that the protections of the Act attached even when employee action was not directed toward a specific employer,⁵⁴ the Court recognized the limits of such protection. The Court observed that "some concerted activity bears a less immediate relationship to employees' interests as *employees* than other such activity . . . [A]t some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause."⁵⁵

Rather than developing a distinct jurisprudence based on "mutual aid and protection,"⁵⁶ most decisions focus on the nature of concerted

47. *Main St. Terrace Care Ctr.*, 218 F.3d at 538 (noting that the fact that the rule was unwritten did not prohibit a finding of employer liability).

48. *Id.* at 539 (noting that lack of enforcement of a rule is not a defense to employer liability).

49. 29 U.S.C. § 151 (2013).

50. Corbett, *supra* note 29, at 287. *But see* Charles J. Morris, *NLRB Protection in the Non-Union Workplace: A Glimpse of a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1683 (1989) (arguing that the purpose of the Act is to promote equality and cooperation).

51. 29 U.S.C. § 157 (2013).

52. 437 U.S. 556, 564-66 (1978).

53. *Id.* at 559-61.

54. *Id.* at 564.

55. *Id.* at 567-68 (emphasis added).

56. Estlund, *supra* note 30, at 927 (observing that while "the 'mutual aid or protection' clause extends the legal protection of the Act beyond the concerted activities of Section 7, it is "not by

activities as a basis for triggering the protection of the Act.⁵⁷ Once "concertedness" has been established, the issue of whether such action has the object of "mutual aid or protection" recedes.⁵⁸

The determination of concerted activities in a pre-cyber landscape was characterized by varying degrees of emphasis on the nature of the activities;⁵⁹ the extent of worker participation;⁶⁰ and whether the objective of the activities benefitted the group or only an individual employee.⁶¹ Given such disparate elements embedded in diverse factual scenarios, it is not surprising that jurisprudence of concerted activities was characterized by splits in the circuit courts⁶² and recalibrations by the Board.⁶³ Despite this, in a series of cases decided between 1962 and 1997,⁶⁴ a framework for determining the existence of concerted action began to emerge.

The definition of concerted activities was a key issue in the 1962 Supreme Court case of *NLRB v. Washington Aluminum*.⁶⁵ *Washington Aluminum* involved a walk-off by workers who had repeatedly

much").

57. See *id.* at 927-30.

58. But see *Five Star Transp. Inc.*, 349 N.L.R.B. 42, 44 (2007) (holding that school bus drivers engaged in a letter writing campaign that expressed general safety concerns but did not refer to the safety of drivers, were engaged in concerted activities but were not engaged in activity for "mutual aid and protection.").

59. See, e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15 (1962) (holding that a work stoppage by seven employees constituted concerted activities, even in the absence of a specific demand on the employer).

60. See, e.g., *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999, 1000 (1975) (holding that where an employee acted with regard to an issue that affected all employees, the employee could be presumed to be acting on behalf of co-workers).

61. See, e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984) (holding that an individual enforcing a right under a collective bargaining agreement benefitted all employees, even though there had been no prior discussion among the employees).

62. Compare *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 843-44 (2d Cir. 1980), and *Aro, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979) (generally requiring interaction between two employees as a predicate to a finding of concerted action), with *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (recognizing circumstances in which the action of a single employee could be deemed concerted action). See also B. Glenn George, *Divided We Stand: Concerted Activity and the Maturing of the NLRA*, 62 GEO. WASH. L. REV. 509, 518 n. 58 (1988) (identifying disagreement among the circuit courts concerning the "Interboro Doctrine" that held that an individual's assertion of a collective bargaining right was concerted activity); Morris, *supra* note 50, at 1686 (observing that many judicial and administrative decisions interpreting concerted activities "lack consistency.").

63. See, e.g., *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 496 (1984) (repudiating the Board's earlier decision in *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999 (1975), insofar as *Alleluia Cushion* presumed "concertedness" when the subject matter was deemed to be of interest to all employees).

64. See *supra* notes 59-63 and accompanying text.

65. 370 U.S. 9, 14 (1962).

complained to their employer that the machine shop where they worked was too cold.⁶⁶ The workers were not unionized,⁶⁷ and there was no indication that their action was part of an organizing effort.⁶⁸ Moreover, although they had complained to their employer about the temperature in the plant, the employees had neither threatened a walk out nor made a specific demand to their employer—factors relied on by the circuit court in denying enforcement of the Board order of reinstatement.⁶⁹ The Court reversed, noting that “[t]he language of Section 7 is broad enough to protect concerted activities whether they take place before, after or at the same time such a demand is made.”⁷⁰

Whatever the implications of its broad language, *Washington Aluminum* involved a “traditional” employee action—a work stoppage.⁷¹ It provided little guidance in situations “upstream” of a walkout. Two years after *Washington Aluminum*, the Third Circuit confronted the question of whether conversations unaccompanied by a walkout could constitute “concerted activities” within the purview of the Act.⁷² *Mushroom Transportation Co. v. NLRB*⁷³ involved an appeal from a decision of the Board ordering reinstatement and back pay to an employee whom the Board found had been terminated for engaging in concerted activities protected by Section 7.⁷⁴ The Court accepted the Board’s finding that the terminated employee functioned as an informal adviser, telling employees that “they were not getting what they were entitled to” under the union contract,⁷⁵ and discussing other topics such as wages, holiday pay and scheduling.⁷⁶ Nonetheless, the Court refused to enforce the Board’s order of reinstatement.⁷⁷ While acknowledging the principle that conversations, *unaccompanied by action*, could be protected as concerted activities,⁷⁸ the Court injected a qualitative

66. *Id.* at 10.

67. *Id.* at 14.

68. *See id.* at 15.

69. *NLRB v. Wash. Aluminum Co.*, 291 F.2d 869, 877-78 (4th Cir. 1961) (holding that the walkout was not concerted action because, inter alia, the employees had left without affording the company an opportunity to avoid the walkout), *rev’d*, 370 U.S. 9 (1962).

70. *Wash. Aluminum Co.*, 370 U.S. at 14 (stating that the activity was a way for “workers to act together to better their working conditions.”).

71. 291 F.2d at 877.

72. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

73. *Id.* at 683.

74. *Id.* at 685.

75. *Id.* at 684.

76. *Id.* (adopting the Board’s finding that the claimant’s activities were “directly related to the employees’ legitimate interests in the terms and conditions of employment”).

77. *Id.* at 686.

78. *Id.* at 685 (noting “[i]t is not questioned that a conversation may constitute a concerted

analysis of the conversation as a predicate to finding concerted activity.⁷⁹ The Court held that

Activity which consists of mere talk must, in order to be protected, be talk *looking toward group action*. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere "griping."⁸⁰

To hold otherwise, the court reasoned, would extend legal protection to virtually every conversation among co-workers that relates to topics of interest to employees.⁸¹

Even as the *Mushroom Transportation* decision injected a requirement that the Board evaluate the nature of employee conversations, the Board was confronted with the question of when an action could be deemed "concerted" even in the absence of any conversations at all. *Alleluia Cushion Co., Inc.*⁸² involved the discharge of an employee who had complained to Occupational Safety Health Administration (OSHA) about safety violations by the employer.⁸³ The workforce was unorganized and there was nothing in the record to suggest that the claimant sought to induce other employees to support his safety complaints.⁸⁴ Nonetheless, the Board held that the action of the single employee was concerted, even in "the absence of any outward manifestation of support" by fellow workers.⁸⁵ The Board reasoned that when an employee asserted a statutory provision designed to benefit all workers, absent a clear repudiation of his representation, the consent of fellow workers could be presumed.⁸⁶ By interpreting the Act as protecting "constructive" concerted activities⁸⁷—at least insofar as statutory rights were concerned—*Alleluia Cushion* shifted the focus

activity although it involves only a speaker and a listener").

79. *Id.*

80. *Id.* (emphasis added).

81. *Id.* (holding that to qualify for protection "at the very least" requires a showing that the purpose of the conversation was to induce or initiate group action).

82. *Alleluia Cushion Co., Inc.* 221 N.L.R.B. 999 (1975).

83. *Id.* at 999.

84. *Id.* at 1000.

85. *Id.*

86. *Id.* (noting that it would be "incongruous" with public policy to assume that fellow employees did not condone claimant's action in reporting safety violations).

87. Terry A. Bethel, *Constructive Concerted Activity Under the NLRA: Conflicting Signals from the Court and the Board*, 59 IND. L.J. 583, 584 (1984).

from the collaborative aspect of the “concerted activities” to the subject matter of the activity.⁸⁸ *Alleluia Cushion* effectively created a “per se” standard of concerted activities: if the activities undertaken by a single employee, acting in isolation and without collaboration, were in furtherance of a goal that *should be* a group concern, “concertedness” could be presumed.⁸⁹

Despite its far-reaching implications—or perhaps because of them—the courts did not embrace the *Alleluia Cushion* approach. Circuit courts that considered the issue disavowed the notion of a constructive concerted activities standard.⁹⁰ By 1984, the Board itself had discarded the most expansive aspects of *Alleluia Cushion*.⁹¹ Yet, even as the Board was backing away from *Alleluia Cushion*, a closely divided Supreme Court revived the spirit of *Alleluia Cushion* when it found in *NLRB v. City Disposal Systems, Inc.*⁹² that an employee, acting alone, was engaged in concerted activities when claiming a right under a collective bargaining agreement.⁹³

NLRB v. City Disposal Systems, Inc. involved a claim by a unionized worker that he had been engaged in concerted activity when he refused to operate a truck because of safety concerns.⁹⁴ There was nothing in the record to indicate that the employee had ever discussed his concerns with fellow employees or approached his union representative with his concerns.⁹⁵

The Board found for the claimant holding that the assertion of a right under a collective bargaining agreement is protected under Section 7 of the Act.⁹⁶ In vacating the Board’s order of reinstatement, the Circuit Court of Appeals held that, notwithstanding the assertion of

88. *See id.* at 586.

89. *Meyers I*, 268 N.L.R.B. 493, 495 (1994).

90. *See e.g.*, *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) (holding that “[n]ot only must the ultimate objective be “mutual” but the activity must be “concerted” . . .”); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980) (reasoning that *Alleluia Cushion* was limited to situations where the right asserted was a part of a collective bargaining agreement); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079, 1083-84 (8th Cir. 1977) (rejecting the concept of constructive concerted activities as having “questionable” statutory basis).

91. *Meyers I*, 268 N.L.R.B. at 496 (declining to adopt the view that conversations related to topics of interest to employees, without more, qualify for protection under the Act).

92. 465 U.S. 822 (1984).

93. *See id.* at 831-32.

94. *See id.* at 825.

95. *See id.* at 846 (O’Connor, J., dissenting) (noting that the claimant had not alerted other workers or union representatives about his safety concerns).

96. *City Disposal Sys., Inc.*, 256 N.L.R.B. 451, 454 (1981) (holding that an employee who asserts a right under a collective bargaining agreement may still be engaged in concerted activity, even if acting alone).

rights provided under a collective bargaining agreement, the employee was not engaged in concerted activities because he had not sought to induce group action.⁹⁷

On appeal, the Supreme Court reversed, noting

[W]hen an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employee He [the claimant] was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though [the claimant] was reassembling his fellow union members A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.⁹⁸

In dissent, Justice O'Connor deftly identified the distinction between concerted actions and other actions that might merit protection.⁹⁹ She noted, "The fact that the right asserted can be found in the collective-bargaining agreement may be relevant to whether activity of that type should be "protected," but not to whether it is "concerted.""¹⁰⁰ Such an approach risked stretching the language of Section 7 "past its snapping point" by extending legal protection to actions that are wholly personal to the employee.¹⁰¹

Even as *City Disposal Systems* appeared to marginalize the requirement of "concertedness"—at least in those instances where a collective bargaining agreement was in effect—the Board retreated from this approach. In decisions that straddle the Supreme Court's decision in *City Disposal Systems*,¹⁰² the Board refocused the inquiry on the "collaborative" aspect of concerted action rather than the subject matter.¹⁰³ *Meyers Industries* ("*Meyers I*") involved a situation that was

97. *City Disposal Sys., Inc. v. NLRB*, 683 F.2d 1005, 1007 (6th Cir. 1982) (noting that there was nothing to suggest that claimant was acting on behalf of anyone but himself), *rev'd*, 465 U.S. 822 (1984).

98. *City Disposal*, 465 U.S. at 832.

99. *Id.* at 845-46 (O'Connor, J. dissenting).

100. *Id.* at 846.

101. *Id.* at 847.

102. On January 6, 1984, the Board issued a decision in *Meyers I*. The Supreme Court decision in *City Disposal Systems, Inc.* was issued on March 21, 1984. The Board reconsidered its action in *Meyers I* and issued a second opinion, *Meyers Indus., Inc., (Meyers II)*, 281 N.L.R.B. 882 (1986), on September 30, 1986. *Meyers Indus., Inc.*, 268 N.L.R.B. 493 *aff'd* 281 N.L.R.B. 882 (1986).

103. *Meyers I*, 268 N.L.R.B. at 496-97 (noting that a Board finding that an activity *ought* to be

strikingly similar to the facts in *City Disposal Systems*. A truck driver alleged that he had been discharged in violation of Section 7 of the Act for refusing to drive a truck that he claimed was unsafe and after voicing his concerns to a state agency.¹⁰⁴

In holding for the employer, the Board reasoned that in order to be “concerted,” an activity must be undertaken “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”¹⁰⁵ In a firm repudiation of the per se approach of *Alleluia Cushion* and *City Disposal Systems*, the Board noted, “It will no longer be sufficient . . . to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby.”¹⁰⁶

The circuit court remanded, holding that the Board’s interpretation of Section 7 was too restrictive in light of the then recent decision in *City Disposal Systems*.¹⁰⁷ On remand, the Board distinguished *City Disposal Systems, Inc.* by noting the Court’s assertion that rights under a collective bargaining agreement were a “single, collective activity.”¹⁰⁸ Although admitting the possibility that the activity of a single employee could rise to the level of concerted action¹⁰⁹ the *Meyers II* Board nonetheless reaffirmed its previous holding.¹¹⁰ In rejecting the contention that invocation of statutory rights by a single employee created a presumption of concerted activities, the *Meyers II* Board returned to a pre-*Alleluia Cushion* posture that pinned concerted activities, not to the subject matter of the action, but on the existence of affirmative indications of interest from co-workers or a call for group action.¹¹¹

The concept of concerted action that was forged in the context of face-to-face communication was applied, with little fanfare, to internet communications. In *Timekeeping Systems, Inc.*, the Board held that employees’ email communications to co-workers commenting on a proposed vacation policy constituted protected concerted activities under

a concern of the group is not a substitute for concerted activity).

104. *Id.* at 497-98.

105. *Id.* at 497 (emphasis added).

106. *Id.*

107. *Prill v. NLRB*, 755 F.2d 941, 952-53 (D.C. Cir. 1985).

108. *Meyers II*, 281 NLRB at 885 (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831-32 (1984)).

109. *Meyers II*, 281 N.L.R.B. at 885 (“There is nothing in the *Meyers I* definition that states that conduct engaged in by a single employee at one point in time can *never* constitute concerted activity within the meaning of Section 7.”).

110. *See id.* at 889.

111. *See id.*; *see also Adelphi Inst. Inc.*, 287 N.L.R.B. 1073, 1074 (1988) (holding that “[s]ubject matter alone . . . is not enough to find concert.”).

Section 7.¹¹² In 2002, in *Konop v. Hawaiian Airlines*,¹¹³ the Ninth Circuit Court of Appeals found “no dispute” that the protection of the Railway Labor Act,¹¹⁴ an act analogous to the National Labor Relations Act,¹¹⁵ extended to an employee blog that posted comments critical of both the employer and the union.¹¹⁶

The cases shared two similarities to earlier decisions decided in the pre-cyber context: in each case, communications were limited to co-workers; “outsiders” were not part of the interchange. In *Timekeeping Systems*, comments critical of the company’s proposed vacation policy were sent exclusively to management and co-workers using the company’s email system.¹¹⁷ In *Konop*, employees communicated via a secure website that was not accessible to the public.¹¹⁸ Second, both cases involved core concerns of labor management negotiation: vacation policy¹¹⁹ and comments critical of both the union and management’s handling of collective bargaining negotiations.¹²⁰ Neither case suggested the commingling of personal and workplace concerns, disseminated to both co-worker “friends” and social “friends” that mark the hyperactive interactions of social media less than a decade later.

B. Chilling Policies

One of the fundamental tensions affecting interpretation and implementation of the Act is the need to balance the employees’ right to engage in concerted activities with the legitimate needs of employers to maintain discipline in the workplace.¹²¹ Employers routinely issue

112. 323 N.L.R.B. 244, 247-48 (1997).

113. 302 F.3d 868 (9th Cir. 2002).

114. 45 U.S.C. §§ 151-188 (2012).

115. *Konop*, 302 F.3d at 883, n.10 (noting that courts look to the National Labor Relations Act for guidance in interpreting the Railway Labor Act); see also Marc Cote, *Getting Dooched: Employee Blogs and Employer Blogging Policies Under the National Labor Relations Act*, 82 WASH. L. REV. 121, 136 (2007) (noting that the analysis under the National Labor Relations Act is frequently applied to the Railway Labor Act).

116. *Konop*, 302 F.3d at 882 (noting that the claimant’s posting of statements critical of management and suggesting alternative union representation was clearly protected activity).

117. 323 N.L.R.B. at 246.

118. 302 F.3d. at 872-73.

119. *Time Keeping Sys.*, 323 N.L.R.B. at 245-46 (indicating that the communications began when management asked for comments on proposed changes to the vacation policy).

120. *Konop*, 302 F.3d at 872-73 (describing postings critical of concessions made during collective bargaining).

121. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (noting that employers have an “undisputed” but not “unlimited” right to discipline in the workplace).

policy statements in an effort to minimize risk,¹²² preserve legal rights¹²³ and justify discipline.¹²⁴ Employers, however, do not enjoy unfettered discretion when crafting policies. Section 8 of the Act treats any policy that could reasonably discourage employees from exercising their Section 7 rights as an unfair labor practice.¹²⁵ As the Board observed in *Lafayette Park Hotel, Inc.*:¹²⁶ “Where the [employer work rules] are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, *even absent evidence of enforcement* [of such policy].”¹²⁷

The Board set out the criteria used to determine whether a policy is overbroad in *Martin Luther Memorial Home, Inc.*, (“*Lutheran Heritage*”).¹²⁸ Any rule that explicitly prohibits engagement in activities protected by Section 7 is itself an unfair labor practice.¹²⁹ However, even absent a specific restriction on protected activity, a policy is overbroad upon a showing of any of the following: “[that] (1) employees could reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule had been applied to restrict the exercise of Section 7 rights.”¹³⁰ Noticeably absent from such criteria is any consideration of employer purpose or justification in promulgating a policy. Whether a policy is chilling depends, not on what the employer may have intended to convey, but on whether employees might reasonably construe the policy as discouraging protected activity.¹³¹

122. See e.g., Marisa Warren & Arnie Pedowitz, *Social Media, Trade Secrets, Duties of Loyalty, Restrictive Covenants And Yes, the Sky is Falling*, 29 HOFSTRA LAB. & EMP. L.J. 99, 112-13 (2001) (recommending explicit reference to social media in employer confidentiality and non-competition agreements).

123. See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010) (noting that “employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.”); see also Christopher S. Miller & Brian D. Poe, *Employment Law Implications in the Control and Monitoring of E-Mail Systems*, 6 U. MIAMI BUS. L. REV. 95, 104 (1995) (noting that the ordinary course of business exception to the Electronic Communications Privacy Act is most likely to be available to employers who effectively communicate their monitoring policies to employees).

124. See David J. Walsh & Joshua L. Schwartz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement and Rationales*, 33 AM. BUS. L.J. 645, 676-77 (1996) (arguing that though states laws do not impose a “just cause” requirement for termination, judges may be sympathetic to employees who have been terminated under “questionable circumstances”).

125. 29 U.S.C. § 158(a)(1) (2013).

126. *Lafayette Park Hotel, Inc.*, 326 N.L.R.B. 824 (1998).

127. *Id.* at 825 (emphasis added).

128. *Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. 646 (2004).

129. *Id.* at 646 (citing *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825).

130. *Martin Luther*, 343 N.L.R.B. at 647.

131. See *id.* at 647-48.

Employers seeking to defend arguably well-intentioned policies have not fared well.¹³² Moreover, the existence of an overbroad employer policy may have the legal effect of prohibiting an employer from disciplining an employee, even when the employee is *not* engaged in concerted activities. In *Double Eagle Hotel & Casino*¹³³ a majority of the Board announced what has come to be called, the "*Double Eagle Rule*": "where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful *regardless of whether the conduct could have been prohibited by a lawful rule.*"¹³⁴ In effect, under the *Double Eagle Rule*, the existence of an overbroad rule "taints" a disciplinary action by an employer—even if the activities triggering a disciplinary action are outside the scope of Section 7 protection.¹³⁵

In 2011, the Board set limits on the *Double Eagle Rule* in its decision in *Continental Group, Inc.*¹³⁶ *Continental Group* involved a disciplinary action¹³⁷ against an employee for, among other things, sleeping on the job and living out of his car which was parked on company property.¹³⁸ Such actions were in violation of a company

132. See e.g., *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007) (rejecting the employer's argument that policy prohibiting disclosure of "any information" related to employees was not intended literally); *Directtv U.S. Holdings, LLC*, 359 N.L.R.B. No. 54, 2013 WL 314390 at *3, *6 (Jan. 25, 2013) (holding that instruction to employees to "[n]ever discuss details about your job, company business or work projects with anyone outside the company" was overbroad); *Flex Frac Logistics, LLC*, 358 N.L.R.B. No. 127, 2012 WL 3993589, at *1 (Sept. 11, 2012) (holding that policy prohibiting revealing information related to "personnel information and documents" was overbroad); *Lockheed Martin Astronautics*, 330 N.L.R.B. 422, 422-23 (2000) (rejecting the employer's argument that directives to employees not to discuss pending investigation was justified by ADA and anti-discrimination laws); *Flamingo Hilton-Laughlin*, 330 N.L.R.B. 287, 288 n.3 (1999) (holding that prohibition on revealing confidential information about fellow employees is overly broad); *Great Lakes Steel*, 236 N.L.R.B. 1033, 1037 (1978) (finding that a policy which prohibited the distribution of literature which is "libelous, defamatory, scurrilous, abusive or insulting" violated Section 8 of the Act). But see *Adtranz ABB Daimler-Benz Transp. N.A., Inc. v. NLRB*, 253 F.3d 19, 22 (D.C. Cir. 2001) (finding "utterly without merit" a Board finding that a policy prohibiting threatening language constituted an unfair labor practice); *Fiesta Hotel Corp.*, 344 N.L.R.B. 1363, 1367 (2005) (finding that a rule prohibiting conduct that is "offensive, threatening, intimidating, coercing or interfering" with fellow employees could not be construed to chill Section 7 rights).

133. *Double Eagle Hotel & Casino*, 341 N.L.R.B. 112 (2004), *enforced with modifications* 414 F.3d 1249 (10th Cir. 2005).

134. 341 N.L.R.B. at 112, n.3 (emphasis added).

135. See *id.* at 115.

136. *Cont'l Grp., Inc.*, 357 N.L.R.B. No. 39 (2011).

137. The employee was given two written warnings for violation of company policy. The employee was told that he could not continue to work at his current location and offered a different position at other properties owned by the employer. In response, the employee chose to resign. See *id.* at *2-3.

138. See *id.* at *2.

policy that prohibited employees from off-duty loitering at the facility.¹³⁹ Although the Board affirmed the determination that the employer's "no access" policy was overbroad,¹⁴⁰ it reversed the decision of the administrative law judge that the employer's action in disciplining the employee pursuant to the overbroad policy constituted an unfair labor practice.¹⁴¹

In reaching its decision, the Board considered the impact of the *Double Eagle* Rule on three categories of employee conduct. At the extreme was discipline for activities that were clearly within the protection of Section 7.¹⁴² The chilling effect of disciplining employees for such conduct was potentially significant and disciplinary action in such cases was clearly unlawful.¹⁴³ The Board distinguished such situations from disciplinary actions for behavior, such as sleeping on the job, which was wholly outside the purview of Section 7 protection.¹⁴⁴ Even if such discipline was meted out pursuant to an overbroad rule, the risk of deterring employees from engaging in concerted activities was small.¹⁴⁵

The Board then sketched out a third category of cases involving discipline pursuant to an overbroad rule for conduct that "touches the concerns animating Section 7 . . . but is not protected by the Act because it is not concerted."¹⁴⁶ The Board reasoned that discipline in such cases created a significant risk of chilling employee activities—the very situation that the *Double Eagle* Rule was intended to remedy.¹⁴⁷

At first glance, *Continental Group's* mitigation of the *Double Eagle* Rule would seem to offer employers some relief from the strictures resulting from an overbroad policy; such relief, however, might prove hollow. Whatever its flaws, the *Double Eagle* Rule had the virtue of consistency; the maintenance of an overbroad policy effectively

139. *See id.*

140. *See id.* at *1.

141. *See id.* at *2.

142. *See id.* at *5 (noting that disciplining an employee for engaging in Section 7 activities clearly fits within the justification for the *Double Eagle* Rule).

143. *See id.* at *4 (reasoning that if the existence of an overbroad rule has a chilling effect, the chilling effect would be even greater if an employee is disciplined pursuant to such a rule).

144. *See id.* at *5 (reasoning that applying the *Double Eagle* Rule in such situation would "expand the rule beyond its appropriate boundaries.").

145. *See id.* at *4 (acknowledging that while "an overbroad rule might produce *some* chilling effect . . . the chilling effect is much less significant than it would be if the employee's conduct were not wholly unprotected.").

146. *Id.* at *5.

147. *See id.* at *5, *5 n.11 (reasoning that employees might not recognize the distinction between concerted activity and other activity relating to topics protected by Section 7).

insulated employees from disciplinary action—whether or not the conduct rose to the level of concerted activities. In distinguishing between three categories of conduct—concerted action, unprotected conduct, and conduct which, although not concerted “touches” the concerns of Section 7—*Continental Group* may have left both employers and employees confused. Creating a class of “protected non-concerted” activities blurs the already fluid distinctions between personal griping, venting, complaining, and the incipient stages of concerted action. Moreover, the *Continental Group* Board made no effort to define when activities were within the penumbra of Section 7 protection.¹⁴⁸ It is, however, against these standards that employer social media policies will be judged.

III. APPLYING THE OLD RULES TO A NEW GAME

The cases highlighted in the *Memoranda* are a relatively small sampling of recent decisions dealing with social media.¹⁴⁹ It is not far-fetched to assume that the cases were selected for inclusion in order to make a point. The *Memoranda* provide a glimpse of the overarching principles that shape the NLRB’s approach to social media. They are also an invitation to “connect the dots” between the decisions discussed in the *Memoranda* and the “bricks and mortar” jurisprudence of the past decades. The announced purpose of the *Memoranda*—to provide guidance on “emerging issues”¹⁵⁰—suggest that the *Memoranda* are only the first installment in the NLRB’s development of an analytical framework focused on the networked workplace of the twenty-first century.

A. Concerted Action or “Acting Out”

Although not free of ambiguity, after fifty years of Board and judicial decisions, the contours of a working definition of “concerted activities” in a bricks and mortar workplace were clearly visible.¹⁵¹

148. Although *Continental Group, Inc.* did not define the otherwise unprotected activities qualifying for protection under the *Double Eagle* Rule, it did cite a decision finding that an employer had violated the Act by discharging an employee for violating the employer policy prohibiting disclosure of the terms of employment by complaining to a customer about his wages—even though the complaints involved an “individual compensation issue.” *Id.* at *5 n.10 (citing NLS Grp., 352 N.L.R.B. 744 (2008)).

149. See *supra* notes 18-21 and accompanying text.

150. Jan. 2012 REPORT, *supra* note 14, at 1.

151. See discussion *supra* Part II.A.

Cases could be generally divided into two categories: actions where the rights being asserted were an outgrowth of prior collective action,¹⁵² and “classic” situations in which there was clear communication among co-workers that suggest the possibility of group action.¹⁵³

While the benchmarks of concerted activities in an environment characterized by face-to-face interactions do not fit perfectly with a wired workforce, they do provide a useful context for analyzing the decisions highlighted in the *Memoranda*. A close examination of the *Memoranda* suggests that just as in the pre-cyber cases, the NLRB is most likely to find concerted action when social media interaction is a continuation of face-to-face protected activities.¹⁵⁴ In those instances where interaction is initiated or takes place primarily via social media, the extent and quality of co-worker responses plays a significant role in deciding whether the interactions rise to the level of concerted action.¹⁵⁵

1. Cyber-communications as a Continuation of Protected Activity

A few of the cases highlighted in the *Memoranda* involved conversations or interactions that were continuations of face-to-face encounters among employees or with management.¹⁵⁶ *American Medical Response of Connecticut, Inc.*, heralded as expanding protection for social media postings,¹⁵⁷ was consistent with prior decisions on concerted action. The employee’s Facebook posts about her supervisor were precipitated by his denial of her request for union representation.¹⁵⁸ It is settled law that employees facing an investigatory interview with the potential for disciplinary action have a right to union representation.¹⁵⁹ In reality, the employee’s Facebook posts were merely

152. See, e.g., *NLRB v. City Disposal Sys., Inc.*, 456 U.S. 822, 832 (1984) (involving assertion of rights under a collective bargaining agreement); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 872 (9th Cir. 2002) (involving actions relating to an ongoing labor dispute).

153. See e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 10 (1962) (involving an employee work stoppage).

154. See Oct. 2010 REPORT, *supra* note 3, at 4-5.

155. See BARRY J. KEARNEY, NLRB OFFICE OF GEN. COUNSEL, NO. 13-CA-46689, ADVICE MEMORANDUM ON JT’S PORCH SALOON & EATERY, LTD. 3 (July 11, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055b9c6> [hereinafter JT’S PORCH SALOON MEM.].

156. See Oct. 2010 REPORT, *supra* note 3.

157. See *Standora*, *supra* note 12 and accompany text.

158. *Am. Med. Response of Conn.*, 365 N.L.R.B. No. 155, 4 (2011).

159. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (holding that even if such right is not explicitly contained in an agreement, employees have a “right to representation at an investigatory interview when the employee reasonably believes may result in disciplinary action against him.”).

a continuation of an interchange that had begun earlier in a face-to-face discussion with the employer.¹⁶⁰ In addition, the Charging Employee received supportive comments from other co-workers.¹⁶¹ Although the case ultimately settled, by almost any measure, this was "classic" concerted action.

In another case, employees of a sports bar discovered that they owed taxes for the 2010 tax year because of the employer's tax withholding practices.¹⁶² One employee approached the employer and requested that the matter be addressed at an upcoming meeting.¹⁶³ Shortly after the request, a former employee made a Facebook post in which she complained about owing additional taxes and made comments critical of her former employer.¹⁶⁴ Both customers and current employees posted responses.¹⁶⁵ Two of the employees were terminated based on their Facebook postings.¹⁶⁶ Although acknowledging that the Facebook conversations related to the employees' concerns, the *Memoranda* noted that "prior to the Facebook conversation, this shared concern had been brought to the Employer's attention by at least one employee. . . ."¹⁶⁷

The absence of responsive posts from co-workers was not an impediment to a finding of concerted action in a case involving an automobile dealership.¹⁶⁸ The Charging Party was terminated after posting criticisms about a promotional event being held by the employer to kick-off a new car model.¹⁶⁹ After a meeting in which management gave a description of the kick-off event, the employees voiced their concerns that the event would send the "wrong message" to potential customers and negatively affect their commissions.¹⁷⁰

160. Aug. 2011 REPORT, *supra* note 14, at 5 (noting that the claimant had had an in-person disagreement with her supervisor concerning her request for union representation).

161. *See id.* at 6 (noting that co-worker posts were part of an "online employee discussion of supervisory action, which is protected activity.").

162. *See id.* at 9.

163. *See id.*

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

165. *See id.* at 10 (noting that one employee responded by clicking "like," another posted a derogatory comment about the employer's owner and a third suggested that the issue be raised at a meeting with management).

166. *See id.* (noting that in one instance the employee was told that her posting suggested that she was not "loyal enough" while another employee was threatened with legal action if she failed to retract allegedly defamatory posts about the employer).

167. *See id.*

168. Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, (Sept. 28, 2012), at *10, *available at* <http://www.nlrb.gov/search/simple/all/13-CA-46452>.

169. Aug. 2011 REPORT, *supra* note 14, at 7.

170. *Id.* at 7.

The Charging Party later took pictures at the promotional event and posted them on Facebook, noting how the employer had gone “all out” by serving overcooked hot dogs, stale buns and small bags of chips.¹⁷¹ A review of the Administrative Law Judge’s decision suggests that, although fellow employees had access to the posts, no co-workers responded.¹⁷² Instead of highlighting these facts, the *August, 2011 Memorandum* highlighted the connection between the earlier interchanges both among the employees and with the employer, noting that the Facebook posts were a “direct outgrowth of the earlier discussion among the salespeople.”¹⁷³

2. The Extent of Co-Worker Response: The Bandwagon Effect

The *Memoranda* imply that in those instances where the social media postings did not *begin* a conversation, but rather *continued* a face-to-face interchange, the NLRB will be less concerned with the extent or quality of employee responses.¹⁷⁴ Where face-to-face communications are limited or absent, however, the number of co-worker “friends” responding to a post, and the content of their messages, appear to affect the determination of whether the action is concerted.¹⁷⁵

This rationale was the basis for a finding that employees of a non-profit social services provider had engaged in concerted activities.¹⁷⁶ The Charging Party had received multiple text messages from a client advocate criticizing her performance.¹⁷⁷ The employee approached a co-worker to discuss the criticism; the co-worker suggested that the employee meet with management in an effort to resolve the dispute.¹⁷⁸ In an effort to prepare for the meeting, the Charging Party conducted a Facebook “survey” of co-workers to solicit their views and discuss the criticisms.¹⁷⁹ Multiple co-workers responded with substantive comments relating to staffing and work issues.¹⁸⁰ Although the

171. *Id.*

172. *Karl Knauz Motors*, 358 N.L.R.B. at *7 n.3, 10 (noting that the claimant had fifteen or sixteen Facebook friends who were coworkers but that responses were posted by “relatives and friends” of the claimant).

173. *See Aug. 2011 REPORT*, *supra* note 14, at 8.

174. *See supra* notes 154-73 and accompanying text.

175. *See infra* notes 199-220 and accompanying text.

176. *See Aug. 2011 REPORT*, *supra* note 14, at 3.

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

Facebook posts arguably grew out of a face-to-face discussion between employees, the *August, 2011 Memorandum* characterized the Facebook interchanges "a textbook example of concerted activity."¹⁸¹

In a case involving a collection agency, an employee complained to her supervisor about a transfer to a position that had reduced her opportunity for bonuses.¹⁸² Upon returning to her home, the Charging Party recounted the incident on her Facebook page, and made disparaging comments about her employer.¹⁸³ The Charging Party was Facebook friends with approximately ten co-workers.¹⁸⁴ Unlike other cases, there was no group discussion or request for a meeting prior to the post by the claimant.¹⁸⁵ The Facebook post initiated a virtual conversation among multiple coworkers.¹⁸⁶ In finding that the Charging Party was engaged in concerted activities, the *Memorandum* highlighted the existence of Facebook posts from co-worker friends.¹⁸⁷

The termination of an employee for posting statements critical of a supervisor at a popcorn factory was also found to violate section 7 when co-worker "friends" responded to the posts.¹⁸⁸ Employees had initially engaged in face-to-face discussions both among themselves and with their employer with regard to scheduling and other terms of employment.¹⁸⁹ The conversation migrated to Facebook where one employee commented on the "drama" at the plant,¹⁹⁰ another referred to an employee who had been disciplined for being a "smart ass"¹⁹¹ and complained about the need to work on Saturday.¹⁹² A third employee noted that she hated her job and criticized the Operations Manager.¹⁹³ While suggesting that the claimant's activity would have been protected as a continuation of face-to-face group discussions,¹⁹⁴ the *January, 2012*

181. *Id.* at 4.

182. *See* Jan. 2012 REPORT, *supra* note 14, at 3.

183. *Id.*

184. *Id.* at 4.

185. *See id.* at 4 (noting that the contact between the Charging Party and coworkers occurred when the Charging Party updated her Facebook status).

186. *Id.* at 4-5 (noting that co-workers complained about the employer "get[ting] rid of higher paid, smarter people" with one employee suggesting a "class action lawsuit").

187. *Id.* at 5 (stating that the claimant's "initial Facebook statement, and the discussion it generated . . . clearly fell within the Board's definition of concerted activity").

188. *See id.* at 22-23.

189. *See id.* at 22.

190. *Id.*

191. *Id.*

192. *Id.* at 22-23.

193. *See id.* at 23.

194. *See id.* (stating that the Charging Party's conduct was part of "earlier group action that included complaints to management").

Memorandum also indicated that the posts themselves qualified as concerted action.¹⁹⁵

A similar rationale was evident in a case involving a veterinary hospital in which three employees responded to the Facebook post of the Charging Party criticizing the promotion of a supervisor and complaining about company mismanagement.¹⁹⁶ One employee commented that it would be “pretty funny if all of the good employees actually quit.”¹⁹⁷ The January 2012 *Memorandum* highlighted the Facebook posts as the basis for the finding of concerted action, stating

[T]he employees were engaged in protected concerted activity when they posted comments on Facebook discussing their shared concerns about terms and conditions of employment. These discussions constituted “concerted activity for mutual aid and protection . . . because multiple employees were involved in the discussion, and the discussion involved a term or condition of employment.”¹⁹⁸

Unless postings can be construed as a continuation of prior protected activities, a dearth of responsive postings from co-workers is likely to result in a finding that there is no concerted action.¹⁹⁹ In *JT’s Porch Saloon and Eatery, Ltd.*,²⁰⁰ a bartender made a Facebook post critical of his working conditions.²⁰¹ Although the topic of the conversation – wages – is clearly a term of employment, and despite evidence of a conversation about the tipping policy with a fellow bartender a few months earlier,²⁰² the *August, 2011 Memorandum* found that the claimant had not engaged in concerted activities, noting that the claimant “did not discuss the posting with his coworkers, and none of them responded to the posting.”²⁰³

A respiratory therapist’s Facebook postings critical of a co-worker for “sucking his teeth”, was held not to constitute concerted activities.²⁰⁴ While such an outcome is not surprising, unfortunately the Act does not

195. See *id.* (noting that the posts were part of a discussion of employees’ “shared concerns about terms and conditions of employment”).

196. See *id.* at 20-21.

197. *Id.* at 21.

198. *Id.*

199. See *id.* at 21-22; JT’S PORCH SALOON MEM., *supra* note 155, at 3.

200. See JT’S PORCH SALOON MEM., *supra* note 155.

201. In his Facebook post, the bartender complained that he had not had a raise in five years and was doing waitress work without tips. Aug. 2011 REPORT, *supra* note 14, at 14.

202. See *id.* (describing a conversation about the employer’s tipping policy).

203. *Id.* at 14-15.

204. See Jan. 2012 REPORT, *supra* note 14, at 30-31.

protect employees from annoying co-workers, but, two other aspects of the case are revealing. Although two of the Charging Party's Facebook friends responded to her postings with supportive statements, neither was a co-worker, a fact that is highlighted in the *January, 2012 Memorandum*.²⁰⁵ In addition, the Charging Party made an earlier post in which she claimed that she was not respected on the job.²⁰⁶ With regard to that post, the *Memorandum* concluded, "[e]ven if her comment concerned a protected subject, there was no evidence to establish concert. The Charging Party did not discuss her Facebook post with any of her fellow employees, and none of her coworkers responded."²⁰⁷ The number of co-workers responding to the posting was an important factor in determining the existence of concerted activities.²⁰⁸

A similar outcome occurred in another case involving a chain of home improvement stores.²⁰⁹ An employee, annoyed after a supervisor reprimand, updated her Facebook status with an expletive about her employer.²¹⁰ One employee-friend "liked" the comment.²¹¹ Later, the Charging Party posted a comment that the employer did not treat its employees fairly.²¹² None of the Charging Party's four co-worker friends responded.²¹³ In finding that the cyber interchanges did not rise to the level of concerted activities, the *January, 2012 Memorandum* alluded to the fact that only one co-worker responded to the post and the response only offered "sympathy."²¹⁴ A similar rationale was the basis for the outcome in two other cases cited in the *January, 2012 Memoranda* where no concerted action was found.²¹⁵

The *January, 2012 Memorandum* cited only one example where, despite numerous posts by co-worker "friends," the Board failed to extend Section 7 protection.²¹⁶ In that case, the claimant was discharged

205. See *id.* at 31- 32 (noting that the two "friends" who responded were not co-workers and concluding that claimant was merely complaining about a fellow employee).

206. See *id.* at 31 (referring to a sarcastic posting that the Charging Party claimed demonstrated frustration with a condescending comment made to her by a physician).

207. *Id.* at 32.

208. See *id.*

209. Jan. 2012 REPORT, *supra* note 14, at 6.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 7.

215. See, e.g., *id.* at 33 (noting that "[t]he Charging Party did not discuss his Facebook posts with any of his fellow employees, and none of his coworkers responded to his complaints about work related matters."); *id.* at 34 (stating that "[s]ix of the Charging Party's coworkers are his Facebook 'friends.' None of them responded . . .").

216. See *id.* at 11.

after a series of posts accusing a new employee of “screwing over” the customers by using non-premium alcohol.²¹⁷ Although responding with some support,²¹⁸ co-worker friends, fearing that the posts would be viewed by customers,²¹⁹ ultimately complained to management about the posts, in effect dispelling any notion that the claimant was acting on behalf of his fellow-workers.²²⁰

The *Memoranda* also suggest that in instances where co-workers have posted responses, such responses must be more than perfunctory.²²¹ In a case involving Wal-Mart,²²² an employee who had had a negative experience with his new supervisor, made posts disparaging management, and complaining about workplace “tyranny”²²³ and warning that “lots of employees are about to quit.”²²⁴ A number of co-workers responded to the posting.²²⁵ One posted, “bahaha like it ! :)”²²⁶ while another inquired what happened to get the employee so “wound up.”²²⁷ Other responses urged the employee to “hang in there.”²²⁸ Despite the posts by co-workers, the *August, 2011 Memorandum* characterized the responses as offering only “emotional support”²²⁹ or confirming that the co-workers found the posts “humorous”²³⁰ and not a call to group action.²³¹

When Facebook postings have not attracted multiple posts from co-worker “friends,” the Board has required other factors when finding concerted activities.²³² In one example, upset with what she perceived to be a sexist remark by a co-worker,²³³ the Charging Party, posted several

217. *See id.* at 9.

218. *Id.* at 9-10 (stating that although coworkers agreed with some of the comments made by the Charging Party about another coworker, some also warned her about her posts).

219. *Id.* at 10.

220. *Id.*

221. BARRY J. KEARNEY, NLRB OFFICE OF THE GEN. COUNSEL, CASE 17-CA-25030, ADVICE MEMORANDUM ON WAL-MART 3 (July 19, 2011), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e73d> [hereinafter Wal-Mart REPORT].

222. *Id.* at 1.

223. Aug. 2011 REPORT, *supra* note 14, at 17.

224. *Id.*

225. WAL-MART MEM., *supra* note 221, at 1.

226. *Id.*

227. *Id.* at 2.

228. *Id.*

229. Aug. 2011 REPORT, *supra* note 14, at 17-18.

230. *Id.* at 18.

231. *Id.* at 17.

232. *See* Jan. 2012 REPORT, *supra* note 14, at 20.

233. *See id.* at 18 (noting that following a snowstorm, a male-coworker had commented to the claimant and others that he knew that the females would not make it into work).

remarks critical of management.²³⁴ Only one co-worker, a female supervisor, who had been present when the comments were made, engaged in a Facebook conversation, although several non-employee friends offered expressions of support.²³⁵

A week later, the Charging Party also made subsequent posts about a separate incident involving the termination of a co-worker.²³⁶ Several non-employee friends commented on her posts and offered sympathy.²³⁷ In describing the decision for the claimant, the *January, 2012 Memoranda* focused on the claimant's prior history of acting as an informal advisor to her coworkers about working conditions.²³⁸

An overview of the decisions suggests that the existence of multiple responsive postings by coworkers may be sufficient to tip the balance toward a finding of concerted activities, even when the postings are not the continuation of earlier discussions among employees.²³⁹ However, the *Memoranda* also imply that the impact of responsive posts by co-worker friends may be discounted when the responses are tepid or only a courteous show of sympathy.²⁴⁰ While a widespread response may not guarantee a finding of concerted activities, the absence of co-worker posts or pro-forma responses of generalized support, may be sufficient to derail a finding of concerted activities.²⁴¹

B. Avoiding the Chill: Limitation by Example

The advent of personal electronic devices²⁴² combined with the burgeoning use of social media²⁴³ has created enormous legal and managerial challenges for employers. The existence of a wired workforce has created opportunities for bullying and harassment;

234. See *id.* (noting that the claimant "did not want to be told that she was less of a person because she was a female").

235. See *id.* at 18-19.

236. See *id.* at 19 (describing the posts as indicating that "employees were losing their jobs because they asked for help").

237. See *id.*

238. See *id.* at 20 (noting that employer discharged the claimant because her posts suggested that she intended to continue to act as an informal advisor to co-workers about working conditions).

239. See *supra* note 176-99 and accompanying text.

240. See *supra* notes 210-16, 221-31 and accompanying text.

241. See *supra* notes 200-222 and accompanying text.

242. Facebook estimates that 874 million users access Facebook through their mobile devices as of September, 2013. *Key Facts*, FACEBOOK NEWSROOM, <https://newsroom.fb.com/Key-Facts> (last visited Dec. 1, 2013).

243. As of September, 2013, 727 million active users log into Facebook daily. *Id.* Twitter reports 230 million active users who post 500 million tweets a day. *Who's on Twitter*, TWITTER.COM, <https://business.twitter.com/whos-twitter> (last visited on Dec. 1, 2013).

increased the risk of dissemination of confidential information; and created a platform for potential defamation of the employer's brand or image.²⁴⁴ While federal law provides employers with a modicum of control when employees utilize either the employer's hardware or its internet access to post material or comments,²⁴⁵ the increased use of smart phones and other devices allows employees to circumvent employer systems both during break-time and office hours.

Employer efforts to manage the use of social media have been varied. In a recent survey, only 25% of employers interviewed²⁴⁶ have a "stand alone" policy on social media.²⁴⁷ For 43% of employers, the social media policy is embedded in another substantive policy.²⁴⁸ 32% of employers polled either did not have a policy, or did not know whether they had a policy.²⁴⁹ The lack of a specific policy on the use of social media creates challenges for both employers and employees, as traditional policies are stretched and contorted to apply to a social media context.²⁵⁰

The NLRB had occasion to consider the potentially chilling effect of a stand-alone social media policy in *Sears Holdings* ("Roebucks").²⁵¹ The employer had promulgated a Social Media Policy restricting employee use of blogs, message boards and other types of cyber communication.²⁵² Among the prohibited topics focused on in the Advice Memorandum was "[d]isparagement of company's or competitors' products, services, executive leadership, employees,

244. See DLA PIPER, *supra* note 18, at 14 (identifying potential risks of social media). Also identified as possible risks were liability for employee recommendations; loss of productivity; association with controversial opinions or actions; and association with defamatory comments. *Id.*

245. See *infra* notes 295-308 and accompanying text.

246. See DLA PIPER, *supra* note 18, at 5 (indicating that report data is based on 250 online interviews with senior managers of organization of more than 250 employees and revenues of more than £30 million).

247. See *id.* at 15.

248. See *id.*

249. See *id.*

250. *Id.* at 17 (reporting on a United Kingdom case in which an employee was terminated for publishing comments on a fan site for a football team but was reinstated because there was no policy, procedure or guidance that would have put him on notice that his conduct would subject him to termination); For a summary of this unreported case see *Aston Villa Unfairly Dismissed Football Historian Who Has Supported Club for 60 Years*, XPERTHR (Apr. 14, 2011), <http://www.xperthr.co.uk/article/108880/aston-villa-unfairly-dismissed-football-historian-who-had-supported-club-for-60-years.aspx>.

251. BARRY J. KEARNEY, NLRB OFFICE OF THE GEN. COUNSEL, CASE 18-CA-19081, ADVICE MEMORANDUM ON SEARS HOLDINGS (ROEBUCKS) (Dec. 4, 2009), *available at* <http://www.nlr.gov/case/18-CA-019081>.

252. *Id.* at 2 (citation omitted).

strategy, and business prospects."²⁵³ The union, which was using social media and internet communication as part of its organizing drive,²⁵⁴ charged that the policy could be construed to prohibit protected activities such as discussion of the terms and conditions of employment.²⁵⁵

The NLRB noted that the disputed language was embedded within a list of "plainly egregious conduct"²⁵⁶ including but not limited to racial or religious disparagement, explicit sexual references and allusions to illegal drugs.²⁵⁷ Given such context, the NLRB concluded that employees could not reasonably construe the policy as restricting Section 7 activities.²⁵⁸ In reaching its decision, however, the NLRB was also influenced by practical considerations: employees continued to use social media sites to engage in union organizing even after the promulgation of the policy and the employer had not disciplined anyone for engaging in such activities.²⁵⁹

In the years since *Sears Holdings*, social media policies have come under increased scrutiny. Of the twenty-seven cases involving employers that are described in the *August 2011 Memorandum* and in the *January, 2012 Memorandum*, thirteen also included challenges to employer social media policies, either in the context of a disciplinary action, or as a freestanding policy.²⁶⁰ Of these, only two policies were found compliant,²⁶¹ another was found compliant after amendment.²⁶² In the remaining ten²⁶³ cases, at least a portion of the employer's social

253. *Id.* at 3 (emphasis added).

254. *Id.* at 1 (noting that the union had begun an organizing drive and began communicating with employees via Facebook, MySpace and a list serve to which large numbers of the employer's service technicians subscribed).

255. *Id.* at 3-4. Although the union challenged the social media policy in its entirety, only part of the policy was forwarded to the Office of the General Counsel for consideration. *Id.* at 3.

256. *Id.* at 6.

257. *Id.*

258. *Id.* at 4.

259. *Id.* at 3 (finding "no evidence" that the policy had been issued in response to union organizing efforts or that it had been the basis for disciplinary action).

260. Aug. 2011 REPORT, *supra* note 14; Jan. 2012 REPORT, *supra* note 14 (containing thirteen of the twenty-seven cases that involve challengers to employer social media policies).

261. Aug. 2011 REPORT, *supra* note 14, at 22 (finding that the employer's policy that prohibited employees from communicating with the press was justified given its stated purpose of ensuring that the company spoke with only "one voice"); Jan. 2012 REPORT, *supra* note 14, at 17 (holding that the policy of a national drug store chain could not reasonably be construed to discourage protected activities in light of the fact that it contained specific references to customers, patients and health information).

262. Jan. 2012 REPORT, *supra* note 14, at 16 (approving a revised policy that included a "list" of proscribed, egregious activities).

263. In one instance, an employer's warning to an employee concerning his tweets was found not to rise to the level of an employer "rule." Aug. 2011 REPORT, *supra* note 14, at 13.

media policy was found to be overbroad.²⁶⁴

Less than five months after issuance of the *January 2012 Memorandum*, the Office of the General Counsel issued the *May 2012 Memorandum*, focused exclusively on social media policies.²⁶⁵ Of the seven decisions highlighted in the *May 2012 Memorandum*, six were found to be overbroad or otherwise unlawful in whole or in part;²⁶⁶ only one, a revised policy, was found to be compliant.²⁶⁷

Careful scrutiny of the policies deemed to be overbroad suggests that *any* ambiguity in a policy will be construed as creating an impression that it applies to protected activities. For example, a provision in social media policy that employees “[r]eport any unusual or inappropriate internal social media activity” was found to have the potential to discourage employees from engaging in protected activity.²⁶⁸ In another example, the social media policy of a health care provider asked employees to “Respect Privacy” by observing the following guideline:

264. *Id.* at 12 (indicating that policy prohibiting “inappropriate discussions” was overbroad); *id.* at 19-20 (noting that hospital’s prohibition on disclosure of confidential information or dissemination of harassing or defamatory statements via social media was overbroad in failing to define such terms); *id.* at 20 (stating that employer policy that prohibited inappropriate comments was overbroad); *id.* at 21 (noting that while prohibition on pressuring coworkers to use social media was acceptable, additional provisions precluding disclosure of personal information without the consent of the owner was overbroad); Jan. 2012 REPORT, *supra* note 14, at 4-5 (holding that a company rule that prohibited “disparaging” comments was overbroad); *id.* at 8 (holding that despite a “savings clause” explicitly providing that the policy did not apply to protected activities, the employer’s policy was overbroad); *id.* at 10 (noting that work rule that prohibited “disrespectful conduct” and “inappropriate conversations” were “overbroad”); *id.* at 12 (noting with regard to a medical employer that a prohibition on using social media to engage in conduct that negatively impacted on the employer’s reputation or interfered with the employer’s mission was overbroad); *id.* at 14 (noting that, among other things, a prohibition on employee use of the company logo violated the Act).

265. May 2012 REPORT, *supra* note 14, at 2.

266. *Id.* at 4-5 (noting that retail store prohibition on release of “confidential guest, team or company information” and threat of criminal prosecution for failure to report unauthorized access was overbroad); *id.* at 6-7 (holding that a car manufacturer’s policy requiring employees to ensure that post are “completely accurate and not misleading” and prohibiting posting photos, quotes and personal information without prior permission was overbroad); *id.* at 13 (finding provisions prohibiting bullying lawful but noting that restriction on disclosure of “material non-public information” was vague and overbroad); *id.* at 15 (stating that provision requiring employees to report unsolicited electronic communication is overbroad, but upholding prohibition on posting that could be mistakenly attributed to the employer); *id.* at 17 (holding that a prohibition on participation in blogs, forums and social networking while on company time was unlawful because it failed to acknowledge that employees have the right to engage in such activities on employer premises during off-duty hours).

267. *Id.* at 19-20.

268. *Id.* at 8.

If during the course of your work you create, receive or become aware of personal information about . . . employees, contingent workers, customers, customers' patients, providers, business partners or third parties, don't disclose that information in any way via social media or other online activities. You may disclose personal information only to those authorized to receive it in accordance with [Employer's] Privacy policies.²⁶⁹

The foregoing policy was deemed overbroad because it could be interpreted to preclude communications about wages and working conditions.²⁷⁰ Such an interpretation ignored the context of the policy – prohibiting employees from disclosing confidential information *about others*; the policy on its face did not restrict voluntary disclosures by the owner of the information.²⁷¹ Similarly, in the section of the same policy urging “respect [for] all copyright and other intellectual property laws,”²⁷² a provision requiring employees to secure permission before using content or images of third parties, was found to be susceptible to interpretation as a prohibition on posting pictures of strikers or unsafe working conditions.²⁷³ Even a policy suggesting that employees adopt a “friendly tone” when using social media failed to pass muster.²⁷⁴

Determining when language is so ambiguous that it could reasonably be construed to chill employee rights is also problematic. The portion of an employer policy that stated that on-line “bullying” was not permissible was found to be compliant,²⁷⁵ even though the term “bullying” was not defined, while a provision in the same policy that prohibited employees from posting “material non-public information” (a phrase with a well-established financial connotation) was found to be “so vague that employees would reasonably construe it to include subjects that involve their working conditions.”²⁷⁶ Even a reference that specifically prohibited postings on Google Finance was insufficient to provide context.²⁷⁷

The *May 2012 Memorandum* eliminated any hope of an employer “safe harbor” by noting that a blanket disclaimer that provided that a social media policy would be applied in conformance with law (and

269. *Id.* at 9.

270. *Id.* at 9-10.

271. *See id.*

272. *Id.* at 10.

273. *Id.* at 11.

274. *Id.* at 10.

275. *Id.* at 13.

276. *Id.*

277. *Id.* at 12.

specifically mentioned Section 7 of the Act) would not cure ambiguities elsewhere in the policy.²⁷⁸

For employers unwilling or unable to parse linguistic distinctions, the *May 2012 Memorandum* provides some additional guidance in the form of a policy (“Compliant Policy”)²⁷⁹ where the employer apparently “got it right.” While eschewing the possibility of a safe harbor,²⁸⁰ careful consideration of the structure and tone of the Compliant Policy offers valuable insights in the approach of the NLRB.

The tone of the Compliant Policy is decidedly non-threatening. It uses language such as “[t]o assist you in making responsible decisions”²⁸¹ and asks employees to “consider some of the risks and rewards that are involved [in online posts].”²⁸² It also states “[u]ltimately, you are solely responsible for what you post online.”²⁸³ In fact the term “policy” is used only three times in reference to the Compliant Policy;²⁸⁴ and instead, it is referred to as “guidance” or “guidelines.”²⁸⁵ Although the Compliant Policy alludes to possible termination, it does so only in the specific context of postings that are discriminatory, harassing or threaten violence,²⁸⁶ or in those instances where an employee retaliates against another employee.²⁸⁷

The most salient feature of the Compliant Policy, commented on with approval in the *May 2012 Memorandum*,²⁸⁸ is the use of examples to avoid the ambiguity that proved fatal to other policies. For example, in contrast to another employer policy where a prohibition on posting “material non-public information” was deemed overbroad,²⁸⁹ the Compliant Policy asks employees to “[r]espect financial disclosure laws. It is illegal to communicate or give a “tip” on inside information to

278. *See id.* at 8-9.

279. *See id.* at 22-24.

280. *See id.* at 2 (noting that the policy offers only “additional guidance in this area”).

281. *Id.* at 22.

282. *Id.*

283. *Id.*

284. *Id.* at 22-23.

285. *Id.* at 22-24.

286. *Id.* at 22 (noting that “[i]nappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.”).

287. *Id.* at 23 (noting “[a]ny associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.”).

288. *Id.* at 20 (noting that the Compliant Policy passes muster because it provides “sufficient examples of prohibited conduct” to avoid ambiguity).

289. *Id.* at 13.

others so that they may buy or sell stocks or securities.”²⁹⁰ Similarly, the portions of the Compliant Policy that prohibit bullying or harassment,²⁹¹ and require employees to maintain the confidentiality of information²⁹² contain specific examples of such conduct. Implicit in this “policy by example” approach is the assumption that examples should be interpreted as *limitations* on action. It is interesting to note that the Compliant Policy does not use the customary legal saw, such as “examples include but are not limited to”²⁹³ To the contrary, the *May 2012 Memorandum* makes clear that examples are intended to be limitations.²⁹⁴ In effect, a policy has the greatest probability of compliance when only the examples specifically identified in the policy are prohibited and all other activities are presumably permitted.²⁹⁵

IV. MAKING SENSE OF IT ALL

Tension between employees’ cyber activities and employers’ interests has existed almost since the advent of social media.²⁹⁶ A recent survey conducted by the American Management Association found that sixty-six percent of employers monitored employee internet use.²⁹⁷ Such monitoring is frequently the harbinger of disciplinary action. Twenty-eight percent of employers surveyed had terminated employees for misusing email;²⁹⁸ forty-eight percent of companies surveyed have discharged employees for violating company policies related to internet communications.²⁹⁹

290. *Id.* at 23.

291. *Id.* (noting that the policy applies to posts meant to “intentionally harm someone’s reputation” or which “contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy”).

292. *Id.* (noting that employees should maintain the confidentiality of information “regarding the development of systems, process, products, know-how and technology”).

293. *Id.* at 18, 23 (noting that the language uses the phrase “might include” instead of “not limited to”).

294. *Id.* at 20 (noting that “rules that clarify and restrict their scope by including examples of clearly illegal conduct. . . are not unlawful”).

295. *Id.*

296. See e.g., Cote, *supra* note 115, at 122-23 (describing cases in which employees were terminated for internet postings); DLA PIPER, *supra* note 18, at 11 (noting that “engagement with social media can enable employers to open up dialogue with the workforce in a way that traditional communications cannot.”).

297. 2007 *Electronic Monitoring & Surveillance Survey*, AM. MGMT. ASS’N. & THE E-POLICY INST. (Feb. 28, 2008), <http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey>.

298. *Id.*

299. *Id.*

Until recently, the conflicts caused by the use of cyber media in the workplace occurred outside the purview of the NLRB. Disgruntled employees, terminated for posts or tweets, looked for redress primarily to state statutes or common law protection,³⁰⁰ or in cases in which the termination was accompanied by improper employer monitoring, the Electronic Communications Privacy Act ("ECPA").³⁰¹

Employees looking to ECPA for protection for social media activities have not fared especially well.³⁰² Although ECPA purports to protect electronic privacy,³⁰³ interception of electronic communications is permissible if there is consent by the sender,³⁰⁴ or if retrieval is required by the network provider,³⁰⁵ which in many cases is the employer.³⁰⁶ In addition, the prohibition on interception of communications excludes communications from a device furnished to a user for use in the "ordinary course of business."³⁰⁷ While ECPA has not defined "ordinary course of business" for purposes of the exemption, courts have generally required that the monitoring be routine, for a legitimate purpose and done with prior notice.³⁰⁸ In many instances, such "notice" is embodied in a specific policy and is a condition to the

300. See Matthew W. Finkin, *Information Technology and Workers' Privacy: The United States Law*, 23 COMP. LAB. L. & POL'Y J. 471, 472 (2005) (describing protections for employees as an "amalgam" of federal and state laws generally protecting "dignitary" interests).

301. 18 U.S.C. §§ 2510-20, 2701-11(2006). For an insightful description of U.S. laws impacting employer monitoring, see generally Cory A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285, 298-301 (2011).

302. See, e.g., *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 115 (3d Cir. 2003) (holding that an employer's retrieval of employee's email did not violate federal law); *Bohach v. City of Reno*, 932 F. Supp. 1232, 1237 (D. Nev. 1996) (holding that employer that provided internet service to employees was free to access data stored on or transmitted by the service). But see *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754, 2009 WL 3128420, at *3 (D. N.J. Sept. 25, 2009) (holding that employees' rights were violated when employer coerced a co-worker into providing the employer with access to employee forum).

303. See generally Finkin, *supra* note 300, at 478 (describing ECPA as a "skein of statutory opacity"); Christopher Pearson Fazekas, *1984 Is Still Fiction: Electronic Monitoring in the Workplace and U. S. Privacy Law*, DUKE L. & TECH. REV. 15, ¶ 5 n.9 (2004) (observing that the ECPA is "notably ambiguous").

304. 18 U.S.C. § 2701(c)(2) (providing an exemption where the interception of communications has been authorized by the user of such electronic communication service).

305. *Id.* at § 2701(c)(1) (providing an exemption where interception of communications is authorized by the provider of the electronic communication service).

306. See, e.g., *Fraser*, 352 F.3d at 115 (holding that because the employee email was held on a network administered by the employer, the exception of 18 U.S.C. § 2701(c) applied).

307. 18 U.S.C. § 2510(5) (excluding any device "(i) furnished to the . . . user by a provider of wire or electronic communication service . . . and being used by the . . . user in the ordinary course of its business . . .").

308. *Adams v. City of Battle Creek*, 250 F.3d 980, 984 (6th Cir. 2001).

use of the equipment or the network.³⁰⁹

In instances where the electronic communication is made during off-duty hours, or using the employee's personal device, the common law tort of invasion of privacy appears to offer some opportunities for redress.³¹⁰ However, obstacles to recovery under an invasion of privacy theory are significant. A plaintiff must establish that her "solitude" was disturbed and that the disclosure would be "highly offensive" to the "reasonable person."³¹¹ Implicit in the notion of "solitude" is an expectation of privacy – an expectation that courts have frequently rejected in the context of the workplace.³¹² Moreover, the difficulty of proving a "disturbance" is exacerbated when posts are disclosed, not by employer monitoring, but by the voluntary disclosure of co-worker friends.³¹³

State statutes or common law actions for wrongful termination seldom provide meaningful protection for cyber postings. Most of such statutes are limited in scope, offering protection for "whistleblowing"³¹⁴ or terminations that are against "public policy."³¹⁵ Identifying when a

309. *Id.*

310. See Joan T. A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L. J. 301, 313-15 (2003) (observing that invasion of privacy is an umbrella term that encompasses three distinct incursions: intrusion on seclusion; public disclosure of private facts; and placing the claimant in a "false light" by falsely attributing characteristics or beliefs to the plaintiff).

311. See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

312. See, e.g., *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 666 (N.J. 2010) (finding an expectation of privacy when employee used employer email system for communication with personal counsel); *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E. D. Pa. 1996) (holding that employee had no expectation of privacy when using employer email system to send unprofessional comments to a supervisor). See also *Finkin*, *supra* note 300, at 485, 490 (noting that the employer's notice of monitoring is sufficient to disrupt any expectation of privacy).

313. See Aug. 2012 REPORT, *supra* note 14, at 3 (indicating that one party to a Facebook conversation described the content of the conversation to the employer); *id.* at 7 (noting that photographs and Facebook postings were brought to the attention of the employer by a co-worker of claimant); *id.* at 16 (indicating that a Facebook "friend" of claimant, a former client of the employer, complained about the Facebook posts to the employer); *id.* at 17 (stating that a co-worker of claimant provided the employer with a print out of their Facebook conversation); Jan. 2012 REPORT, *supra* note 14, at 10 (noting that co-worker who was a Facebook friend of the claimant complained to the employer about the posts); See *id.* at 31 (stating that co-worker friend of claimant showed the offensive posts to the colleague who was the subject of the posts who subsequently complained to the employer).

314. See, e.g., 43 PA. CONS. STAT. ANN. § 1423(a) (West 2012) (preventing a job action against public employees reporting fraud); 40 PA. CONS. STAT. ANN. § 1303.308(a)-(c) (2012) (protecting medical care providers from reporting errors or fraud).

315. See, e.g., *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) (providing an exception to employment at will if the terminations violates public policy as embodied in a state statute or constitution); *Purdy v. Wright Tree Serv.*, 835 N.E. 2d 209, 212 (Ind. App. Ct. 2005) (holding that the public policy exception to the doctrine of employment at will exists only when

termination violates “public policy” can be difficult;³¹⁶ courts generally require such termination to negatively impact public “health, safety, morals or welfare.”³¹⁷ Employer restrictions on employee speech have not generally been found to be against public policy except where it involves political speech or political engagement.³¹⁸

In contrast to wrongful termination statutes, state legislation aimed primarily at “lifestyle discrimination,” offer the greatest protection for employees whose off-duty activities have resulted in termination.³¹⁹ Such legislation, much of which was passed in reaction to implementation of “no-smoking bans,”³²⁰ prohibits discrimination against use of a lawful product.³²¹ Only four states, however, have enacted broader bans that prohibit discrimination based on off-duty conduct that is not necessarily related to the use of a product.³²² Even if the language of such statutes is broad enough to offer protection to employee cyber communications, such statutes frequently withdraw protection in those cases where the employee’s conduct conflicts with a legitimate interest of an employer³²³ or a bona fide job qualification.³²⁴

termination is in retaliation for a statutorily conferred right).

316. See, e.g., *Edmondson v. Shearer Lumber Prod.*, 75 P.3d 733, 739 (Idaho 2003) (noting that public policy exception is a narrow exception to the general rule of employment at will); *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 288 (Pa. 2000) (holding that the determination of public policy must be based on the public policy of Pennsylvania and not just a violation of state law); *Carl v. Children’s Hosp., Inc.*, 702 A.2d 159, 163 (D. C. 1997) (Terry, J. concurring) (stating that the court would recognize a public policy exception if it is “solidly based on a statute or regulation that reflects the particular public policy to be applied. . .”).

317. *Shick v. Shirey*, 716 A.2d 1231, 1235-36 (Pa. 1998) (rejecting view that public policy is “only that which is legislatively enacted”).

318. Claire R. LaRoche, Glenn S. Dardick & Mary A. Flanagan, *Employee Blogs: Protected Speech or Grounds For Discharge?*, 6 J. BUS. & ECON. RES. 9,12 (2008) (noting that twenty-six states have Anti-SLAPP (Strategic Lawsuit Against Public Participation) laws prohibiting retaliation for employee political activities).

319. See Stephen D. Sugarman, *Lifestyle Discrimination in Employment*, 24 BERKELEY J. EMP. & LAB. L. 377, 417-20 (2003).

320. *Id.* at 419 (observing that “smoking rights” laws were the result of the combined efforts of the American Civil Liberties Union and the tobacco lobby) (citations omitted).

321. *Id.* at 417-420 (describing common protections and variants in lifestyle discrimination statutes); see also *Discrimination Laws Regarding Off-Duty Conduct*, NAT’L CONFERENCE OF STATE LEGISLATURES 1 (Oct. 18, 2010), <http://www.ncsl.org/documents/employ/off-dutyconductdiscrimination.pdf> (noting that twenty-nine states and the District of Columbia prohibit discrimination against employees who use tobacco during off-duty hours with eight states banning the use of any lawful product).

322. See e.g., CAL. LAB. CODE § 98-6(a)-(b) (West 2012); COLO. REV. STAT. ANN. § 24-34-402.5 (West 2012); N.Y. LAB. LAW § 201-d(2) (McKinney 2012); N.D. CENT. CODE § 14-02.4-03 (2011).

323. See, e.g., COLO. REV. STAT. ANN. § 24-34-402.5(1)(b) (West 2012); N.Y. LAB. LAW § 201-d(3)(a) (McKinney 2012) (exempting from the provisions actions to protect trade secrets or other “property of business” interests).

Given the haphazard protections offered by ECPA and state law, the NLRB's recent pronouncements on social media mark a new frontier in the developing law governing internet communications in the workplace.³²⁵ By focusing on unorganized workforces,³²⁶ involving postings that are well upstream of any organizing effort, the NLRB has acknowledged a shift in the locus of labor-management relations from the factory floor to the Facebook wall.

Such a shift is not without risks; an unprincipled, unexamined expansion of "bricks and mortar" jurisprudence into the virtual workplace is fraught with challenges for employers and employees alike. An untoward, narrow reading of concerted action deprives workers of a potent tool for rallying support for shared concerns. Conversely, adoption of wholesale protections that dignify every post and response with the mantle of Section 7 protection corrodes workplace morale and undermines employer efforts to create a professional working environment.

While the extension of Section 7 protections to electronic communications may seem to be a simple extrapolation of existing law, it ignores the fundamental question of whether social media interactions are in some way *different* from face-to-face communications, and whether the jurisprudence of concerted activities needs to take account of such differentiation. A thoughtful reading of the *Memoranda* suggests that the NLRB is not unmindful of the potential distinction between "real" and virtual communications and has adopted a nuanced approach in finding concerted activities that allows for further refinements.

While the *Memoranda* offer no bright line test, they do suggest two emergent principles for use in determining when a cyber-post rises to the level of concerted action.³²⁷ One principle is a logical extension of the "bricks and mortar" context: where the virtual communication is a

324. See, e.g., COLO. REV. STAT. ANN. § 24-34-402.5(1)(a) (West 2012) (exempting any restriction which is a bona fide occupational qualification or necessary to avoid conflict with responsibilities to the employer); N.D. CENT. CODE § 14-02.4-01 (2011) (providing an exception from protection of the statute if the employee's conduct harms the employer).

325. See Steven Greenhouse, *Even if It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. TIMES (Jan. 21, 2013), http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all&_r=0.

326. In only two of the cases discussed in the *Memoranda* did the NLRB mention the existence of a union and only one of these cases involved an organizing effort. Eastman, *supra* note 20, at 10, 17.

327. See JT'S PORCH SALOON MEM., *supra* note 155, at 2; WAL-MART MEM., *supra* note 221, at 3.

continuation of a “real-world” encounter – in the form of face-to-face discussions with co-workers, a confrontation with an employer, or assertion of collectively bargained rights, social media posts will likely be deemed to be protected, without regard to the quality or the extent of coworker response.³²⁸ The larger challenge arises when the posts themselves are the first indication of employee concerns. In such instances, the *Memoranda* suggest that the number of co-workers making responsive posts, and the “quality” of the posts will determine the availability of legal protection.³²⁹

Determining the adequacy of the number of responsive posts and evaluating their content is significantly more difficult than a similar analysis of a face-to-face encounter. Whether because of careful consideration or a canny instinct, the examples highlighted in the *Memoranda* suggest a practical understanding about how Facebook postings are used and perceived.³³⁰ While the use of Facebook is evolving, there appear to be some emerging “conventions” that affect “friending” and posting. Both popular and academic articles have commented on the “awkwardness” of refusing a “friend” request.³³¹ Moreover, users frequently do not “prune” their friends so that once accepted, a “friend” may remain connected for a significant period of time.³³² In such circumstances, it may not be clear who the intended “audience” for a particular post actually is. As a noted researcher remarked, “[w]hen people speak, they typically have a sense of to whom they are speaking . . . speakers gauge the potential audience and the volume of their voice . . . Digital environments do not afford this

328. JT’S PORCH SALOON MEM., *supra* note 155, at 2-3; WAL-MART MEM., *supra* note 221, at 3; Oct. 2010 REPORT, *supra* note 3.

329. JT’S PORCH SALOON REPORT, *supra* note 155, at 3; WAL-MART MEM., *supra* note 221, at 3; Oct. 2010 REPORT, *supra* note 3, at 10.

330. WAL-MART MEMO, *supra* note 221, at 3.

331. See, e.g., Janet Kornblum, *Meet My 5,000 New Best Pals*, USA TODAY (Sept. 20, 2006), http://usatoday30.usatoday.com/tech/news/2006-09-19-friending_x.htm?POE=click-refer (giving an example of participant who accepts friend requests from strangers, because it is “kinda cool.”); Danah Boyd, *Friends, Friendsters, and Top 8: Writing Community Into Being on Social Network Sites*, FIRST MONDAY 11 (Dec. 4, 2006), <http://www.firstmonday.org/ojs/index.php/fm/article/view/1418> (noting that people often accept friend invitations because “[i]t’s easier to say yes than no.”).

332. Mary Madden, *Privacy Management on Social Media Sites*, PEW INTERNET 2 (Feb. 24, 2012), <http://pewinternet.org/reports/2012/Privacy-mmanagement-on-social-media.pdf> (reporting survey data that indicated that overall only fifty-eight percent of men and sixty-seven percent of women reported deleting people from their friend network); see also *How to Have Good Facebook Etiquette*, EHOW, http://www.ehow.com/how_2252686_have-good-facebook-etiquette.html (last visited June 7, 2013) (suggesting that people try to refrain from deleting friends in an effort to avoid a “potentially awkward run-in.”).

luxury."³³³ While technological developments allow users to implement tiered privacy settings,³³⁴ research suggests that social media users frequently do not take advantage of the ability to limit access to their profiles and posts.³³⁵ For many people, the "intended" audience on Facebook is everyone that they know – or have ever known. Such breadth makes it exceedingly difficult to distinguish situations where a user intends simply to "vent" to family and close friends from those where she is extending an invitation to co-workers to engage in a discussion about workplace conditions.

Responsive posts also require careful consideration. Failure to respond to a wall post may be considered rude. As one online commentator noted: "Responding to Facebook wall posts as soon as possible . . . will create a better impression than replying after a couple of weeks or not responding at all."³³⁶ While such "conventions" are hardly dispositive, they do suggest the expectation of a response to a posting as a matter of courtesy. Such a convention makes it difficult to separate polite expressions of empathy for a co-worker from the manifestations of shared concerns that might lead to group action.

Adding to the complexity is the use of social media for personal "branding," cultivating an image of the poster as witty, intelligent, rebellious or edgy.³³⁷ Self-branding is an "inevitable" result of social media.³³⁸ Participants in social media create an image of themselves through the content that they post online, pictorial representations and posted conversations.³³⁹ In fact, participants, whether by intention or default,³⁴⁰ frequently manage multiple online identities, aimed at diverse

333. Danah Boyd & Jeffrey Heer, *Profiles as Conversation: Networked Identity Performance on Friendster*, HAW. INT'L CONF. SYS. SCI. 4 (2006), <http://origin-www.computer.org/csdl/proceedings/hicss/2006/2507/03/250730059c.pdf>.

334. FACEBOOK, <http://www.facebook.com/help/459934584025324/> (last visited June 13, 2013) (identifying tools that allow users to determine with whom they will share information).

335. Madden, *supra* note 332, at 9 (reporting that among college graduates surveyed, sixty-two percent reported "some difficulty" in managing privacy controls on their profiles).

336. Adele Eliot, *Etiquette for Responding to Wall Posts in Facebook*, EHOW, http://www.ehow.com/info_8783146_etiquette-responding-wall-posts-facebook.html (last visited June 7, 2013); see also Blaise Lucy, *11 Reasons That People Aren't Responding to Your Posts*, CONSTANT CONTACT BLOGS, <http://blogs.constantcontact.com/product-blogs/social-media-marketing/people-respond-to-facebook-posts/> (last visited June 2, 2013).

337. See generally Lauren I. Labrecque, Ereni Markos & George R. Milne, *Online Personal Branding: Processes, Challenges and Implications*, 25 J. INTERACTIVE MARKETING 37 (2011).

338. *Id.* at 48.

339. *Id.* (discussing research that describes the principle mechanisms for personal branding).

340. *Id.* (noting that while the majority of individuals recognized that they were self-branding, they were sometimes unaware of how to achieve their message accurately); DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET* 2 (2007)

audiences.³⁴¹ The existence of an accessible audience and the impersonality of electronic communication may encourage posters to make comments online that might not have been made in face-to-face conversations³⁴² – what might be termed “the open mike” effect.³⁴³ The willingness of participants to post for the purpose of cultivating an image suggests that in the context of concerted activities, actions should speak louder than words. Only when posts invite or reference group action is there an assurance that the purpose of the interchange is concerted action and not personal brand-building.³⁴⁴

Given this context, online posts about working conditions need to be considered, not only in the context of the workplace, but also in the conventions of the social media in which they appear. A post about the working environment may have multiple purposes and audiences; it can be a status report to family on how the day is going, an effort to joke or commiserate with friends – or an invitation to co-workers to participate in a conversation.

While not explicitly considering the mores of cyber communication, the *Memoranda* imply an appreciation of the context of internet postings that may prove to be a basis for further development. For example, a focus on the number and character of the responses to a posting as an indicia of concerted action raises the questions of whether communications on sites such as Twitter, that limits communication to one hundred forty characters, or actions such a “poking” – basically a communication with no content – can ever be the basis of concerted action. The *Memoranda* highlighted only two decisions that did not involve Facebook postings.³⁴⁵ Of these, only one, involving a posting to a newspaper website during the course of an ongoing dispute with the

(suggesting that individuals may not be cognizant of the extent to which information about them is available and how it may impact their image).

341. Labrecque et al., *supra* note 337, at 48.

342. Madden, *supra* note 332, at 3 (reporting on the results of a survey in which 15% of men and 8% of women reported regretting that they had posted certain content).

343. Ken Strutin, *Social Media and the Vanishing Point of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 242 (2011) (stating that “[s]ocial media are analogous to open mikes” but suggesting that participants have an unwarranted sense of privacy).

344. See generally Aug. 2011 REPORT, *supra* note 14.

345. *Id.* at 12 (holding that an employee who was terminated for tweets critical of a employer’s copy editors was not engaged in concerted activities); Jan. 2012 REPORT, *supra* note 14, at 26 (involving the discharge of a nurse because of messages posted on an online message board of a local newspaper that were critical of hospital management). A third case highlighted in the *Memoranda* involved union misconduct rather than employer interference with concerted action. Aug. 2012 REPORT, *supra* note 14, at 18.

union, was found to constitute concerted action.³⁴⁶ While nothing in the *Memoranda* suggests that concerted action is possible only in the context of Facebook communications, employers may take comfort in the fact that there appears to be a higher threshold for establishing concerted action than ambiguous tweets and “pokes,” “likes” or “tags.”

In contrast to its nuanced approach to finding concerted action, the operative principle emerging from the NLRB’s treatment of employer social media policies appears to be that only the most narrowly drafted policies will be deemed compliant.³⁴⁷ The existence of an overbroad policy throws the blanket of legal protection over employees.³⁴⁸ Not only does it prohibit discipline for engaging in concerted activities, it also protects conduct which, though not concerted, “touches” core concerns of Section 7.³⁴⁹

Defining the penumbra of Section 7 protection in the context of social media is complicated not only because of the complexity of labor law jurisprudence, but also because of the fluid nature of social media interactions. In contrast to face-to-face conversations directed to identified co-workers, social media communications are a shotgun blast directed to broad categories of “friends” who may include family, co-workers and even supervisors and managers. Complaints about the “daily grind” that in the past might have been shared with family and close friends take on a new connotation when posted on a Facebook wall accessible to co-workers. Not only is the audience more diverse, the very nature of the communications has changed. Expressions of frustration no longer “evaporate” but remain as a permanent invitation to commiserate or sympathize.

Determining when social media posts brush against the concerns of Section 7 is difficult. Unfortunately, the *Memoranda* did not identify a single case in which a termination was unlawful because the Facebook postings touched on issues within the ambit of Section 7 protection. In the context of social media, however, it is not difficult to imagine possible examples. Assume that an employee makes the following post on his Facebook page, during his own time and utilizing his personal computer: “I hate this job! Kim [the supervisor] is a fat jerk who couldn’t manage a garage sale. What a ****! I am not getting paid what I’m worth! I am heads above the other idiots in my department! I

346. Jan. 2012 REPORT, *supra* note 14, at 28 (noting that the statements that were the basis of the termination were the “logical outgrowth of long-standing concerted activity.”).

347. Martin Luther Memorial Home, Inc., 343 N.L.R.B. 646, 647 (2004).

348. *Id.*; see also May 2012 REPORT, *supra* note 14, at 3.

349. See May 2012 REPORT, *supra* note 14, at 3.

need to straighten Kim out.” None of the poster’s co-worker friends respond to the post. Further assume that the posting employee is terminated, based on the employer’s concern that the posting is threatening and harassing and generally corrosive to workplace discipline. Unless the posts are an outgrowth of an earlier dispute with the employer, or were the subject of face-to-face discussions with other employees, there is a colorable argument that the posts do not rise to the level of concerted action.³⁵⁰ The absence of any co-worker response and the emphasis on individual concerns (“*I’m not being paid what I’m worth*”) rather than group concerns (“*We’re not be paid what we’re worth*”) suggest the absence of concertedness. Given this context, the employer’s disciplinary action would appear to be justified. Nonetheless, at least one subject – wages – arguably touches on a core concern of Section 7 protection and, if the employer’s social media policy is found to be overly broad, the termination would arguably violate the Act.³⁵¹ In effect, the nuanced approach to concerted action that runs through the *Memoranda* has been undercut by the NLRB’s straightjacketed approach to the interpretation of employer social media policies.

Employers may seek solace in the Board’s recent decision in *Continental Group* that suggests the possibility that some employee conduct may be beyond even the widest penumbra of Section 7 protection, no matter how broad the policy.³⁵² The *Memoranda* identify three cases in which the employer’s disciplinary action was deemed to be lawful even though the employer’s social media policy was found to be overbroad.³⁵³ Each of those cases involved angry or profanity laced postings.³⁵⁴ Yet while disciplining employees for such conduct was lawful, it is questionable whether a compliant social media policy, in the mode of the Compliant Policy, would have provided meaningful notice that such behavior would merit discipline. The *May 2012 Memorandum* rejected an employer policy that cautioned employees to “communicate

350. See *supra* notes 160-161 and accompanying text.

351. See *supra* note 41 and accompanying text.

352. *Continental Group, Inc.*, 357 N.L.R.B. 39 (2011).

353. See Jan. 2012 REPORT, *supra* note 14, at 6 (holding that a termination for posting an explicative about employer and commenting on the employer’s failure to appreciate employees was not unlawful, despite the existence of an overbroad policy); *id.* at 11 (holding that, while the employer’s policy was overbroad, termination for posting that co-workers were “screwing over” the customers was lawful); *id.* at 11 (holding that, while the employer’s social media policy was overbroad, termination for profane and angry complaints about co-workers was not unlawful).

354. *Id.*

in a professional tone,"³⁵⁵ noting that it discouraged discussions that could become "heated"³⁵⁶ or "controversial."³⁵⁷ As a result of this inconsistency, employers are left to navigate a virtual Symplegades: an employer may terminate an employee whose abusive and malicious postings are personal and not concerted action – but cannot announce that action in advance in a social media policy without running the risk of being deemed "overbroad."³⁵⁸

V. CONCLUSION

Examination of its recent guidance suggests that the NLRB has been careful not to conflate the interactive nature of social media exchanges with legally protected "concerted activities." However, despite its fairly conservative approach to defining concerted activities in the context of social media, the NLRB has been fairly quick to feel a "chill" in employer social media policies. By making it more likely that a social media policy will be found to be overbroad, the NLRB has expanded Section 7 protection well beyond concerted activities. Such an expansion shifts the focus from communications looking toward group actions to simply "communications."

Of even greater significance, by positioning the Act at the center of the burgeoning issue of employee use of cyber communications, the NLRB has provided a veneer of protection for employee off-duty postings, separate and distinct from employment law. Employers will look for practical guidance on the extent to which they are permitted to discipline employees for cyber activities and may well inquire at what point "cyber-gripping," brushes against concerns animating Section 7. Given the continued evolution in both the technology and the mores of social networking, further refinements may be long in coming and equally dissatisfying. Wary of triggering the machinery of an unfair labor practice investigation, and concerned that their social media policy is overbroad, employers may simply "back away" from any disciplinary actions based on social media postings.

For employees, however, the recent actions of the NLRB provide additional protections for activities that have enjoyed only sporadic protection under the employment laws. Even a thin strand of protected activities – or actions which "touch" on such activities in a social media

355. May 2012 REPORT, *supra* note 14, at 10.

356. *Id.*

357. *Id.*

358. *Id.* at 13.

posting - may serve to insulate disparaging and abusive comments about an employer far better than the pallid protections of state wrongful discharge laws. Employees anticipating disciplinary action may find it beneficial to make a Facebook posting explicitly inviting co-worker friends to engage in a frank and vigorous discussion of working conditions. Workers may also benefit from an approach that encourages social media policies that are so anemic and limited that they fail to provide the notice necessary to defeat employee expectations of privacy. Given this context, the NLRB may prove to be far more valuable to employees than any Facebook friend.