DO BANS ON WORKPLACE GOSSIP VIOLATE THE NLRA?

EMPLOYERS RESPOND TO EMPLOYEE SPEECH

IN THE SOCIAL MEDIA AGE[*]

by

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> "Do not let any unwholesome talk come out of your mouths, but only what is helpful for building others up according to their needs, that it may benefit those who listen." (Ephesians 4:29) — from WinePress Publishing "No Gossip" Policy[1]
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> "...one person's harmful gossip may well be another person's concerted activities." [2]
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> "...we are only beginning to understand the costs of an age in which so much of what we say, and what others say about us, goes into our permanent – and public – digital files."[3]

In their attempts to regulate or control workplace gossip by creating rules and policies prohibiting it, do employers run the risk of committing an *unfair labor practice*? This paper considers whether bans on workplace gossip violate Section 8 of the National Labor Relations Act of 1935 (the "NLRA").[4] We also examine how recent National Labor Relations Board ("NLRB" or "Board") activity in the social media area relates to bans on workplace gossip.

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I: What is *gossip*?

Humans, according to sociologists, are wired for gossip – it's something everyone does.[5]

Where people go to work, it seems that gossip follows. It's no surprise then that the NLRB has been discussing gossip since the earliest days of its opinions.[6] How does labor law define gossip? The NLRB[7] may have a long history of discussing gossip in the workplace, but until recently the Board took no position on the definition of gossip. In a case decided in 2011, *Hyundai America Shipping Agency Inc.*[8] where the interpretation of an employer rule prohibiting gossip[9] was at the heart of the case, the Board consulted *Merriam-Webster's* which defined gossip as "'rumor or report of an intimate nature' or 'chatty talk.'" As we discuss in our commentary in section VI, this commonplace definition of gossip may have serious implications for employees' rights.

II: Employer control of workplace gossip

In today's workplace, gossip takes place not only around the office water cooler, but is proliferated by social media tools such as Facebook, Twitter, blogs, instant messages, online chat, YouTube videos, etc.[10] Thanks to a web of low cost technologies, office gossip now permeates office walls with breathtaking speed at all hours of the day and night.[11]

Because of (or despite) gossip's ubiquitous and pervasive nature, employers have become increasingly concerned about controlling it in the workplace.[12] There may be a strong business case for doing so. It is argued in the popular management literature that gossip impedes productivity and destroys morale in the workplace and thus should not be tolerated.[13] Sam Chapman, the CEO of Chicago public relations firm Empower, claimed that his no-gossip policy greatly improved the culture of his workplace and caused his business to double in a year.[14] He claimed to have been inspired to institute this policy after he had to fire three employees over an instance of harmful gossip.[15] Chapman penned a book about the experience, advising other companies to do the same.[16] In *The New York Times*, an employee of an online printing company spoke glowingly of her experience working for an organization with a "no-gossip policy," claiming the policy promoted a greater sense of a team environment.[17]

Moreover, legal experts warn that employers may be liable for hostile work environment or a host of other claims if adequate procedures aren't in place to deal with gossip in the workplace.[18] For example, retaliation claims may be supported by evidence that the claimant was the subject of grapevine gossip; privacy claims can be supported by allegations that information from confidential Human Resources records was the subject of gossip.[19] Employees who are the victims of malicious gossip may have claims of libel, slander, or intentional or negligent infliction of emotional distress. With potential upsides of increased profit and productivity and a downside of a costly jury verdict, it is understandable that organizations might be interested in what they could do to limit gossip in the office.

Some employers have tried to discipline individual employees or groups of employees on the basis of specific incidents of harmful gossip.[20] They may heed the advice to enact blanket "bans" on gossip in the workplace[21] or may rely on more general behavior handbook policies without specific reference to gossip.[22] Now that gossip has gone viral with the aid of the internet, some employers include prohibitions on gossip-type speech or activity in their social media policies.[23] Or, the employer may use general conduct handbook policies to punish gossip posted on social media.[24] There also may be many other cases where the employee's speech or behavior would satisfy a definition of gossip, but was labeled something else by the organization (or the employee).[25]

III: How the NLRB views employer control of workplace gossip

The National Labor Relations Board (the "Board")[26] is the independent government agency charged with enforcing the National Labor Relations Act ("NLRA" or "the Act") of 1935[27] which applies to employees[28] in both union and non-union private sector[29] workplaces.[30]

The NLRA has relevance to employer control of gossip. Section 7 of the Act, includes a ban on employer inference with employee *concerted activity* protected under the Act.[31] Section 8 of the Act makes it an *unfair labor practice* to engage in a variety of activities including to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[32] The Act does not specifically define protected concerted activity, but it does specifically include activities for "mutual aid or protection." [33]

The NLRB has developed its current stance on employer control of gossip though a string of cases from 1989-2011 including four important Board decisions that will be discussed in this section: *Southern Maryland Hospital Center and Office* ("Southern Maryland Hospital")[34]*; Aroostook County Regional Ophthalmology Center* ("Aroostook")[35]; *Ellison Media Co.* ("Ellison Media")[36]; and *Hyundai America Shipping Agency, Inc.* ("Hyundai Shipping").[37]

A. An employer may prohibit "malicious gossip"

In *Southern Maryland Hospital*, the Board affirmed an administrative law judge ("ALJ") decision finding an unfair labor practice where an employer policy in a hospital personnel manual prohibited:

> Malicious gossip or derogatory attacks on fellow employees, patients, physicians or hospital representative...[38] [emphasis added]

The General Counsel argued that the rule was unlawful on the grounds that it was "overbroad" because it contains terms that "unduly interfere with employees' Section 7 rights."[39] The ALJ agreed, but on narrow grounds – the rule was overbroad because it combined in a single provision a prohibition on "malicious gossip" (which the ALJ found to be lawful) with an unlawful prohibition on "derogatory attacks" on hospital representatives.[40] It is worth noting that the hospital was at the time of the complaint in the aftermath of unsuccessful attempts by its employees to organize.[41]

The employer's policy did not define gossip, and discussion of the rule in the ALJ's opinion does not define gossip. Rather, the ALJ provided a dictionary definition of "malicious" to support the finding that *malicious* was different from *derogatory*. Malicious was defined as "given to or marked by malice" and having an intention or desire to harm, usually seriously.[42] The ALJ found that since the hospital had linked the concept of malicious gossip with the derogatory attacks in its work rule, the entire rule was overly broad and therefore unlawful.[43] An important part of the ALJ's reasoning was:

> [T]he Board with Court approval has consistently held that an employer may lawfully maintain a rule that prohibits "malicious" statements, i.e. statements "deliberately and maliciously made, with knowledge of their falsity or with reckless disregard of the truth...[44]

The Board appealed to the Fourth Circuit for enforcement of the order.[45] The Fourth Circuit Court of Appeals agreed to enforce the Board's order with respect to the gossip provision, also finding that it violated the Act because of the associated derogatory attacks prohibition.[46] The Court did not address gossip specifically. However, it did state that, "[i]t is well established that...employers may proscribe 'deliberately or maliciously false' statements..."[47]

Southern Maryland Hospital has come to be widely cited for the proposition that an employer is "privileged" to prohibit malicious gossip and to threaten employees with discipline for doing so.[48]

B. A generalized prohibition on gossip and complaining violates the Act

In *Aroostook*, the Board had the opportunity to consider another gossip case in a healthcare setting; this time the workplace was small and had experienced no union activity.[49] This complaint arose where a physician manager offered to reinstate four nurses he had terminated for discussing grievances within earshot of patients, but only if they would promise to "'stop gossiping and complaining' to one another and to bring any complaint they had to him alone."[50] The ALJ found the doctor's blanket prohibition on gossip unlawful, reasoning that,

> ...what is ''gossiping and complaining'' to an employer might very well reasonably be considered by an employee to be an effort to initiate group action about terms and conditions of employment. Thus a generalized prohibition on ''gossiping and complaining'' also violates the Act.[51]

The Board agreed with the ALJ and also found the nurses' terminations unlawful.[52] Both parties appealed to Court of Appeals for the District of Columbia.[53] The Court agreed completely that the conditions for rehiring the nurses – prohibitions on discussions of complaints (other than with one doctor), and gossip - were unlawful.[54]

In assessing the impact of the ban on gossiping and complaining on the section 7 rights of the nurses, the Court found a very clear violation of the NLRA:

> The effect that these conditions likely would have had on the employees' ability to engage in behavior that is protected under the NLRA is so obvious that ACROC has not seriously attempted to defend the legitimacy of the conditions as imposed. Instead, ACROC claims that the employees should have understood that Dr. Young did not really mean what he said; rather, they should have understood that his harsh terms were intended to impose the more reasonable demand that employees discuss their grievances outside the presence of patients. Neither the ALJ nor the Board were convinced by this argument, and neither are we. Thus, the finding of the Board that ACROC violated the NLRA by placing improper conditions on the rehiring of fired employees must stand. [internal citation omitted][55]

Thus *Aroostook* stands for the proposition that a blanket ban on workplace gossip (or complaining) violates the Act.[56]

C. A verbal threat to discharge for gossip may violate the Act

In *Ellison Media*, the Board evaluated a situation where an employee had been fired pursuant to a verbal ban on gossip between two employees.[57] The employee manual also included a prohibition on the "spreading of malicious gossip."[58] The ALJ reasoned that the employer's verbal threat to discharge the employees for gossip did not constitute a new rule of general application.[59] Distinguishing this case from *Aroostook*, the judge found that the gossip involved here was not protected concerted activity.[60] Citing *Southern Maryland Hospital*, the ALJ went on to affirm the employer's privilege to discipline employees for malicious gossip,[61] finding that the statement barring gossip would not be reasonably understood under the circumstances to be a prohibition to "discussions related to concerted activity about terms and conditions of employment."[62] The ALJ therefore found that the rule banning gossip between the employees was a lawful prohibition on malicious gossip that did not violate the Act.

The Board disagreed. Relying on the *Mushroom Transportation* line of cases, it found that the employer did indeed violate the Act because the conversation was concerted.[63]

> ...And it was protected because it was engaged in for the purpose of "mutual aid or protection" within the meaning of Section 7 of the Act, i.e., the two employees' common interest in eliminating offensive remarks from their workplace.[64]

The Board found that Ellison Media had violated the Act by promulgating an overly broad no-communication rule (gossip ban) and by threatening employees with termination for violating the rule.[65]

D. Is "harmful gossip" the same as "malicious gossip"?

In *Hyundai Shipping*, the ALJ considered a number of oral rules and provisions in an employee handbook, including a rule prohibiting "indulging in harmful gossip."[66] An adjacent rule prohibited "exhibiting a negative attitude towards or losing interest in your work assignment."[67] The General Counsel argued that the "harmful gossip" phrase was ambiguous because "one person's harmful gossip may well be another person's concerted activities."[68] The ALJ agreed on the basis that the phrase was sufficiently ambiguous to allow different interpretations by reasonable people and that some reasonable meanings might include protected activity.[69] In terms of legal support the ALJ cited cases where the Board had found rules overbroad and therefore chilling to employees' Section 7 rights.[70]

The Board disagreed. Although the Board adopted most of the ALJ's other findings in the *Hyundai Shipping* case, it dismissed the complaint allegations pertaining to the bans on harmful gossip and negative attitude.[71] In a two-to-one decision on the point about gossip, the Board ruled that "[g]iven all of the circumstances" it would not find that the employer's rule against "indulging in harmful gossip" would inhibit employees' exercise of Section 7 rights.[72]

Noting that there was no evidence the rule was promulgated in response to any union activity at the company,[73] the Board stated that the only question is whether the employees would reasonably construe the gossip rule as prohibiting Section 7 activity.[74]

In its analysis the Board tried to analogize to a ruling made in the *Claremont Resort & Spa and Hotel* case.[75] That example was chosen because the work rule there also included "negative conversations," but did not prohibit gossip.[76] It also was noted that the Hyundai Shipping company gossip rule applied to everyone without distinction and did not mention managers, as the Claremont Resort rule did.[77] The Board therefore found it necessary to define gossip and consulted Merriam-Webster's, which defines gossip as "rumor or report of an intimate nature" or "chatty talk."[78]

Without further elaboration the Board found that employees would not reasonably construe the employer's rule against "indulging in harmful gossip" to be a prohibition on engaging in Section 7 activity, and therefore ruled in favor of the employer.[79] On the gossip provision, this appears to be a solid win for the employer.[80]

The Board's decision on the gossip provision in *Hyundai Shipping* is curious. At first blush it may seem consistent with the line of cases since *Southern Maryland Hospital* holding that an employer may lawfully prohibit "malicious gossip." However, it may be misleading to assume that "harmful" and "malicious" are one in the same. In *Southern Maryland Hospital* the Board provided the Webster's dictionary definition of "malicious" as involving an act, "given to or marked by malice i.e., 'intention or desire to harm another usually seriously...'"[81] While the Board in *Hyundai Shipping* did not define "harmful," Webster's dictionary defines it to be "of a kind likely to be damaging."[82] This definition lacks the elements of *intent* and *seriousness* that the word "malicious" implies.

Although the Board ruled that the employer's provision prohibiting "harmful gossip" was lawful, there are clearly arguments to the contrary. The ALJ in the *Hyundai Shipping* case and Member Pearce of the Board both believed that the term "harmful gossip" was overbroad because it is so ambiguous as to be capable of different meanings, including a reasonable belief by an employee that it would prohibit protected activity.[83]

Although the terms "malicious" and "harmful" are not synonymous, on the basis of the Board's ruling in *Hyundai Shipping*, employers are equally privileged to ban gossip that is deemed either malicious or harmful.

IV: How NLRB activity in social media area relates to gossip

Employees often gossip using social media,[84] and employers may include bans on gossip in their social media policies.[85] In the past two years the General Counsel has demonstrated a high level of interest in how employers address worker's use of social media.[86]

Complaints by workers about employer actions related to employee social media activities have been summarized in a report prepared by the U.S. Chamber of Commerce ("Chamber Report").[87] The report, prepared with information received pursuant to a FOIA request, indicates the General Counsel's Office received approximately 129 charges involving social media related disciplinary actions from 2009 through early 2011.[88] According to the Chamber Report, the most common issues raised in cases before the Board were that 1) the employer had overbroad policies restricting use of social media; or 2) the employer had unlawfully disciplined or discharged one or more employees due to the content of their social media posts.[89]

The Chamber Report mentions only one case where a specific ban on gossip was included in an NLRB social media related complaint.[90] The example cited was *Qualitest Pharmaceuticals* ("Qualitest"), where a Qualitest employee was discharged, allegedly after the employee had discussed on her Facebook page a warning she had received under the company's conduct policy.[91] The policy includes a prohibition on

> Carrying of tales, gossip and discussion regarding company business or employees[92]

The complaint alleged that this policy and other related Qualitest company policies were "overbroad." The Board closed this case without comment after a complaint had been issued by the General Counsel.[93]

Since this this complaint was resolved privately, we must look to other social media activity in order to anticipate how the Board might have ruled on this type of anti-gossip provision in a social media context.

A. The development of NLRB position regarding Section 7 and social media

Looking to the social media case activity for guidance about bans on gossip generates a good deal of caution. There have been no ALJ or Board decisions on social media cases involving gossip provisions, so one must extrapolate from other similar types of provisions. The Board's position on social media and the protections of Section 7 of the Act has developed through advice memoranda, case settlement and ALJ decisions. The Board's General Counsel has released two reports on cases involving social media in order to give guidance to practitioners.[94] In the press release accompanying the second report, it was noted:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.[95]

The General Counsel also noted the "new and evolving" character of the social media case law currently and that the nature of the case decisions to date were "extremely fact-specific."[96]

1. Advice Memorandum: *Sears Holdings* – anti-disparagement clause did not violate Act

A common provision in social media policies is prohibition on "disparagement," and the General Counsel opined on such a policy in an advice memorandum in 2009. In *Sears Holdings (Roebucks)* ("Sears Holdings") the General Counsel concluded that the retailer's anti-disparagement clause in its social media policy did not violate the Act.[97] The union challenged the policy and the General Counsel for the region requested advice as to whether the social media policy could be reasonably construed to chill Section 7 activity.[98] The General Counsel concluded that Sears Holdings' policy as a whole did not violate the Act because it could not be reasonably interpreted in a way that would chill Section 7 activity,[99] following precedents established in *Lafayette Park Hotel*[100]and *Lutheran Heritage Village – Livona,*[101] even though the disparagement clause taken alone could be construed to do so if read in isolation.[102]

2. Cases: Settlement and ALJ Decisions

Examination of the four most recent social media cases provides a fuller picture of the confused state of the law. The Board recently announced a high profile settlement in *American Medical Response of Connecticut, Inc.* ("AMR"),[103] and is currently considering exceptions to the ALJ decisions in *Hispanics United of Buffalo* ("Hispanics United"),[104] *Karl Knauz BMW, Knauz Auto Group* ("Knauz BMW")[105] and *Three D, LLC d/b/a Triple Play Sports Bar and Grille* ("Triple Play Sports").[106]

a. American Medical Response – anti-disparagement clause did violate Act

The first, and perhaps best-known, social media case was the settlement reached between the Board and AMR in relation to the complaint on Dawnmarie Souza's ("Souza") behalf by her union.[107] The complaint alleged that the employer had violated several of Souza's Section 8 rights by firing her in connection with her extremely rude Facebook posts about her boss. The complaint also alleged *inter alia* that AMR's blogging and internet policy violated the Act.[108] The employer countered that Souza had been fired "for cause."[109]

The AMR company policy in dispute prohibits, "... making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superior, co-workers and/or competitors."[110]

On February 7, 2011 the NLRB announced that it had reached a settlement with AMR on the charges specified in the complaint by the union. Under the terms of the settlement, AMR:

> agreed to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.[111]

The media interpreted the Board's news release as a "win" for Souza.[112] Since this was a settlement there was no legal analysis available along with the Board's announcement.[113]

b. Hispanics United

In *Hispanics United of Buffalo* ("Hispanics United"), five employees of the not-for-profit social services organization were terminated after they engaged in a conversation on Facebook in which they discussed alleged criticism of their work by a particular coworker.[114] In terminating the five, the administrative law judge ("ALJ") found that Hispanics United had violated the Act saying,

> Employees have a protected right to discuss matters affecting their employment amongst themselves. Explicit or implicit criticism by a co-worker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7. That is particularly true in this case, where at least some of the discriminatees had an expectation that [the co-worker] might take her criticisms to management. By terminating the five discriminatees for discussing [the co-worker's] criticisms of HUB employees' work, Respondent violated Section 8(a)(1).[115]

The ALJ ordered Hispanics United to reinstate the five employees with backpay, benefits and other remedies to make them whole.[116] Hispanics United has since appealed the ALJ's ruling to the full Board.[117] This resolution seems to align with the settlement in the AMR case. In both AMR and Hispanics United the employee or employees made work-related posts that were responded to by other employees, which would satisfy the "concerted" element of Section 7 of the Act. [118]

c. Knauz BMW

In Karl Knauz Motors Inc. ("Knauz BMW") a BMW salesman complained on his Facebook page about the quality of food served at a luxury car sales event. At around the same time he also posted about an embarrassing, and potentially dangerous, mishap he witnessed at an adjacent Land Rover dealership owned by the same owner.[119] The salesman was fired for his postings, although it was not entirely clear for which postings because there were conflicting conversations.

In his analysis the ALJ found that the salesman's posts about the quality of food at the BMW event, coupled with on-site meetings to discuss the product launch and incentives for the salesmen, did constitute protected concerted activity.[120] Conversely, he found the postings about the Land Rover accident that the salesman had witnessed were not protected concert activity because they were a "lark" and "had no connection to any of the employee's terms and conditions of employment."[121] The ALJ apparently believed testimony from one of the managers that it was the postings about the Land Rover incident that truly triggered the salesman's dismissal.[122] He therefore found that the salesman was not unlawfully terminated under the Act because the firing was a result of the unprotected postings.[123]

In addition the ALJ addressed whether Knauz BMW had provisions in its employee handbook that might restrict employees in the exercise of their Section 7 rights, which would constitute an unfair labor practice under Section 8. He found three offending provisions. The first states, "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership."[124] The ALJ paraphrased the second and third as prohibiting, "employees from participating in interviews with, or answering inquiries concerning employees from, practically anybody."[125]

> In finding that these provisions violated the Act, the ALJ noted that the Board had the task of balancing the exercise of employees' rights guaranteed them by Section 7 of the Act and an employer's right to operate his business without unnecessary restrictions.[126]

This is done according to the standard set in *Lafayette Park Hotel*,[127] which determines whether the rule in question would "reasonably tend to chill" the employees' exercise of their Section 7 rights.[128] Where the rule is likely to have a chilling effect, the Board may conclude on the basis of *Lutheran Heritage Village – Livonia* that there is an unfair labor practice, even absent evidence of actual enforcement of the rule.[129]

The ALJ found that the rule prohibiting the use of disrespectful or profane language – or any other language resulting in injury to the dealership violated the Act because "employees could reasonably interpret it as curtailing their Section 7 rights."[130] The judge indicated that the word "disrespectful" seemed particularly subjective.[131] With respect to the rules barring employees from participating in interviews or answering inquiries, the ALJ found that these

> ...clearly would be understood to restrict and limit employees in the exercise of their Section 7 rights... If employees complied with the dictates of these restrictions, they would not be able to discuss their working conditions with union representatives, lawyers, or Board agents.[132]

Since these three provisions were found to violate Section 8 of the Act, the employer was ordered to rescind them.[133] The Board's general counsel has appealed this decision to the full Board, and the appeal is currently pending.[134]

In Knauz BMW the decision supported the employer in terms of the termination – firing the salesman for the Facebook posts about the Land Rover did not violate the Act. Although this finding seems at odds with the results in the AMR and Hispanics United cases where the employees prevailed, Knauz BMW is distinguishable on the basis that the Land Rover posts were found by the ALJ to have no connection with his "terms and conditions of employment."[135] The ALJ also found that those specific posts were coupled with no discussion with any other employees of Knauz.[136] Those elements were sufficient to persuade the ALJ that the post was "neither protected nor concerted."[137]

With respect to the handbook policies in Knauz BMW, the ALJ found the three policies to be overbroad in violation of the Act, and ordered rescission of the policies, even though the salesman had not been fired pursuant to protected activity under the Act. This demonstrates the Board's interest in the policing of handbook policies of all stripes. In fact the handbook policies in question at Knauz BMW were not social media policies at all, but rather general employee conduct provisions.[138]

d. Triple Play Sports

In *Triple Play Sports* two employees of a restaurant and sports bar were discharged in connection with a Facebook conversation they shared about the employer's alleged improper withholding of payroll taxes (causing the employees to have a state tax liability).[139] The Facebook conversation was found by the ALJ to be part of an "ongoing sequence of events" that constituted protected concerted activity.[140] Significantly, the ALJ found that one of the employee's act of pressing the "Like" button in Facebook - for which he was fired – constituted concerted activity.[141] He found the terminations unlawful because the employees' Section 7 rights had been violated. However, on the lawfulness of the employer's social media policy, the ALJ found in favor of the employer. The employer's policy stated that employees "may be 'subject to disciplinary action' for 'engaging in inappropriate discussions about the company, management, and/or co-workers.'"[142] Citing *Lutheran Heritage Village-Livona*, the ALJ maintained that the policy would not be reasonably construed to prohibit Section 7 activity.[143] An appeal of this case is currently pending before the full Board.[144]

V: Should employers try to control gossip in the workplace?

In this paper we examined whether bans on gossip are prohibited by Section 8 of the NLRA by constituting an *unfair labor practice.* We have determined that the latest definition of gossip recognized by the Board was given in *Hyundai Shipping* as, "rumor of report of an intimate nature" or "chatty talk."[145] We determined that gossip most likely would be considered to be protected concerted activity when it can be construed as relating to "terms and conditions of employment,"[146] or "matters affecting their employment,"[147] is more than "griping,"[148] and involves discussion with other employees,[149] unless it so "opprobrious" that it loses protection of the Act.[150]

This places employers in a legally awkward position. If the employer seeks to minimize harmful gossip that may one day lead to an expensive jury verdict, it would be a logical organizational policy to enact a ban on gossip. However, recent activity by the Board suggests that such a policy, even by a non-union employer may be considered to be overbroad and may constitute an *unfair labor practice*. The remedies for disciplining employees in violation of the Act could involve reinstatement, back pay and fines.[151]

Employers looking to enact new restraints on gossip in the workplace would be well advised to narrowly tailor the work rules to specifically prohibit only "malicious" or "harmful" gossip and to avoid mention of managers in the work rule.[152] Those who have existing generalized bans on gossip in their employee handbooks should revisit those legacy provisions; it is quite likely those bans violate federal labor law.[153] It is important to note that verbal bans have the same effect as written ones under the Act.[154] Some employers claim to take a "voluntary," "cultural" or "corporate philosophy" approach where all employees agree to a "statement of values" that gossip is unkind and shouldn't happen in the workplace.[155] However, if the policy carries disciplinary action, the Board is not likely to be persuaded that compliance was truly voluntary.

Social media presents special challenges for employers. The ALJ decisions in this area have been somewhat inconsistent with respect to whether specific policy provisions violate the Act. While there has been an attempt to apply traditional rules to new media, the rules do not always translate directly. For example, what is the legal effect of an employee clicking on the "Like" button in Facebook? We now have one ALJ decision where that act was viewed as equivalent to *concerted activity* under Section 7 of the Act, even when undertaken by only one employee.[156]

VI: Commentary: Gossip may be protected, concerted activity

We note with concern the Board's recent definition of gossip in *Hyundai Shipping* as "'rumor or report of an intimate nature' or 'chatty talk.'"[157] Applying this definition caused an ALJ, following *Hyundai Shipping*, to conclude that "a work rule prohibiting gossip could not be reasonably construed as prohibiting Section 7 activity."[158] This ruling seems to be at odds with prior Board decisions in *Aroostook* and *Ellison*. In short, the definition of gossip matters, and the common definition provided by a dictionary of general application may not be the best one in this instance.

Although courts and the NLRB do not consider management literature in their analyses of whether anti-gossip provisions violate the NLRA, the management literature offers some insight as to the function of gossip in organizations which sheds light on its connection to concerted activity. Section 7 provides, *inter alia*, that employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[159] To constitute "concerted activity," employees must be acting in concert with other employees, and not just engaging in personal griping. However, citing NLRB precedent, the ALJ in *Hispanics United* stated that the action of an individual "enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity….Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action.., the object of inducing group action need not be express."[160]

Organizational and management literature report that gossip in organizations functions to "maintain relationships within and between individuals and groups… [and] rumors (a related type of communication), which are transmitted through gossip, are more likely to occur when anxious individuals find themselves in conditions of environmental ambiguity."[161] According to Noon and Delbridge, "Gossip might be the only means of influence available for those excluded from the formal power structure within the organization."[162]

The interpretation of gossip policies is largely dependent upon the definition of "gossip." As noted, the courts and the NLRB generally accept the common dictionary definition as "idle talk" or "chatter." As such, it is difficult to see how gossip could be protected, concerted activity. However, as we have seen in the cases discussed above, the determination of what is "idle chatter" as opposed to discussion of terms and conditions of employment can be very subjective. The organization and management literature provides several more contemporary definitions of "gossip" that align more closely with speech as protected, concerted activity. For example, gossip is defined as "the process of informally communicating value-laden information about members of a social setting"[163] or "evaluative talk between at least two persons that may be spoken (most common) written (less common) or visual."[164]

Applying these definitions and considering the relationship of gossip and power in the workplace it is clear that, although in some cases, gossip whether circulated around the old water cooler or through the new social media, may be simply "idle talk" or "chatter" at best, and at worst may be merely "malicious" with no redeeming value, in other cases, it may constitute preliminary activity toward mutual aid and protection that would constitute protected, concerted activity under the Act.

APPENDIX A

Anti-Gossip Policies the NLRB Has Considered

- Example A: Written rule provides a three-day suspension from hospital grounds for "'"malicious **gossip** or derogatory attacks" on fellow employees and patients."[165]

- Example B: Verbal rule to four employees "stop **gossiping** and complaining" to one another and to bring any complaint they had to manager alone. [166]

- Example C: Written rule, "Will not be personally concerned with or listen to any Sam's Club/Wal-Mart internal disputes, internal problems, rumors, **gossip**, etc. unless told to do so by management," combined with verbal rule against "malicious **gossip**"[167]

- Example D: Written rule, "asks employees 'not to participate in rumors and **gossip** . . . that could cause any type of damage to the facility or anyone employed by the facility.' Further, it states that disciplinary action could be instituted against an employee whose statements 'slander or cause pain to anyone with a malicious intent.'"[168]

- Example E: Written rule, "Not participate in any **gossip**, negative talk, backbiting or conversation that could be disruptive to the team or management…." Combined with verbal rule that, "that any negative talk, backbiting, gossip, or conversation that could be misconstrued or disruptive would not be tolerated and would be grounds for termination."[169]

- Example F: Verbal rule, issued by manager who was "tired" of gossip in the office and that if he saw Miller and Christie **gossiping** anymore, Miller would be fired. Written rule also involved: employee manual contains list of unacceptable activities including the "Spreading of malicious **gossip**..."[170]

- Example G: Written rule, "We will not engage in or listen to negativity or **gossip**. We will recognize that listening without acting to stop it is the same as participating."[171]

Footnotes

[1]According to WinePress Publishing, "The only gossip allowed is talk about our 'No Gossip' policy..." http://winepresspublishing01.notationsite.com/about/no_gossip (last visited May 30, 2012).
[2] Hyundai America Shipping Agency, Inc., 357 N.L.R.B. 80, at 13 (2011).
[3] Jeffrey Rosen (2010, July 21). The Web Means the End of Forgetting. *The New York Times*, p. MM30, http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all
[4] 29 U.S.C. §§ 151-169.
[5] Tim Hallett, Brent Harger & Donna Eder, *Strategies of Adult Gossip*. *Paper presented at the annual meeting of the American Sociological Association, Marriott Hotel, Loews Philadelphia Hotel, Philadelphia, PA*, Aug 12, 2005 http://www.allacademic.com/meta/p19684_index.html (last visited February 7, 2012).
[6]The NLRB has considered cases involving gossip since as early as 1943 when it assessed a prohibition on discussing wages. Ohio Crankshaft, Inc., 048-787, 00-C-002488, March 30, 1943. A reference to "...idle gossip which interferes with production..." makes an appearance in 1946. See, The Iron Fireman Manufacturing Co., 069-19, 19-C-001407, June 26, 1946. The term "common gossip" appears even earlier, in a 1939 case involving rumors of organizing activities. See, John A. Roebling's Sons Co, 017-482, 00-C-000860, November 10, 1939.

[7]This paper is based on research related to alleged unfair labor practices under the NLRA; as such, it will concern only complainants who filed a complaint with the NLRB. Some employees may also (or instead) file charges based on employment law with the U.S. court system or federal agencies such as the Equal Employment Opportunity Commission (or the state equivalent). Our earlier research unearthed ten court decisions from 1992 to 2008 in which gossip was specified as a motivating factor in a discharge, and the employee challenged the termination through the courts. For a discussion of these cases see, Rosemary Hartigan & Paula O'Callaghan, *Loose Lips Bring Pink Slips: Fired for Gossip at the Office*, 40 Acad. Legal Stud. In Bus. Nat'l Proc. __(2009), http://alsb.roundtablelive.org/resources/documents/np%202009%20hartigan,%20r%20and%20o%27callaghan,%20p.pdf (last viewed April 13, 2012).

[8]Hyundai, *supra* note 3 at 2.

[9] The employer's handbook included a rule that threatened disciplinary action for "indulging in harmful gossip" as well as "exhibiting a negative attitude" about work. On the gossip rule the Board overruled the ALJ's finding that the gossip rule was "imprecise, ambiguous, and subject to different meanings, including a reasonable belief that it would include protected activity." A divided Board found that "[g]iven all of the circumstances, ...employees would not reasonably construe the [employer's] rule against 'indulging in harmful gossip' to prohibit Section 7 activity.'" Id at 2.

[10] SHRM Survey Social Media in the Workplace. http://op.bna.com/dlrcases.nsf/id/mroe-8ngv9d/$File/SHRM%20social%20media.pdf

[11]Stephanie Armour (2007, September 10). Office gossip has never traveled faster, 'thanks' to tech. USA Today, http://www.usatoday.com/money/workplace/2007-09-09-office-gossip-technology_N.htm (last visited December 12, 2011).

[12] See, for example, Workplace Gossip: Policies Needed? Workplace Insider, November 26, 2009, http://workplaceinsiders.com/2009/11/26/workplace-gossip-policies-needed/ (last visited March 17, 2012); Margot Carmichael Lester. Tear Down the Rumour Mill: Building a Gossip-Free Workplace to Tame Office Politics. Monster Career Advice, http://career-advice.monster.com/in-the-office/workplace-issues/office-politics-tear-down-rumor-mill/article.aspx (last visited March 17, 2012); and Marie E. McNamara. 3 steps to end veterinary gossip. dvm360, January 1, 2011 (last visited March 17, 2012).

[13] Grant Michaelson, Ad van Iterson & Kathryn Waddington. *Gossip in Organizations: Contexts, Consequences, and Controversies*. 35 GROUP & ORGANIZATION MANAGEMENT 371 (February, 2010) at 372.

[14] Marilyn Gardner, *Some employers get tough on workplace gossip*, CHRISTIAN SCIENCE MONITOR, June 2, 2008, Money & Values, at 13; and *Sam Chapman Speaks with Neil Cavuto about the No-Gossip Zone*, http://www.youtube.com/watch?v=5c5RwM1qM7c (last visited March 31, 2012).

[15] CBS: Chicago, *Office Gossip: Is It a Bad Thing?* (March 29, 2012 10:10 PM), http://chicago.cbslocal.com/2012/03/29/office-gossip-is-it-a-bad-thing/ (last visited March 31, 2012); and Champman, *supra*, note 15 at 9.

[16] SAM CHAPMAN, THE NO-GOSSIP ZONE: A NO-NONSENSE GUIDE TO A HEALTHY, HIGH-PERFORMING WORK ENVIRONMENT (2009).

[17]"There's a greater sense of being part of a team here than in other jobs I've had. If employees do violate the company policy, a manager speaks to them, and if they don't stop, they're let go. It has happened." McKnight, S. (2009, November 15). Workplace gossip? Keep it to yourself. *The New York Times*, p. BU9.

[18] Association of Corporate Counsel, *Legal Risks Associated with Employees' Social Media Use,* March 10, 2010, http://www.acc.com/legalresources/quickcounsel/wcawesmu.cfm (last visited January 16, 2012); Marcie Cornfield**,** *Commentary: Implementing a No-Gossip Policy* , wislawjournal.com, August 16, 2010, http://wislawjournal.com/2010/08/16/commentary-implementing-a-nogossip-policy/(last visited March 17, 2012).Elizabeth Ison, *Employers Can't Afford to Ignore Malicious Office Gossip*, January 4, 2012, http://www.hrcsuite.com/productivity/gossip (last visited January 16, 2012). But see, William Dotinga, Brothel Gossip Wasn't Defamatory, Judge Says, COURTHOUSE NEWS SERVICE, January 12, 2012, http://www.courthousenews.com/2012/01/12/43000.htm (last visited March 1, 2012), based on Duste v. Chevron, 2012 U.S. Dist. LEXIS 2236 (2012).

[19] Saphronia Young, *Triangulation in the Workplace ("gossip"),* July 6, 2011, http://ameryounglaw.com/blog/ (last visited March 17, 2012).

[20] Gardner, *supra*, note 13. Erika Hayasaki, *4 go through the mill over a rumor - Gossip about their boss cost women their town hall jobs. Now everybody's talking*, LOS ANGELES TIMES, July 24, 2007, http://articles.latimes.com/2007/jul/24/nation/na-rumor24 (last visited December 12, 2011).

[21] See, for example, WinePress Publishing's No Gossip Policy, which states, "The only gossip allowed at WinePress Publishing is talk about our "No Gossip" policy." http://winepresspublishing01.notationsite.com/about/no_gossip (last visited March 17, 2012).

[22] See, Brinson v. Barden Mississippi Gaming, 2007 U.S. Dist. LEXIS 21965 (Miss. 2007 ("policy against 'breaches of confidentiality and/or spreading rumors.'"); Bick v. Harrah's, 2001 U.S. App. LEXIS 455 (7th Cir. 2001)("... involvement in other people's business will result in immediate termination.'"); State *ex rel.* Wal-Mart v. Riley, 159 Ohio App. 3d 598 (2005)(policy against "...Harassment/Inappropriate Conduct."); and Jackson v. Ritter, 1992 U.S. Dist. LEXIS 12114 (Ala. 1992)("…the company policy of not doing things that make the workplace unpleasant for fellow workers.") .

[23] Brenda Tassava, When Veterinary Gossip Goes Global: Create a Social Media Policy and Keep Internal Matters Private, (November 2, 2011) available at http://veterinaryteam.dvm360.com/firstline/Veterinary+team/When-veterinary-gossip-goes-global/ArticleStandard/Article/detail/747169 (hospital administrator recommends that practices create social media policy dealing with gossip) (last visited May 22, 2012).

[24] "...carrying of tales, gossip, and discussion regarding company business or employees," Qualitest Pharmaceuticals NLRB Case No. 10-CA-38757 (complaint issued February, 23, 2011) as cited in, A Survey of Social Media Issues Before the NLRB, U.S. Chamber of Commerce, Labor, Immigration & Employee Benefits Division (August 5, 2011)(case closed, 6/21/2011).

[25] Fired-for-gossip cases are sometimes given other names, particularly if the gossip was posted or spread online. For example, the first known "fired-for-blogging" case was Heather Armstrong in 2002. Armstrong has shared "...I was fired from my job for this website because I had written stories that included people in my workplace." See, DOOCE, http://dooce.com/about (last visited March 31, 2012). Talking about one's coworkers without their knowledge on one's personal website would fit most definitions of gossip. Armstrong apparently did not legally challenge her termination. Rather, she went public with her experience by writing about it on her website. The name of the website gave birth to the term, "getting dooced," for social-media based termination; this largely has been displaced by newer terms, such as "Facebook firing" or "fired for blogging." Blogging and the NLRA has been discussed in several law reviews. *See generally*, Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355 (2007); Marc Cote, *Getting Dooced: Employee Blogs and Employer Blogging Policies Under the National Labor Relations Act*, 82 WASH. L. REV. 121 (2007); and Katherine M. Scott, *When Is Employee Blogging Protected by Section 7 of the NLRA?*, 2006 DUKE L. & TECH. REV. 17 (2006).

[26] In this paper "ALJ" will refer to the administrative law judge who conducts a trial and renders a decision in unfair labor practice cases. "Board" will refer to the three-member panel that reviews ALJ decisions and issues decisions of the National Labor Relations Board. "General Counsel" will be used to refer to the General Counsel's Office, the independent office responsible for the investigation and prosecution of unfair labor practice cases and for the supervision of NLRB field offices in the processing of cases. See, THE NLRB PROCESS, http://www.nlrb.gov/nlrb-process (Last visited April 1, 2012).

[27] *Supra* note 2.

[28] See, 29 U.S.C §152 for definition. "Employee" for purposes of the Act, excludes, "many categories of workers, including independent contractors, agricultural workers, domestics, managers, and supervisors," notes David C. Yamada, in *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 39 (1998). For an explanation of the jurisdictional limits of the NLRA, see, JURISDICTIONAL STANDARDS, https://www.nlrb.gov/rights-we-protect/jurisdictional-standards (Last visited April).

[29] The Act does not apply to governmental employers, however public sector employees may argue that gossip falls within free speech protections that private employees do not enjoy. See, Jerome O'Callaghan, Rosemary Hartigan & Paula O'Callaghan, *Gossip, the Office and the First Amendment*, 25 NORTH EAST J. LEGAL STUDIES 1 (Spring, 2011).

[30] Yamada notes that although the jurisdiction of the NLRA covers about 57% of the U.S. workforce (43% are excluded), the Act suffers from a lack of awareness that its protections apply outside the collective bargaining environment, even among legal professionals and scholars. See, David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN L. J. 475, 518 (2000 . *See also*, Nancy J. King, Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces, 40 AM. BUS. L. J. 827 (Summer 2003) ("[I]t is time for renewed discussion of the application of traditional labor law to non-union workplaces. New insights are needed because the National Labor Relations Board ... and the federal courts have taken a more expansive view of what, under the NLRA, constitutes 'protected concerted behavior' in the workplace.").

[31]Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]. Corbett argues that the applicability of Section 7 of the Act to non-union employees may be "one of the best- kept secrets of labor law..." and that "It also may be one of the best means for protecting employee rights in the United States in the twenty-first century." 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, 278 (2002).
[32] 29 U.S.C. § 158(a)(1).
[33] 29 U.S.C. § 157.
[34] Southern Maryland Hospital Center and Office, 293 N.L.R.B. 1209 (1989), *enforcement granted in relevant part, enforcement denied in part*, National Labor Relations Board v. Southern Maryland Hospital Center, 916 F.2d 932(4th Cir 1990).
[35] Aroostook County Regional Ophthalmology Center, 317 N.L.R.B. 218 (1995), *enforcement granted in relevant part, enforcement denied in part*, Aroostook County Regional Ophthalmology Center v. National Labor Relations Board, 81 F.3d 209 (D.C. Cir 1996) .
[36] Ellison Media Company 344 N.L.R.B. 1112 (2005).
[37] Hyundai America Shipping Agency, Inc. 357 N.L.R.B. 1 (2011).
[38] Southern Maryland Hospital, 293 N.L.R.B. 1209, 1221 (1989).
[39] Id. at 1221.
[40] Id. at 1222.
[41] "These various organizational efforts culminated in Board-conducted elections in five separate units...None of the unions won, no exceptions were filed, and the results were certified. However, as an outgrowth of the campaign, the Union filed unfair labor practice charges against the Company." Id. at 1210.
[42] Id. at 1222. Derogatory, by comparison, was found to mean expressive of low estimation or disparaging. "Thus for example, an assertion that an employer overworks its employees, which would constitute the most elementary kind of union propaganda, could fairly be regarded as "derogatory" toward the employer, but would not, absent unusual circumstances, be "malicious."
[43] Id.
[44] Id., citing Radisson Muehlebach Hotel, 273 N.L.R.B. 1464 (1985); Stanley Furniture Co., 271 N.L.R.B. 703, 704 (1984); American Cast Iron Pipe Co., 234 N.L.R.B. 1126, 1131 (1978); enfd. 600 F.2d 132, 136-7 (8th Cir. 1979).
[45] National Labor Relations Board v. Southern Maryland Hospital Center, 916 F.2d 932; 1990 U.S. App. LEXIS 18092 (1990, 4th Cir.).
[46] Id. at 940. Context may be important to this outcome though. The court said, "It may very well be true that derogatory attacks destroy, as the hospital puts it, "the positive work atmosphere," but the values of free speech and union expression outweigh employer tranquility in this instance" indicating that the union activity and public nature of the workplace may have been influential in this decision.
[47] Id.
[48]See for example, Sam's Club, 342 N.L.R.B 620 (2004); Ellison Media Company, 344 N.L.R.B. 1112 (2005);and Hills and Dales General Hospital, Docket No. 7-CA-53556, at 8 (N.L.R.B. Div. of Judges Feb. 17, 2012), *available at* http://www.nlrb.gov/case/07-CA-053556 (pagination based on NLRB-source document).
[49] Aroostook County Regional Ophthalmology Center, 317 N.L.R.B. 218 (1995), *enforcement granted in relevant part, enforcement denied in part*, Aroostook County Regional Ophthalmology Center v. National Labor Relations Board, 81 F.3d 209 (D.C. Cir 1996) ("ACROC employs several physicians to perform eye surgery and to otherwise treat patients who use the Center. The non-physician staff at ACROC is not unionized, and it is undisputed that there has been no union activity or solicitation among these employees").
[50] Id. at 219 .
[51] Id. at 229.
[52] Id. at 219.
[53] ACROC filed for review , and the NLRB filed for enforcement of the Board's order. Aroostook County Regional Ophthalmology Center v. National Labor Relations Board, 81 F.3d 209 (D.C. Cir 1996).
[54] Id. at 215.
[55] Id.
[56] Unless it applied only to workers who are exempt from the reach of the Act, such as managers and supervisors. See, 29 U.S.C §152
[57] The employer is a media buyer for infomercials and religious programming. The incident that gave rise to this complaint involved an ambiguous remark of a somewhat sexual nature about the boss of the division. The two employees, neither of whom made the remark, were discussing what to do about it (e.g. whether it should be reported). Ellison Media Company, 344 N.L.R.B. 1112, 1117 (2005)
[58] Id. at 1119-20.
[59] Id. at 1119.
[60] Id.
[61] Id. at 1120. See also, Sam's Club, 342 N.L.R.B. 620 (2004)(cited by the ALJ for the same proposition).

[62] Id.
[63] Id. at 1113.
[64] Id. at 1113-4. Mushroom Transportation Co. v. N.L.R.B., 330 F.2d 683, 685 (3d Cir. 1964) ("It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or preparing for group action or that it had some relation to group action in the interest of the employees.").
[65] Id. at 1112. Interestingly, the original complainant who was fired in connection with the incident that gave rise to the rule was not reinstated; the Board agreed with the ALJ that the General Counsel failed to establish that protected concerted activity was a motivating factor in the discharge.
[66] Hyundai America Shipping Agency, Inc. 357 N.L.R.B. 1, 13 (2011) (The full rule reads, "Threatening, intimidating, coercing, harassing or interfering with the work of fellow employees or indulging in harmful gossip." It appears the General Counsel objected specifically to the phrase "harmful gossip.")
[67] Id. at 2.
[68] Id.
[69] Id.
[70] Id. See, Lafayette Park Hotel, 326 N.L.R.B. 824 (1998) (a rule against making false, vicious, profane or malicious statements concerning the employer or any of its employees was found to be overbroad); See also, Claremont Resort Spa and Hotel, 344 N.L.R.B. 646 (2004) (rule prohibiting "negative conversations" about associates or managers violated the Act, applying three-part test from Lutheran Heritage Village-Livonia 343 NLRB 6464 (2004)).
[71] Id. at 2. The board also found another handbook rule about exhibiting a "negative attitude" toward work or a loss of interest in the employee's work assignment not to violate the Act.
[72] Id.
[73] Id.
[74] Id.
[75] Id.
[76] Claremont Resort Spa and Hotel *supra* note 68. (rule prohibiting "negative conversations" about associates and managers found to violate Act).
[77] Id. To distinguish this case from Claremont Resort *supra* note 68.
[78] Id.
[79] Id. (There was a split on the Board on this point. In footnote 4 it was noted "Contrary to his colleagues, Member Pearce would adopt the judge's findings that the Respondent's rules prohibiting employees from "indulging in harmful gossip" and from "exhibiting a negative attitude toward...your work assignment" violated Sec. 8(a)(1). Regarding the former, Member Pearce agrees with the judge that the "the term 'harmful gossip' is imprecise, ambiguous, and subject to different meanings, including a reasonable belief that it would include protected activity." ...He does not view the rule declared unlawful in *Claremont Resort* as materially distinguishable from the present rules. Accordingly, as employees would reasonably construe the language of both rules to prohibit Sec. 7 activities, Member Pearce would adopt the judge's findings that they violated Sec. 8(a)(1).") Id at 3.
[80] We note a puzzling inconsistency between the Board's Decision and Order and the text of the Appendix on p. 5 which states, "WE WILL revise or rescind the provision in our Employee Handbook under the heading Employee Conduct that contains the following language threatening disciplinary action for: "14 – indulging in harmful gossip." Id. at 5.
[81] Southern Maryland Hospital, *supra* at note 40.
[82] http://www.merriam-webster.com/dictionary/harmful
[83] Hyundai at 3 (see footnote 4) ("Counsel argues that the phrase "harmful gossip" is ambiguous, and one person's harmful gossip may well be another person's concerted activities. I agree.") Hyundai at 13.
[84]The General Counsel's office defines social media thus, "Social media include various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications." Report of the Acting General Counsel Concerning Social Media Cases, Division of Operations Management (August 18, 2011) available at http://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases (last viewed April 5, 2012).
[85] See, for example, http://www.hjlawfirm.com/IT-eCommerce/Considerations-for-your-Company-s-Privacy-and-Social-Media-Policies.shtml (Law firm recommendation that "A social media policy should focus on the identification of risks associated with the corporate presence in a social network [including] (ii) clarification that workplace gossip is not tolerated and could have reprimand or termination consequences).
[86]In April 2011, the acting general counsel ordered all NLRB regional directors to submit to the Division of Advice for review all, "Cases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter." Lafe E. Solomon, Acting General Counsel, National Labor Relations Board, Memorandum, (April 12, 2011). The Board's general counsel has released two reports on social media

cases, dated August 18, 2011 and January 24, 2012. Both reports available at: http://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report For an excellent analysis of approximately 24 of the Board's social media advice opinions and decisions, see, Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. ___ (2012)

[87] Michael J. Eastman, Exec. Dir., Labor Law Policy, U.S. Chamber of Commerce, A Survey of Social Media Issues Before the NLRB 2 (Aug. 5, 2011), available at http://www.uschamber.com/reports/survey-social-media-issues-nlrb (last viewed April 5, 2012).

[88]Id. at 3. The case information contained in this report was obtained by the Chamber of Commerce through a FOIA request that was responded to by the NLRB on May 5, 2011. (The scope of the project is limited to "issues raised through the use of Facebook, Twitter, and similar channels. There are additional cases involving very similar issues, such as employees posting information onto more traditional web pages [citation omitted] Clearly, these cases will inform the development of the law as it relates to social media. However, we leave that discussion for another day" (p. 2-3)).

[89] Id. at 1.

[90] Id. at 5 ("The majority of the allegations, however, aver that the rule or policy restricts discussions permitted by the Act.").

[91] Id. at 24. This appeared to be part of the company's general conduct policy rather than a specific social media policy.

[92] Id. at 33.

[93] Qualitest Pharmaceuticals, Case No. 10-CA-38757 (complaint issued February 23, 2011; case closed June 21, 2011). Docket available at https://www.nlrb.gov/case/10-CA-038757#events (last viewed February 29, 2012) The Chamber Report notes that the "overwhelming number of meritorious cases are settled, either before or after a complaint is issued." Id. at 3.

[94]Report of the Acting General Counsel Concerning Social Media Cases, Division of Operations Management, (January 25, 2012) available at http://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report (last viewed April 5, 2012) ("covers 14 cases, half of which involve questions about employer social media policies. Five of those policies were found to be unlawfully broad, one was lawful, and one was found to be lawful after it was revised. The remaining cases involved discharges of employees after they posted comments to Facebook. Several discharges were found to be unlawful because they flowed from unlawful policies. But in one case, the discharge was upheld despite an unlawful policy because the employee's posting was not work-related."); and Report of the Acting General Counsel Concerning Social Media Cases, Division of Operations Management (August 18, 2011) available at http://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases (last viewed April 5, 2012) (covers 14 cases, "In four cases involving employees' use of Facebook, the Division found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, the Division found that the activity was not protected. In one case, it was determined that a union engaged in unlawful coercive conduct when it videotaped interviews with employees at a nonunion jobsite about their immigration status and posted an edited version on YouTube and the Local Union's Facebook page. In five cases, some provisions of employers' social media policies were found to be unlawfully overly-broad. A final case involved an employer's lawful policy restricting its employees' contact with the media.")

[95] Acting General Counsel Issues Second Social Media Report, National Labor Relation Board (January 25, 2012) available at https://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report (last viewed April 5, 2012).

[96] Id.

[97] Sears Holdings (Roebucks), No. 18-CA-19081 (Complaint filed June 16, 2009)(Case closed December 15, 2009); Advice Memorandum dated December 4, 2009 available at http://www.nlrb.gov/case/18-CA-019081 (last visited April 4, 2012). (The policy included this provision in a long list of subjects that "may not be discussed by associates in any form of social media," ..."Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects")

[98] Id.

[99] Id.

[100]Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998) (that the appropriate inquiry is whether the rule being questioned "would reasonably tend to chill employees in the exercise of their Section 7 rights.").

[101] Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004) ("First, the rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8 (a)(1) upon a showing that: (1)employees would reasonably construe the language to prohibit Section 7 activity; (2)the rule was promulgated in response to union activity; or (3)the rule has been applied to restrict the exercise of Section 7 rights.")

[102] Sears Holdings at 6, citing Tradesmen International, 338 N.L.R.B. 460, 462 (2002).

[103] American Medical Response of Connecticut, Inc., Case 34-CA-012576, https://www.nlrb.gov/category/case-number/34-ca-012576#documents (last visited February 28, 2012).

[104] Hispanics United of Buffalo, Inc., Docket No. 3-CA-27872, 2011 WL 3894520, at 7 (N.L.R.B. Div. of Judges Sept. 2, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580622877

[105] Karl Knauz Motors, Inc., d/b/a Knauz BMW, Docket No. 13-CA-46452, 2011 WL 4499437, at 1-3 (N.L.R.B. Div. of Judges Sept. 28, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/
[106] Three D, LLC d/b/a Triple Play Sports Bar and Grille, Case 34-CA-12915, (N.L.R.B Div. of Judges, January 3, 2012), available at http://www.nlrb.gov/case/34-CA-012915 (last viewed April 5, 2012).
[107]American Medical Response of Connecticut, Inc., Case 34-CA-012576, https://www.nlrb.gov/category/case-number/34-ca-012576#documents (last visited February 28, 2012). "Certain facts were not included in the AMR complaint – i.e. that the employee's negative remark about the supervisor posted on her personal Facebook page drew supportive responses from her co-workers and led to further negative comments about the supervisor from the employee." Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 UNIVERSITY OF LOUISVILLE LAW REVIEW 1 (2011) at 21.
[108] https://www.nlrb.gov/category/case-number/34-ca-012576#case details (last visited February 28, 2012) For an excellent discussion of this case in detail, see, Christine O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK UNIVERSITY LAW REVIEW 29 (2011).
[109] Susanna Kim, *NLRB Backs Worker Fired over Facebook Posts Ripping Boss*, ABC NEWS (Nov. 10, 2010), http://abcnews.go.com/Business/facebook-firing-labor-board-takes-stand/story?id=12099395 (last visited Feb. 28, 2012).
[110] Id. (quoting AMR company handbook).
[111] NLRB news release available at http://www.employerlawreport.com/2011/02/articles/workforce-strategies/nlrbs-facebook-firing-case-against-amr-settles/#axzz1rBja3Hoy (last viewed April 5, 2012). Settlement agreement available at http://www.minnesotaemploymentlawreport.com/NLRB%20Facebook%20Settlement.pdf (last viewed April 5, 2012).
[112] However the Board's press release was largely silent about what the settlement meant for Souza, saying only that, "The allegations involving the employee's discharge were resolved through a separate, private agreement between the employee and the company.") See, http://www.employerlawreport.com/2011/02/articles/workforce-strategies/nlrbs-facebook-firing-case-against-amr-settles/#axzz1rBja3Hoy (last viewed April 5, 2012). See also,
Melanie Trottman, For Angry Employees, Legal Cover for Rants, The Wall Street Journal, December 2, 2011, http://online.wsj.com/article/SB10001424052970203710704577049822809710332.html (last visited February 28, 2012).
[113] For an in-depth analysis of this case, see, Christine O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK UNIVERSITY LAW REVIEW 29 (2011).
[114] Hispanics United of Buffalo, Inc., Docket No. 3-CA-27872, 2011 WL 3894520, at 7 (N.L.R.B. Div. of Judges Sept. 2, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580622877
[115] Id. at 9.
[116] Id. at 10.
[117] http://www.nlrb.gov/category/case-number/03-ca-027872#events Reference NLRB email of 1/25/2012 in which it is mentioned that this is one of three cases involving social media currently pending before the Board.
[118] If the posts had been found to be merely individual gripes, they would not have enjoyed this protection. See, Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3rd Cir. 1964).
[119] Karl Knauz Motors, Inc., d/b/a Knauz BMW, Docket No. 13-CA-46452, 2011 WL 4499437, at 1-3 (N.L.R.B. Div. of Judges Sept. 28, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580683b21
[120] Id. at 9.
[121] Id.
[122] Id. at 5-6. He later cited *Wright Line*, 251 NLRB 1083 (1980). This case requires a *prima facie* showing that the protected activity was a motivating factor in the termination. The ALJ states, "I find that Becker was fired on June 22 because of his Facebook posting of the Land Rover accident, and as a result, I find that Counsel for the General Counsel has not sustained his initial burden under *Wright Line..."*
[123] Id. at 9.
[124] Id. at 9.
[125] Id.
[126] Id. at 9-10.
[127] 326 NLRB 824, 825 (1978).
[128] Knauz BMW at 10.
[129] 343 NLRB 646 (2004).
[130] Knauz BMW at 11.
[131] Id.
[132] Id. at 10.

[133] In fact the employer already had done so, but the company's rescission was not sufficient to meet the Board's requirements or a finding of an unfair labor practice. Id. at 12.
[134] Acting General Counsel Issues Second Social Media Report, National Labor Relation Board (January 25, 2012) available at http://www.nlrb.gov/category/case-number/13-ca-046452 (Last viewed April 5, 2012).
[135] Knauz BWM at 9. Although this is what that ALJ found, this is debatable and probably will be an issue on the appeal.
[136] Id. In this case though the ALJ may have been referring to "discussion" in the sense of an on-site meeting because it appears that the Land Rover posts did generate some reply posts on Facebook from Knauz coworkers such as ""How did I miss all the fun stuff?" and ""Finally, some action at our Land Rover store." Id. at 4.
[137] Knauz BMW at 9.
[138] Id. at 6-7.
[139] Three D, LLC d/b/a Triple Play Sports Bar and Grille, Case 34-CA-12915, (N.L.R.B Div. of Judges, January 3, 2012), available at http://www.nlrb.gov/case/34-CA-012915 (last viewed April 5, 2012).
[140] Id. at 8.
[141] Id. at 9 ("I find therefore that Spinella's selecting the "Like" option, in the context of the Facebook conversation, constituted concerted activity as well.")
[142] Id. at 20.
[143] Id.
[144] Id. at note 134. See also, Acting General Counsel Issues Second Social Media Report, National Labor Relation Board (January 25, 2012) available at http://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report (Last viewed April 5, 2012) (Noting this is one of three cases involving social media currently pending before the Board).
[145] *Supra* at note
[146] Knauz BMW at 9.
[147] Hispanics United at 9.
[148] See, Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3rd Cir. 1964) and Wal-Mart, No. 17-CA-25030 (Complaint filed December 9, 2010)(Case closed July 25, 2011); Advice Memorandum dated July 19 4, 2011 available at http://www.nlrb.gov/case/17-CA-025030 (last visited April 25, 2012). (Employee's "Facebook postings were an expression of an individual gripe...Comments must look toward group action; "mere griping" is not protected [citing Mushroom Transrp. Co.]").
[149] Knauz BMW at 9.
[150] It is possible for otherwise protected activity to lose protection through the employee's "opprobrious" conduct. The so-called *Atlantic Steel test* has four factors: 1) the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. Atlantic Steel Co., 245 N.L.R.B. 814, 816 (1979).
[151] http://www.nlrb.gov/chartsdata/remedies#chart6tag
[152] Hyundai at 2.
[153] Ironically, the "No-Gossip Zone Policy" advocated by Chapman in his book, The No Gossip Zone, appears to be problematic under current law. He advocates a four step approach: "1)a formal agreement among all employees (either verbal or written) not to participate in gossip; 2)An agreement to identify and stop gossip when it is heard; 3)An agreement to "follow-up" with the person who being gossiped about and share what was said; and 4)An ongoing commitment to reveal one's true feelings, thoughts, and desires within the work environment, thereby removing any need or environment for gossip." Step 1 appears to be a generalized prohibition on gossip that would violate Section 8 of the Act under the reasoning in *Aroostook*.)
[154] Ellison Media at 1112.
[155] Margot Carmichael Lester, *Tear Down the Rumor Mill: Building a Gossip-Free Workplace to Tame Office Politics*, http://career-advice.monster.com/in-the-office/workplace-issues/office-politics-tear-down-rumor-mill/article.aspx
[156] Supra at note 136.
[157] Hyundai, supra at note 9.
[158] Hills and Dales General Hospital, Case No. CA-53556, 8, Division of Judges (February, 17 2012)
[159] Id at Sec 7 [§§
[160] *Hispanics United*, Id at 7.
[161] Grant Michelson, Ad van Iterson, and Kathryn Waddington. *Gossip in Organizations: Contexts, Consequences, and Controversies.* 35 GROUP AND ORGANIZATION MANAGEMENT 371 (February, 2010) at 373, 374.
[162] Mike Noon & Rick Delbridge, *News From Behind My Hand; Gossip in Organizations*, 23 ORGANIZATION STUDIES 14 (Winter, 1993).
[163] *Id.*
[164] Michaelson, van Iterson, and Waddington, Id. at 379.

[165]Rule found to violate the Act because the lawful gossip provision was combined with the unlawful prohibition on derogatory attacks. Southern Maryland Hospital, supra note xx at 940.
[166] Rule found to violate the Act because a generalized prohibition on gossiping and complaining could reasonably be considered to prohibit discussions of terms and conditions of employment. Aroostook, supra note xx at 12.
[167] Rule found lawful because an employer is privileged to prohibit "malicious" gossip, citing Southern Maryland Hospital. Sam's Club, A Division of Wal-Mart Corporation, 342 N.L.R.B. 57, 635 (2004).
[168] Rule found lawful because inclusion of the term "malicious intent" prevents the prohibition from being overly broad or restrictive of employees' Section 7 rights. Wilshire at Lakewood, 343 N.L.R.B. 23, 153 (2004).
[169] Rule found to violate the Act because "disruptive" was overly broad. Brighton Retail, 354 N.L.R.B. 362, 7 (2005).
[170]Verbal rule was found to violate the Act. Ellison Media Company, supra note xx at 1113.
[171] Rule found to violate the Act because of link to "negativity." Hills and Dales General Hospital, supra note 158.