

# THE TOP TEN NLRB CASES ON FACEBOOK FIRINGS AND EMPLOYER SOCIAL MEDIA POLICIES

By

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*Social media have profoundly changed communications for our personal and professional lives, from social networking to job searching, to social movements and more. Facebook, Twitter, LinkedIn, Pinterest, tumblr, instagram, blogs, as well as emerging social media concepts, have re-imagined our methods and means for speech, interaction and connection. Computers, iPads and smartphones are the means for this intense multi-platform engagement in social media, resulting in the blurring of work and personal time, on work and personal equipment as well as accounts. This further complicates the employment relationship as companies seek to protect their brand, trade secrets and employee communications by publishing social media policies (SMPs). In the context of unfair labor practice cases, the National Labor Relations Board has been reviewing employer social media policies and actions that interfere with rights that apply whether employees are in a union or not. This article outlines the top ten cases in this area to instruct employers and employees on what policies and comments are lawful or protected. The cases encompass employer policies that an employee would reasonably perceive to infringe upon employee rights to engage in National Labor Relations Act- protected concerted activities, and instances where an employee is disciplined or discharged for engaging in protected activity.*

## I. Introduction

In recent cases that captured the interest of the news media, the National Labor Relations Board (NLRB or the Board) applied the National Labor Relations Act (NLRA or the Act) to protect employee discussion about wages, hours and working conditions, union organizing, and concerted communication for mutual aid and protection on social media such as Facebook and Twitter. The complaints of unfair labor practices involved social media policies (SMPs) that chilled protected speech under the Act and, in some instances, discipline and discharge of employees for engaging in concerted activities that are protected under the NLRA. In both types of cases, the Board made clear that the new methods of communication on social media are subject to the same standards for NLRA protection as discussions that take place face to face at work in real time around the water cooler.<sup>1</sup> It is surprising how many managers are unaware that even non-union employees in the private sector are covered by the National Labor Relations Act's protection of work-related communications. Because of this oversight, it can ensnare any business in a costly and time-consuming legal issue that could very easily have been avoided if they had more familiarity with the rules of labor and employment law.

The NLRB reacts to unfair labor practices relating to infringement of employees' Section 7 rights by requiring employers to remedy unlawful discipline or discharge actions by reinstating employees back in the position they would have been in absent the unlawful discrimination - with full back pay, plus interest for any periods of suspension or discharge. Furthermore, the NLRB will require the posting of a notice of employee rights under the NLRA, as well as a statement that the employer will not commit unfair labor practices in future. With respect to overbroad SMPs or other employer policies, the Board will require revisions to fit within the contours of the NLRA; require that notices be posted outlining employee rights under the NLRA; and such notices generally state that the employer's policy has been revised to remedy problem areas and that the employer will not commit unfair labor practices in the future. Where employers usually communicate with employees by email, the Board will require such notices to be sent to employees' email.<sup>2</sup>

In order to understand the NLRB's oversight of employer SMPs, one needs to look to the growing number of Board decisions, the Board's Acting General Counsel's three summary reports regarding the social media cases considered by the Board's Division of Advice (DOA), as well as advisory opinions from Advice that serve as guidance to regional offices on the subject area of interference with protected activity on social media. These decisions, reports and memos detail what types of social media, confidentiality, and other restrictive policies infringe upon NLRA protected concerted activities, and highlight that the Board will order revision of employer SMPs that infringe upon protected employee speech even in the absence of employer enforcement of such policies. This article outlines the evolution of the social media cases, some of which were disposed of by Advice Memorandum and settlement or Administrative Law Judge Decisions rather than Board decisions. The top ten cases will be considered in chronological order, highlighting the key issues and important rules derived for future guidance to employers and employees alike. While the NLRB is currently facing legal challenges to its power to enforce the NLRA,<sup>3</sup> the Board and its acting general counsel maintain that employers must abide by the strictures of the NLRA with respect to concerted communication on social media and revise SMPs and other rules that chill section 7 activities.<sup>4</sup>

The Board's Acting General Counsel (AGC) Lafe Solomon has been extremely vocal about the Facebook firing/employer SMP cases. He made excellent use of the media interest in these cases to get the Board's message out to the public on the important workplace rights protected by the NLRA. The visibility of the Board in the social media cases came

at an opportune moment, because despite the Board's efforts to mandate rights' posters in workplaces through administrative rulemaking, the agency experienced judicial challenges that delayed implementation and thus has been unable to implement its rights' poster rule.<sup>5</sup> One of the best kept secrets in labor law is that the NLRA applies to protect concerted communications of both nonunion and unionized private sector employees. Getting this information out to the working public is increasingly important for the Board to remain relevant to the American people as the base of union members in the private sector in the United States has shrunken over the past decades.<sup>6</sup> During 2011-12, at approximately six month intervals, AGC Lafa Solomon issued three reports on the social media cases summarizing the Board's treatment of the cases that were sent to the Division of Advice for uniform treatment.<sup>7</sup> Cases from the reports as well as some of the NLRB's most recent decisions are highlighted in the following top ten survey of the key cases on this topic.

I. The NLRB Enforces Employees' Right to Engage in Concerted Activities and Closely Scrutinizes Employer Social Media Policies Even Absent Enforcement

1. **AMR** - The First Facebook Firing Case - The NLRB in the News on Social Media Use – Settlement included Requirement to Revise SMP

This case makes the top ten because it is the first case that put the topic of Facebook firing and SMPs being regulated by the NLRB to the forefront of the news media. Over the last five years, when the NLRB directed its attention to the issue of NLRA protection of employee use of social media, it weighed in on two areas: employer discharges for protected activities and overbroad employer policies that infringe on section 7 rights. Initially the Board's action in this area was largely in the background, rather than in the news, with the Board's Division of Advice ruling by Advice Memoranda on early cases.<sup>8</sup> When the *American Medical Response* (AMR) Division of Advice Memorandum was reported in Fall, 2010, the news went viral, pushing the NLRB into the spotlight regarding its pursuit of unfair labor practices relating to employee social media use.<sup>9</sup> While the AMR case was not precedent-setting because the parties settled,<sup>10</sup> it nonetheless had a significant impact. The case alerted the public to the fact that the NLRA applies to employees broadly in the private sector and that the NLRB will pursue charges against employers where SMPs or adverse employment acts are alleged to have infringed on employees' protected concerted activities.

The AMR case involved an emergency medical technician (EMT) who was suspended after she inadequately filled out an incident report relating to a customer complaint. Thereafter, at home, she posted on Facebook derogatory remarks about her supervisor, describing him as a "scumbag" and a "17" (AMR code for a psychiatric patient), and then she was fired.<sup>11</sup> The supervisor had refused the EMT's lawful request to have her union representative assist her with the incident report.<sup>12</sup> Thus, it could be argued that this prompted, and to some extent, justified her online complaints about him.<sup>13</sup> The EMT and the company ultimately reached a private settlement regarding her discharge, but the Board in its settlement with AMR required the company to revise its SMP nationwide.<sup>14</sup> AMR agreed to revise its rules regarding blogging and internet posting, standards of conduct, and solicitation and distribution, to prevent improper restrictions of employees' rights both during and after working hours.<sup>15</sup>

2. **Walmart** – Proactively Revised SMP Conforms to NLRA Requirements Set Forth in NLRB Advice Memorandum.

The Walmart case is the second in the top ten because this was the case that resulted in a company's revised SMP being touted as an exemplar of legality under the NLRA.<sup>16</sup> The region submitted this case for advice on whether Walmart's SMP was unlawfully overbroad, and whether its discharge of the employee for his Facebook comments was an unlawful employment act.<sup>17</sup> The parties settled the case, because while Walmart denied its SMP was overbroad, its interim revisions to the policy cured the defect, and further, the employee's postings did not implicate any protected concerted activity.<sup>18</sup> The Charging Party worked as a Walmart Greeter.<sup>19</sup> On his personal Facebook page, he identified himself as a Facebook employee and five to ten of his Facebook friends were co-workers. His privacy settings were all set to 'Public,' and in 2011, he posted a series of comments about work and customers on his Facebook wall. Specifically he wrote:

The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can't afford to feed them you shouldn't be allowed to have them...Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out!...Just go to your nearest big box store and start picking them off...We cater too much to the handicapped nowadays! Hell, if you can't walk, why don't you stay the f\*\*\* home!!!!<sup>20</sup>

After viewing these postings, one co-worker wrote that she could not wait for punishment because of these comments and expressed her wish to witness the punishment. A Walmart customer complained to Walmart that these comments "scared [her] to the point that [she did] not think [she could] come back in [the] store," and further characterized the comments as "beyond disturbing," especially because of the fatal shooting that had occurred just a year before in that

same store.<sup>21</sup> After an investigation confirmed the employee who posted those comments, the employee explained that these were not pointedly angry comments, but more in the nature of letting off steam. He further acknowledged that the postings were in “bad taste” and showed “poor judgment,” were a form of personal “entertainment” and “therapy,” and that he also meant to see what kind of “reaction [he could] get” and to “get people thinking.” Walmart discharged the employee for his Facebook postings.<sup>22</sup>

The Regional Director submitted this Walmart case for advice on two points: whether Walmart violated Section 8(a)(1) by discharging the employee based on his Facebook postings, and whether Walmart’s SMP then in effect was overly broad and therefore in violation of the National Labor Relations Act.<sup>23</sup> As to the first query, the employee’s discharge, the Board’s DOA outlined that the employee’s charge against Walmart should be dismissed since the NLRA was not implicated in this adverse employment action.<sup>24</sup> In the DOA’s view, the greeter’s conduct was “wholly distinct from activity that falls within the ambit of Section 7.”<sup>25</sup> The Facebook comments did not involve protected concerted activity since the communications did not “address working conditions, nor did they arise out of any concern or complaint about his working conditions.”<sup>26</sup> In fact, the Charging Party admitted that he was not angry at anyone at work....<sup>27</sup> The DOA concluded therefore that the conduct for which the employee was discharged was not protected by Section 7.<sup>28</sup>

As to the second query, the DOA declined to rule on whether Walmart’s SMP in effect at the time of discharge was unlawfully overbroad in violation of Section 8(a)(1).<sup>29</sup> The Advice Memorandum noted that Walmart has a legitimate right to prohibit certain workplace communications as long as the policy does not burden protected communications about terms and conditions of employment.<sup>30</sup> The Memorandum cited as lawful employer prohibitions on: disclosure of trade secrets, confidential internal or commercially sensitive information that yields a competitive advantage, discriminatory, harassing, obscene, threatening, bullying or defamatory comments.<sup>31</sup> Section 8(a)(1) proscribes work rules to the extent they “reasonably tend to chill employees in the exercise of their Section 7 rights.”<sup>32</sup> The DOA reasoned that although Walmart denied its original SMP violated the law, its current and revised SMP (updated May 4, 2012) did not infringe on protected communications, that “[e]mployees would not reasonably construe the Employer’s current social media policy to prohibit Section 7 activity” and therefore the issue of the legality of the former SMP was moot.<sup>33</sup> It was further noted that the revised SMP was sufficiently illustrative for it was replete with examples and discussion of prohibited conduct, and therefore employees would not reasonably construe the rules to prohibit protected Section 7 activity.<sup>34</sup> This Advice Memorandum regarding an endorsement of the revised Walmart SMP is particularly noteworthy because on the same date of its issuance, the NLRB promulgated a system-wide integration of the policies outlined in the Advice Memorandum through its Third Report on Social Media Cases, and further, it appended the revised Walmart SMP as an exemplar of legality.<sup>35</sup>

#### a. Construing Rules Reasonably

The Third Report provided further insight into how the NLRB will construe future challenges to employer SMPs, specifically relying on the reasonable employee standard. Pursuant to this standard,<sup>36</sup> “rules that are ambiguous...and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly...unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.”<sup>37</sup> The Third Report cited one Walmart clause entitled, “‘Be Respectful’ for the proposition that, in certain contexts, the rule’s exhortation to be respectful...could be overly broad.”<sup>38</sup> The Walmart clause however, provided sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct.”<sup>39</sup> The Third Report cited a number of other examples in Walmart’s SMP to establish the principle that employers may enact workplace rules to the extent that they are carefully crafted to ensure employees will not reasonably construe them as limiting protected concerted activity.

### 3. *Costco* – NLRB Decision Rules Employer Must Revise SMP

The *Costco* case makes the top ten because it is the first NLRB decision to consider an SMP that it found problematic, and it clearly outlines the method for testing employer restrictions under the NLRA. In the NLRB’s *Costco* decision, the Board analyzed provisions of Costco’s Employee Agreement to determine if they violated section 8(a)(1) of the NLRA.<sup>40</sup> The Board reviewed the rules in Costco’s Employee Agreement that listed causes for termination such as “Unauthorized collection, disclosure or misuse of confidential information relating to Costco, its members, employees, suppliers or agents including, but not limited to: a. Unauthorized removal of confidential information from Company premises,” “Unauthorized posting, distribution, removal, or alteration of any material on Company property,” and “Leaving Company premises during working shift without permission of management.”<sup>41</sup> The rules also outlined a privacy policy that mandates that “[a]ll [personal employee] information must be held strictly confidential and cannot be disclosed to any third party for any reason, unless (1) we have the person’s prior consent or (2) a special exception is allowed that has been approved by the legal department. All Costco employees shall refrain from discussing private matters of member and other employees...includ[ing]...sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers’ comp injuries, personal health information, etc.”<sup>42</sup> Finally, the challenged rules featured an “Electronic Communications and Technology Policy” stipulating that employees must “communicat[e] with appropriate business decorum” in all electronic media, ensure

that all information relating to Costco is kept confidential, refrain from posting any statements “that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Costco Employee Agreement,” and refrain from storing or sharing any “sensitive information” including payroll and membership data.<sup>43</sup>

a. Testing a Rule - Apply a Standard of Reasonableness

In evaluating these rules, the NLRB first noted that the key inquiry in determining whether a work rule violates section 8(a)(1) is “whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.”<sup>44</sup> Clearly, a rule is unlawful if its language expressly limits section 7 rights. If the rule does not contain explicit language, however, the appropriate consideration becomes whether “(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.”<sup>45</sup>

The Board concurred with the Administrative Law Judge’s (ALJ) decision ruling that:

“(a) unauthorized posting, distribution, removal or alteration of any material on Company property” is prohibited;(b) employees are prohibited from discussing “private matters of members and other employees . . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers’ compensation injuries, personal health information, etc.”;(c) “[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval”; and (d) employees are prohibited from sharing “confidential” information such as employees’ names, addresses, telephone numbers, and email addresses”

were “presumptively unlawful.”<sup>46</sup> The ALJ found the rule violated section 8(a)(1) because it was overbroad and could lead employees to reasonably believe that they restrict protected activity in nonworking areas during nonworking time.<sup>47</sup> The ALJ pointed out that when such rules are presumptively unlawful on their face, the employer bears the burden of proving that they were communicated to employees in such a way as to make clear that protected activity is exempt.<sup>48</sup> Costco was remiss in that it included no such language in the Employee Agreement.

The Board also found that Costco’s rule prohibiting statements (including any stored or posted electronically) that damage the company or any person’s reputation violated section 8(a)(1) because “employees would reasonably construe this rule as one that prohibits Section 7 activity.”<sup>49</sup> Despite the ALJ’s initial opinion that employees would reasonably believe that the purpose of the rule was to promote a “civil and decent work-place,” the Board determined that such a broadly defined rule would unlawfully “encompass[] concerted communications protesting [Costco’s] treatment of its employees,” especially since the rule included no language specifically excluding protected communications from its purview.<sup>50</sup>

With regard to Costco’s rule mandating that employees maintain “appropriate business decorum” in their communications with others, the Board agreed with the ALJ’s assessment that it did not violate section 8(a)(1). Costco argued that an employer was entitled to promote a civil working environment.<sup>51</sup> The General Counsel, however, contended that the rule was overbroad because it *could* be interpreted to restrict section 7 conduct.<sup>52</sup> The ALJ noted that current law in this situation places the burden on the General Counsel to show not that the rule *could* be understood to restrict protected activity, but that it *would* be reasonably understood to restrict such activity.<sup>53</sup> The ALJ observed that “where the rules in question on their face are clearly intended to promote ‘a civil and decent workplace,’ even though in some circumstances protected conduct might be restricted, reasonable employees *would* not infer that the rules restrict Section 7 activity.”<sup>54</sup> The ALJ then adopted the reasoning of *Lutheran Heritage Village-Livonia* that “[w]here...the rule does not refer to Section 7 activities, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach, would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity.”<sup>55</sup>

Finally, the Board concluded that the rule prohibiting employees from leaving the premises did not violate section 8(a)(1).<sup>56</sup> The ALJ had determined that this rule “inhibits the employees’ rights to engage in Section 7 activity (*i.e.*, strike).”<sup>57</sup> The Board, however, noted that the language of the rule would not be reasonably understood by employees to prohibit strikes or “walk outs” protected under section 7. Rather, the rule prohibits leaving Costco premises during working shifts without permission. Therefore, the Board reasoned, the rule would be reasonably understood to apply only to leaving one’s post during work time for matters unrelated to protected, concerted activity.<sup>58</sup> In light of the decision in this case, it seems plain that employers must specifically include unambiguous language excluding protected section 7 activities from the restrictions they outline in employee rulebooks and agreements. If an employer fails to do this, the policy may well run afoul of section 8(a)(1) where a reasonable employee would conclude that the rule prohibits section 7 activity.

4. ***Knauz BMW***- Discharge Upheld Because of Unprotected Activity on Social Media but SMP Must be Revised

The *Knauz* case makes the top ten because it is the first actual NLRB decision concerning a Facebook firing and, like *AMR*, it made for good press. The case resulted in a Solomon-like decision where the employee was not reinstated but nonetheless the SMP had to be revised. In *Karl Knauz Motors, Inc.*,<sup>59</sup> car salesman Robert Becker was terminated for his Facebook posts.<sup>60</sup> Some of Becker's posts related to the inadequacy of food provided at a BMW Series 5 vehicle event at the dealership where he worked, a concern that related to his ability to sell cars and gain commissions.<sup>61</sup> Becker posted pictures of the food at the BMW event on his Facebook page along with pictures taken of a mishap that occurred at the adjacent Land Rover dealership that was also owned by Knauz.<sup>62</sup> At the Land Rover dealership, a customer's 13-year old son who was sitting in the driver's seat stepped on the gas, causing the vehicle and the salesperson to land in an adjacent pond.<sup>63</sup> While the ALJ and the NLRB did not order that salesman Becker be reinstated because his postings regarding the Land Rover accident amounted to an independent and unprotected cause for termination,<sup>64</sup> a two-to-one ruling of a Board panel ordered that the employee handbook rules must be rewritten to prevent a violation of the NLRA.<sup>65</sup> The rule in question was: "Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership."<sup>66</sup>

a. Rules That Reasonably Tend to Chill Employees' Section 7 Rights

The Board majority in *Knauz* found that the rule reasonably tended to chill employees in the exercise of their section 7 rights.<sup>67</sup> This was so because of its broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" both of which encompass protected concerted activity such as statements that object to working conditions and seek support in improving them.<sup>68</sup> The Board noted that the rule did not suggest that activities protected by section 7 were excluded from the company's broad courtesy rule.<sup>69</sup> Further, the Board noted that statements in protest or criticism would reasonably be assumed to fall under the "disrespectful" or tending to injure the image or reputation of the dealership prohibitions.<sup>70</sup> The Board cited its decision in *Costco* for the proposition that it is unlawful for a company to maintain rules that prohibit posting statements electronically that damage the reputation of the company or damage any person's reputation.<sup>71</sup> The Board noted further that ambiguous employer rules that could be read to prohibit protected concerted activities are construed against the employer.<sup>72</sup> Member Hayes dissented in part regarding the Board's ruling on the handbook policy, finding only that the Courtesy rule "could be read to include protected communications, and it lacks limiting language" but not finding that to be enough to conclude that employees "reasonably would do so."<sup>73</sup> Member Hayes thought that the majority read the words and phrases in isolation and thus thought that their analysis departed from the *Lutheran Heritage Village-Livonia* precedent that the rule should be given a "reasonable reading" in its interpretation.<sup>74</sup>

5. *EchoStar* – Board Finds Employer Rules Must be Revised

*EchoStar* makes the top ten because it covers all the main bases where an SMP can go awry in terms of the NLRA, and illustrates how the NLRB will require evaluation of such policies and routinely require revision of certain types of policies if they reasonably tend to chill NLRA-protected conduct. Policies regarding disparagement, not contacting media without prior authorization, restricting access to government agencies, and overbroad confidentiality policies all tend to create NLRA violations unless extremely narrowly and carefully crafted. The NLRB adopted the Administrative Law Judge's decision and order requiring revisions to the SMP in *EchoStar Techs., LLC*.<sup>75</sup> The Charging Party, Ms. Gina Leigh, alleged *EchoStar* maintained rules that directly interfered with Section 7 rights in violation of Section 8(a)(1) of the National Labor Relations Act.<sup>76</sup> Ms. Leigh challenged six provisions impacting social media use:

1. Complaint Paragraph 4(a) [non-disparagement, non-defamation, and not on company time or resources rule]:  
“(i) You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment; and  
(ii) Unless you are specifically authorized to do so, you may not: Participate in these activities with EchoStar resources and/or on Company time....”<sup>77</sup>
2. Complaint Paragraph 4(b) [contact with the media rule]:  
“The Corporate Communications Department is responsible for any disclosure of information to the media regarding EchoStar...you must obtain...written authorization before engaging in public communications regarding EchoStar. You may not engage in any of the following activities unless you have prior authorization...: all public communications including...print...broadcast...web sites. Certain blogs, forums and message boards are also considered media.”<sup>78</sup>
3. Complaint Paragraph 4(c) [employer ban on its disclosure of employee information]:

“[E]mployee information...You must not discuss it with or disclose it to outsiders without the prior written authorization...both during and after employment...you must not discuss it with or disclose it to another employee unless he or she has a specific need to know and only when you are authorized to discuss or disclose it...”<sup>79</sup>

4. Complaint Paragraph 4(d) [contact with government agencies rule]:

“The General Counsel must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities. The correspondence should not be responded to...do not engage in any further discussion. Immediately following the conversation notify a supervisor...”<sup>80</sup>

5. Complaint Paragraph 4(e) [confidentiality in investigations rule]:

“EchoStar has the rights, at any time, to investigate matters involving suspected or alleged violations of EchoStar policies...You are expected to cooperate fully...You are also expected to maintain confidentiality...”<sup>81</sup>

6. Complaint Paragraph 4(f) [disciplinary action rule]:

“Examples of conduct that is unacceptable and subject to disciplinary action ...include...Insubordination...(The refusal to follow a reasonable work directive or undermining the Company, management or employees).”<sup>82</sup>

a. Rules that Reasonably Tend to Chill Employees’ Section 7 Rights

Administrative Law Judge Clifford Anderson first considered Board law on employer conduct rules.<sup>83</sup> Citing the court’s analysis in *Lafayette Park Hotel*<sup>84</sup> as “the proper standard for addressing such issues,”<sup>85</sup> he wrote: “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice.”<sup>86</sup>

The determination of chilling effect is an objectively reasonable one and does not turn on subjective impact evidence from individual employees. The ALJ therefore considered whether reasonable employees in relevant circumstances would construe that their Section 7 rights are chilled.<sup>87</sup> ‘Chilling effect’ is defined as the point at which their Section 7 rights have suffered a reduction or inhibition and this would be in contrast to, for example, rights that have stopped, or ended.<sup>88</sup>

After setting forth the analytical framework, the ALJ in *EchoStar* turned to the complaint allegations and resolved each of these. As to Complaint Paragraph 4(a)’s first rule prohibiting disparaging and defamatory comments, the ALJ concluded that the non-disparagement clause was impermissibly overbroad in violation of the NLRA. The blanket prohibition on disparaging comments failed to make exception for comments that, although critical or harsh, are nevertheless protected by the NLRA and therefore, reasonable employees would find that their Section 7 rights are chilled. “The term ‘disparaging’ like the term ‘derogatory’...goes beyond proper employer prohibition and intrudes on employees Section 7 activities.”<sup>89</sup>

As to Complaint Paragraph 4(a)’s second rule prohibiting social media use on company resources or time, the employees asserted this impacted their rights to use social media during breaks and after work in non-work areas. The ALJ disagreed, citing the handbook’s social media ban only as to its use during “working time” on company resources, and found the ban to be a permissible restriction “since an employee should only be using EchoStar’s equipment if he or she is performing work for the company.”<sup>90</sup>

As to Complaint Paragraph 4(b)’s ban on contact with media,<sup>91</sup> the ALJ concluded that “[t]he stark prohibition of communication with the media by employees is impermissible.”<sup>92</sup> He rejected EchoStar’s contention that the rule was confined to information regarding EchoStar’s business activities,<sup>93</sup> finding that a reasonable employee would not construe the rule to be limited to just official communications. The rule covered a vast amount of protected communications and therefore, the rule was likely to chill section 7 rights in violation of the NLRA.<sup>94</sup>

As to Complaint Paragraph 4(c)’s ban on discussion of employee information, the ALJ upheld the rule because “when read by a reasonable employee in the context and circumstances described...[it] does not chill employees Section 7 rights.”<sup>95</sup> The clear purpose and focus of the rule addresses proprietary confidential information, and reasonable employees would understand the rule was designed to protect information, rather than prohibit discussion of protected communications.<sup>96</sup>

As to Complaint Paragraph 4(d)’s rule concerning contact with government agencies, the ALJ concluded that it violated the NLRA<sup>97</sup> because reasonable employees reading the entire rule would be left in doubt, and that chills employees’ exercise of section 7 rights.<sup>98</sup> Employers may limit workplace communications in certain respects, but these limitations were impermissibly overbroad.<sup>99</sup> The ALJ suggested a different outcome might have been possible if the rules were more “defined or limited by explanation or example...”<sup>100</sup>

As to Complaint Paragraph 4(e)’s rule requiring employee confidentiality in investigations, the ALJ concluded that the rule chills employees’ section 7 rights by improperly restricting protected communications.<sup>101</sup> The confidentiality policy contained no limiting language, and therefore applied to every investigation, ongoing, and even closed ones.<sup>102</sup> The ALJ

found that employees would reasonably understand this rule to be a complete prohibition, including communications that would otherwise be protected.<sup>103</sup>

As to Complaint Paragraph 4(f)'s disciplinary action rule, the ALJ concluded it chilled employees' section 7 rights,<sup>104</sup> finding that reasonable employees reading the rule would construe it as explicitly prohibiting "undermining activities."<sup>105</sup> The ALJ rejected EchoStar's contention that it was merely prohibiting insubordinate conduct, which is lawful.<sup>106</sup> The ALJ wrote, the "rule in its parenthetical definition of the term 'insubordination' broadens the term beyond its meaning...by adding the [extra language]. The Respondent [EchoStar], the rule's creator, has created a Frankenstein definition within the rule that creates a new word form perhaps, but that parenthetically expanded form retains the violative overreach of the grafted term 'undermining.'"<sup>107</sup> The ALJ issued Conclusions of Law, a Cease and Desist Order, and a directive for EchoStar to effectuate the policies of the NLRA, and the Board adopted the decision and order.

#### 6. *Hispanics United of Buffalo (HUB)* – NLRB Reinstates Five Employees Discharged for Engaging in Protected Concerted Activity on Social Media

*Hispanics United of Buffalo, Inc. (HUB)*<sup>108</sup> makes the top ten because it is the first instance where an NLRB decision required reinstatement of employees who had been fired for their Facebook postings that fell within the protection of section 7. The case is also important because it demonstrates that union membership is not a prerequisite for NLRA protection. In *HUB*, a social worker sounded off about how much more she was doing for the victims of domestic violence than her coworkers at a nonprofit organization.<sup>109</sup> Lydia Cruz-Moore's criticism of her fellow workers included a weekend text message to coworker Marianna Cole-Rivera indicating that she intended to discuss her concerns regarding employee performance with the agency's executive director.<sup>110</sup> Cole-Rivera replied first with a text, and later with a message posted on her Facebook page that asked coworkers how they felt about Cruz-Moore's criticisms of their work, while indicating that she had "about had it!"<sup>111</sup> Four other off-duty coworkers responded objecting to Cruz-Moore's assertion that their work was not up to standard.<sup>112</sup> One wrote "What the f\*\*\*...Try doing my job I have five programs" while another wrote "What the hell, we don't have a life as it is."<sup>113</sup>

A member of the Board of Directors of HUB weighed in on the employees' Facebook exchange asking who Lydia Cruz was, and the secretary to the executive director also posted a comment.<sup>114</sup> Cruz-Moore responded to Cole-Rivera "stop with ur lies about me."<sup>115</sup> She then brought the entire Facebook exchange to the executive director's attention.<sup>116</sup> The five were discharged for "bullying and harassment" of Cruz-Moore in violation of the employer's "zero tolerance" policy.<sup>117</sup> The executive director explained in each employee's termination interview that Cruz-Moore had suffered a heart attack as a result of the harassment and that HUB would be obligated to compensate her.<sup>118</sup> The NLRB ruled that the NLRA was violated by the five discharges because the coworkers were engaged in protected concerted activities for the "purpose of mutual aid or protection" under section 7 of the Act, and the discharges were motivated by the employees' protected concerted activity, affirming the ALJ's order for the employer to reinstate the employees with back pay.<sup>119</sup>

*HUB* was the NLRB's second major social media decision in 2012 that caught the attention of the news media, perhaps because the employees, all non-unionized professional licensed social workers who engaged in protected concerted activity on Facebook, were reinstated, unlike in *Knauz* and *AMR*. Because these HUB social workers were not unionized, the case underscored how the NLRA protects private sector employees who engage in self-organization and other protected concerted activity, in this case stemming from the individual employees who "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>120</sup> The Board noted that the activities of an individual such as Cole-Rivera in "enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity."<sup>121</sup> The decision noted that the action of an individual is concerted if its object is to induce group action.<sup>122</sup> In contrast to *Knauz*, the HUB employees engaged in protected concerted activity, and unlike in *AMR* where the EMT was responding to patient complaints, there did not appear to be any legitimate business reason for the discharge of the HUB workers. HUB's citing a violation of their 'zero tolerance harassment' policy did not get it off the unfair labor practice hook. The ALJ in *HUB* found and the Board agreed that there was "no evidence" that the employees harassed Cruz-Moore in violation of a policy that referenced "race, color, sex, religion, national origin, age, disability, veteran status, or other prohibited basis."<sup>123</sup> *HUB* reinforced the concept that concerted communication on social media is regulated by the NLRB and that employers are accountable for unfair labor practices surrounding use of social media and policies that are overbroad and infringe upon employees' section 7 rights.

#### 7. *DirectTV* - Board Finds Employer Policies Must be Revised and Employee Reinstated

This case makes the top ten because it illustrates the most likely areas where SMPs conflict with the NLRA, and highlights that employers must clearly convey that only certain conduct is restricted, not conduct that is protected by section 7 of the Act. The decision also illustrates that employees should not have to guess at what is prohibited behavior, and that employers need to cooperate with the NLRB in a timely fashion if they are to avoid an unfair labor practice finding.<sup>124</sup> In *DirectTV*, a union was organizing and an employee who "spoke up forcefully in favor of unions at a mandatory employee meeting" was unlawfully discharged.<sup>125</sup> The employee in question was threatened by the operations manager with quality

control inspections on his installations just after he made his statement favoring the union.<sup>126</sup> Beyond this threat of retaliation, there was further testimony establishing antiunion animus in speeches made by a vice president at the mandatory meeting that the company would not allow the union, that “[w]e’re going to shut it down” and that the same vice president interrogated employees regarding the identity of union supporters.<sup>127</sup> A unanimous three-member panel of the NLRB ordered reinstatement of the employee and revision of DirecTV’s rules.<sup>128</sup>

The rules to be revised included those restricting employees from contacting the media which clearly inhibited employee discussion of labor matters in violation of the Act.<sup>129</sup> This rule did not distinguish unprotected communications, such as those that are maliciously false, from protected communications, and thus was overbroad and unlawful.<sup>130</sup> In addition, the corporate policy requiring prior approval by management before contacting or commenting to the media also chilled section 7 rights.<sup>131</sup> Restrictions on employee communications with law enforcement in the employee handbook could be construed to include communications with NLRB agents and thus, where the rule instructed employees that the company’s security people would handle contact instead of employees, this also violated section 8(a)(4) which protects employees who file unfair labor practice charges or provide information to the Board in the course of an investigation.<sup>132</sup> The Board noted that any ambiguity is construed against the employer who made the rules.<sup>133</sup> Further, other rules regarding confidentiality of company information including employee records could be construed to restrict discussion of wages and terms and conditions of employment. Because the rule did not exempt protected communications with unions, Board agents and other government agencies that deal with workplace issues, employees would “reasonably interpret the rule as prohibiting such communications” making the rule unlawful.<sup>134</sup>

DirecTV’s intranet contained a company policy on use of social media, stating that “[e]mployees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”<sup>135</sup> Since the handbook defined “company information” to include employee records, the Board found that the intranet policy prohibited disclosure of information from employee records including information regarding wages, discipline and performance ratings. The Board found that the scope of the intranet policy was ambiguous in light of the handbook provision and that employees should not have to decipher what information or conduct was prohibited, making the employer’s maintenance of the policy unlawful.<sup>136</sup> The employer’s attempt to repudiate its unlawful policies came too little, too late to avoid a finding of unfair labor practices since it waited until the complaint issued, engaged in other unfair labor practices including antiunion statements, discharged employees for union activities, and failed to acknowledge its unlawful conduct.<sup>137</sup> The employer was required to rescind the unlawful rules on a nationwide basis and post a notice to that effect.<sup>138</sup> It was also required to reinstate the discharged employee with back pay.<sup>139</sup> The company’s rule regarding employee use of company systems, equipment and resources was deemed lawful under the Board’s decision in *The Register-Guard*, but while Chairman Pearce and Member Griffin questioned whether that case was correctly decided, they declined to address the question in the instant case.<sup>140</sup>

#### 8. *Jones & Carter* – Board Upholds Reinstatement of Discharged Employee Who Discussed Salaries and Requires Revision of Rule Prohibiting Discussion of Salaries

This case makes the top ten because it clearly states that employees are entitled to discuss their wages with each other because of section 7 of the NLRA. This right applies whether the conduct is on social media or not, and whether employees are in a union or not. In *Jones & Carter*, the Board affirmed an ALJ decision that found the Respondent company engaged in unfair labor practices where it unlawfully maintained a rule in its employee handbook that prohibited discussion among employees about their salaries.<sup>141</sup> *Jones & Carter* terminated Lynda Teare because she engaged in protected concerted activity by discussing salaries with other employees in violation of workplace rules.<sup>142</sup> When Teare applied for unemployment compensation, the company replied to her claim that she was terminated for discussing confidential information regarding an employee’s salary.<sup>143</sup> The employer maintained that salary discussion was prohibited under its confidentiality rule.<sup>144</sup> Later, at the NLRB hearing, the Respondent’s witnesses focused on Teare’s harassment of a new employee regarding her salary rather than on violation of a confidentiality rule.<sup>145</sup> The ALJ found the employer’s shifting reasons for Teare’s discharge were indicative of a discriminatory motive.<sup>146</sup> The employer was ordered to cease maintaining the policy prohibiting employees from discussing salaries, and to offer Teare her job back along with other rights and privileges, back pay, etc. While the discussions in *Jones & Carter* took place face-to-face, as mentioned earlier, the same rules apply whether the protected concerted activities are conducted face-to-face or on social media. Thus, this case highlights that rules inhibiting discussion of salaries unlawfully restricts section 7 activities, regardless of the mode of communication.

#### 9. *Design Technology Group LLC d/b/a Bettie Page Clothing*- Board Finds Facebook Firings and Wage and Salary Disclosure Rule in Handbook Unlawful

This very recent case illustrates that the NLRB remains serious about enforcing employee rights to engage in discussions about wages, hours and working conditions, as well as those for mutual aid or protection, that take place on social media. The Board will order reinstatement for employees discharged because of such protected conduct. In *Bettie Page*

*Clothing*, the Board held that employees who complained about work-related concerns on Facebook as well as offline were entitled to the protection of section 7 of the Act.<sup>147</sup> The employees worked in sales at a Bettie Page Clothing store in Haight-Ashbury, San Francisco. The complaints related to the store manager's treatment of employees as well as the safety issue of leaving the store at 8 p.m. when adjacent businesses closed at 7 p.m. One of the employees complained about this issue to the owner, who then allowed the store to close at 7 p.m. There was some evidence that the manager was upset about the employee going over her head to speak to the owner.<sup>148</sup>

The communications were complaints among employees about the conduct of their supervisor as well as about terms and conditions of employment and state law rights of workers in California. The ALJ and the Board discounted the employer's contention that the employees schemed to entrap the employer into firing them based upon one's post-discharge Facebook posting that included the jest: "Muhahahahaha!!! So they've fallen into my crutches" which was a quote from a vintage comedy television show "The Monkees".<sup>149</sup> The Board ordered the three employees reinstated and required that the employer cease "[m]aintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party."<sup>150</sup>

On the same day that the Board decided the *Bettie Page* case, an ALJ also issued an opinion in a case that overruled an employer's employment policies regarding email and social media use because they were overbroad and ambiguous.<sup>151</sup> Once again, section 7 clearly covered the employees' protected concerted activities, and required the revision of work rules including the company's SMP.

#### 10. *Dish Network* – Board Finds Employer Policies Must be Revised

The last case makes the top ten as the second of two Board decisions from this past April that instruct on SMPs. It sums up the Board's view on SMPs, citing back to *Costco* and *Knauz* concerning the problem with rules regarding disparagement and restrictions on company time that exceed those permitted by the NLRA. *Dish Network* reinforces the danger of restricting employee contact with the media or law enforcement in a manner that is impermissibly overbroad because the rules interfere with NLRA-protected activity.<sup>152</sup> While the Board affirmed the ALJ's determination that Dish Network's rules needed to be revised, at the same time, the Board did not find that the termination of an employee for safety violations was an unfair labor practice.<sup>153</sup> Just as in *Knauz*, when an employee engages in conduct that is not protected by the Act, the conduct is an independent lawful basis for termination and out of the purview of Board control.

The employee handbook in *Dish Network* included a rule prohibiting employees from making "disparaging or defamatory comments about DISH Network" and prohibited posting negative commentary electronically during "Company time."<sup>154</sup> This was construed as overbroad because it chilled some speech protected by section 7, and also the rule did not clarify that solicitation could occur during breaks and other nonworking hours while at work.<sup>155</sup> In addition, the contact with the media policy prohibited employees from speaking about Dish without prior authorization from management, a policy that unduly interfered with section 7 rights.<sup>156</sup> Similarly, the employer's rule on contact with government agencies that banned contact without authorization was unlawful as it would inhibit contact with the Board.<sup>157</sup> The ALJ in *Dish Network* cited the NLRB's 2012 statements on social media policies in *Costco* and *Knauz*, noting that non-disparagement rules place electronic limitations on negative commentary in violation of the Act.<sup>158</sup>

## II. Table of Top Ten NLRB Facebook Firing and Social Media Cases

The following table represents the key aspects of the top ten cases. These include the case name which provides the identity of the respondent company in the context of an unfair labor practice charge; the source of authority- whether from an NLRB Division of Advice (DOA) Memorandum, or NLRB decision; the date of memorandum, decision and/or settlement; the result as to whether unfair labor practices (ULPs) were found with respect to a discharge or an overbroad rule or social media policy, including any remedies ordered such as reinstatement or revision of an SMP or other policies along with posting notices of required action on premises and electronically; and finally whether a union was present such that the employees were already organized, were currently organizing, or were not members of a union and there was no union on the scene. These are the important characteristics in these cases and thus make for a rapid method of comparison.

**Table of Top Ten NLRB Facebook Firing and Social Media Cases**

<i>Case Name</i>	<i>Source of Authority</i>	<i>Date</i>	<i>Outcome</i>	<i>Union or Not?</i>
AMR	NLRB DOA Memorandum	10/5/10 Memo Settlement, 2/8/11 Private Monetary Settlement on Discharge	Revise SMP Nationwide as ULP- Post Notice No Reinstatement	Union
Walmart	NLRB DOA Memorandum	5/30/12 Memo	No ULP on Discharge Revised SMP 5/4/12 a good model so not a ULP	No Union
Costco	NLRB	9/7/12	Revise Rules including regarding Electronic Postings b/c ULP -Post Notice	Union was organizing
Knauz	NLRB	9/28/2012	Discharge not ULP but Revise SMP b/c ULP & Post Notice	No Union
EchoStar	NLRB	9/20/2012	Revise SMP and rules re contacting government agencies, etc. b/c ULP-Post Notice	No Union
HUB	NLRB	12/14/2012	Discharges ULPs as §7 activity- Post Notice -No SMP revisions ordered	No Union
DirecTV	NLRB	1/25/2013	Discharge ULP Reinstatement-Revise handbook & SMP nationwide- Post Notice	Union was organizing
Jones&Carter	NLRB	2/8/2013	Discharge ULP -Revise confidentiality rule to allow discussing salaries Post Notice	No Union
Bettie Page	NLRB	4/19/2013	Discharges ULPs Reinstatement and Revise Rules re Salary Disclosure etc.- Post Notice	No Union
Dish Network	NLRB	4/30/2012	Discharge lawful due to safety violations -Revise SMP b/c ULP- Post Notice	Union just elected

III. Analysis and Recommendations – The Takeaway from the Top Ten

The NLRB cases on social media started off slowly but the news buzz from first the *AMR* case, and then from the ALJ decisions in *Knauz* and then *Hispanics United of Buffalo*, attracted more complaints such that there have been quite a few cases involving social media and employee rules decided by the NLRB since 2012. Just this past April, the NLRB issued two important decisions on SMPs, and on May 8th, the Division of Advice issued another Advice Memorandum on a Facebook discharge case.<sup>159</sup> In this environment, it is increasingly important for businesses in the private sector to understand how the NLRA works, as well as its coverage and applicability, because if businesses ignore this law, they could end up being one of the next cases. It is clear that employers are well advised to train their managers on the labor law surrounding NLRA section 7 rights because the statute protects employees who are nonunion as well as union members.<sup>160</sup>

The NLRB is not stating that employers *should* promulgate SMPs but the agency is clearly aware that many employers will fashion policies in order to protect their companies and set rules of conduct for employees to follow. What the agency has said is that if a company does have an SMP, it is good to abide by the May 2012 guidance available in the AGC's Third Report.<sup>161</sup> There, in addition to adopting the revised Walmart SMP as a role model of legality, the AGC focused on

NLRA violations embodied in overbroad company rules including those relating to social media use, confidentiality, privacy, online tone, prior permission for contacting the media or law enforcement or government agencies, and prohibitions on commenting on legal matters where employees would reasonably interpret these as limiting the exercise of section 7 rights.<sup>162</sup> “Savings clauses” that attempt to cure violations of the NLRA by merely mentioning that a policy will not be construed or applied to improperly interfere with rights under the statute will not suffice.<sup>163</sup> The rights that are protected should be specifically enumerated in an SMP such that a reasonable employee would not feel that section 7 rights were prohibited by the policy or rule. Rules concerning online bullying and harassment are permitted but policies prohibiting harming the image of the company are not.<sup>164</sup>

The AGC’s Third Report outlined the Board’s standard for proving a section 8(a)(1) violation as it noted in *Lutheran Heritage Village-Livonia*, where an employer maintains a work rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights.”<sup>165</sup> The two-step inquiry assesses first if the rule “explicitly restricts Section 7 activities.”<sup>166</sup> If it does not, the next step assesses if “employees would reasonably construe the language to prohibit Section 7 activity” or was “promulgated in response to union activity” or “applied to restrict the exercise of Section 7 activity.”<sup>167</sup> Absent the above, then a rule is tested to determine if it is ambiguous and does not contain “limiting language or context” to clarify that it doesn’t restrict Section 7 rights.<sup>168</sup> Thus, any rules that are overbroad and potentially restrict section 7 rights must clarify specifically that these rights are not proscribed, and ambiguity is construed against the creator of the rules, the employer.

The top ten cases illustrate the types of policies that will not survive scrutiny of the Board.

1. In *AMR*, the employer was required to revise its SMP nationwide with respect to: its blogging and internet posting policy; its standards of conduct rules; and its solicitation and distribution policy, all because they were improperly restrictive of the right to engage in section 7 rights.
2. In *Walmart*, the revised policy became the model for a legal SMP.<sup>169</sup>
3. *Costco* set out the Board’s *Lutheran Heritage Village-Livonia* test for evaluating employer rules and policies.<sup>170</sup> The Board required that policies that interfered with employee discussion of wages and hours, and terms and conditions of employment had to be revised and narrowed so as to not improperly restrict the exercise of section 7 rights. The Board noted that it was important for an SMP to say what employees *can do* with respect to section 7 activities and exclude this from the restrictions on an overbroad policy. For example, the employer should say that employees are able to engage in the above-mentioned section 7 activities on non-work time and areas while at work.
4. In *Knauz*, the employer was required to revise its SMP because it reasonably tended to chill the exercise of section 7 rights. The Board, citing to *Costco*, noted that the SMP should say what is excluded from the restrictions, namely section 7 activities, because the courtesy rule and reference to disrespectfulness and damage to image or reputation of the company would reasonably be construed as overbroad.<sup>171</sup>
5. *EchoStar* also required a revised SMP regarding overbroad policies on disparagement and restrictions on contacting the media without written authorization, no disclosure of employee information, and no contact with government agencies without contacting the company’s general counsel. All of these exceeded permitted restriction on section 7 activities.<sup>172</sup>
6. In *Hispanics United of Buffalo (HUB)*, the Board focused on the reinstatement of the discharged Facebook users but it was clear that the employer’s alleged reliance on its zero tolerance bullying or harassment policy was an insufficient defense when the conduct that led to the discharges was clearly protected by section 7 mutual aid or protection rights.<sup>173</sup> So, the takeaway from *HUB* is that the Board will see through pretextual reasons when protected activities were the real reason for the adverse employment action.
7. The Board in *Direct TV* required revision of provisions in an SMP with respect to a requirement of prior approval on contacting the media, and prevention of contact with government agencies.<sup>174</sup> It is clear that the federal statutes give employees the right to contact the NLRB, DOL, OSHA, and other agencies, and that employers who have policies that interfere with these statutory rights do so at their peril. Specifically, section 8(a)(4) of the NLRA is violated when an employer discriminates against employees who take part in NLRB processes.<sup>175</sup> If an SMP prohibits false statements, that is lawful, but a restrictive policy should give valid examples of conduct that is prohibited rather than leave employees guessing and gambling on whether the action is prohibited.<sup>176</sup> Policies that restrict “company information” must clarify that employees have the right to discuss wages, hours, and working conditions under the NLRA.<sup>177</sup>
8. In *Jones & Carter*, the ALJ and NLRB reinforced that discussion of wages by employees should not be the basis for discipline and discharge.<sup>178</sup>
9. In *Bettie Page*, like in *HUB*, the Board’s emphasis was on reinstating the employees who were discharged because of their Facebook comments rather than on revision of an SMP, but the message was clear that conversations on social media are protected by section 7 in the same manner as face-to-face conversations and employers should not discriminate against employees who engage in discussion of their working conditions, etc.<sup>179</sup>

10. *Dish Network* sums up the Board's view on SMPs, citing back to *Costco* and *Knauz* with respect to approaching provisions on disparagement narrowly and phrasing policies in a manner that excludes prohibiting section 7 activities and not excluding such activities from non-working time and areas within the work day.<sup>180</sup> *Dish* also included unlawful restrictions on contacting the media, law enforcement, etc., similar to those found in *EchoStar* and *Direct TV*.<sup>181</sup> The lesson from *Dish Network*, *EchoStar* and *DirectTV* is that if there are any such provisions that restrict contact with the media, law enforcement or government agencies, the rules must be narrow and examples shown of section 7 activities that are not prohibited.

In the social media cases, the NLRB is not saying that employers can not adopt SMPs or other rules regulating employee conduct. They are merely stating that such rules may not unnecessarily infringe upon section 7 rights. If an employee is afraid to engage in protected concerted activities because of an overbroad or ambiguous employer policy, such will be a target for revision. If an employee is disciplined or discharged for engaging in protected activities and there is no other independent legitimate basis for the adverse employment action, the employer will be ordered to reverse its action and place the employee back in the position s/he would have been in absent the discrimination, and to post a notice that it won't commit further unfair labor practices. The Board follows its *Wright Line* test on dual motive discipline and discharge cases, requiring that the General Counsel make a prima facie showing that protected conduct was a motivating factor in the employer's decision.<sup>182</sup> The burden then shifts to the employer to establish that the employee would have been disciplined or discharged for legitimate business reasons even without the protected conduct.<sup>183</sup>

An employee will not be reinstated if he is discharged for social media activity that is not protected because it does not involve "shared employee concerns over terms and conditions of employment"; when the activity is not in concert because it is not engaged "in with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>184</sup> Individual or personal griping is not protected activity because it lacks shared concern.<sup>185</sup> So if the comments are 'all about me' and not 'all about us' in terms of working conditions or other section 7 matters, the conversation will not be protected by the NLRA. It is critical that employees understand the limits on NLRA protection or they too may hit a career trip wire if they act upon the belief that comments on social media are protected just because they relate to work but the comments do not rise to the level of a shared concern.

## Conclusion

The NLRB has been in the news more in the past three years than perhaps it has in quite some time because of the press generated by its first Facebook firing case in fall 2010 and the subsequent wave of similar cases involving employer policies that restricted employee rights under section 7 of the National Labor Relations Act. The NLRB has now decided a number of these cases involving social media conduct or policies, or related rules infringing upon protected communication that could take place on social media or face-to-face. The Board has also decided cases concerning employee discharges that were alleged to involve unfair labor practices related to the above policies or rules. In each of these cases, the Board took the position that if the employer had an overly broad SMP that infringed or had the potential to infringe employee rights, it must be revised. In addition, when employees were disciplined or discharged because of protected activity whether on social media or not, employers were ordered to reinstate the employees, as well as to post a notice of employee rights under section 7 along with a pledge not to commit unfair labor practices in the future.

There was nothing new in what the NLRB did with respect to the social media cases. The agency was simply following the same rules that it always has with respect to protecting employees' section 7 rights. The thing that was new was the medium, and "in the medium is the message."<sup>186</sup> This is so because just mentioning the words Facebook and social media got people to listen to the message. Acting General Counsel Lafe Solomon captured the public's attention on the NLRB by scrutinizing employer SMPs, and the NLRA's impact on employer rules and employee rights. The media coverage was favorable for the agency because it publicized what is protected concerted activity under the NLRA, and encouraged the filing of unfair labor practice complaints that triggered the agency's investigation and review of SMPs. However, this publicity seems to have brought the agency's political foes to the forefront where they worked successfully to foil the agency's rulemaking on workplace rights posters as well as judicial enforcement of its decisions. Only time will tell just what the cost of publicly enforcing the NLRA will have on the NLRB.

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## Footnotes

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<sup>1</sup> See Steven Greenhouse, *Even if It Enrages the Boss, Social Net Speech is Protected*, N. Y. TIMES, Jan. 21, 2013, available at <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html> (quoting NLRB Chairman Mark G. Pearce that "many view social media as the new water cooler").

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<sup>2</sup> J. Picini Flooring, 356 N.L.R.B. No. 9 (2010).

<sup>3</sup> See *Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) (overruling NLRB order against Canning because of unconstitutional appointment of two NLRB members leaving the Board without a valid quorum to act). The NLRB has asked the Supreme Court to review this appellate court decision. See Petition for Writ of Certiorari, *N.L.R.B. v. Noel Canning*, \_\_\_ U.S. \_\_\_ (No. 12-1281, filed April 25, 2013), available at <http://www.nlr.gov/node/5142> (last visited May 10, 2013); see also Lawrence E. Dube, *NLRB Petitions Supreme Court to Review Noel Canning Ruling on Board Appointments*, Daily Lab. Rep. (BNA) No. 80, at AA-1 (April 25, 2013) (noting Board's argument that *Canning* decision created a "square conflict" with a 2004 Eleventh Circuit decision).

In *Canning*, the D.C. Circuit ruled that the NLRB does not have the power to make decisions with its current composition because of recess appointments made by President Obama in January 2012. The court reasoned that the Senate was not technically in an intersession recess, so that the vacancies that President Obama filled during this recess did not occur during an actual recess and were not filled during an official recess as outlined in Article II, thus creating two constitutional barriers to the validity of the appointments. This ruling places the agency's current orders and decisions in limbo until the Supreme Court considers this new complication regarding the constitutional validity of these appointments to the NLRB. With respect to this paper, the NLRB's pronouncements on SMPs and discharge and discipline for violation of such policies may not be immediately enforceable in the federal courts. Furthermore, in the most recent case, *NLRB v. New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3rd Cir. May 16, 2013), a divided panel of the Court of Appeals for the Third Circuit also ruled that the President's intrasession recess appointment of Member Craig Becker to the NLRB in March 2010 was invalid and therefore the three member Board panel which included Member Becker that issued a bargaining order in the instant case, was not valid.

<sup>4</sup> Section 7 of the National Labor Relations Act provides:

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 have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a)(3). 29 U.S.C. § 151 (2012).

<sup>5</sup> The Board suspended its Employer Rights Notice Posting requirement pending the outcome of the *Canning* appeal. See <http://www.nlr.gov/poster> (last visited May 11, 2013). The court invalidated the Board's Notice Posting rule on First Amendment and statutory grounds, finding that employers could not be forced to speak by posting such Board notices in the absence of an unfair labor practice. *Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 2013 U.S. App. LEXIS 9231 (D.C. Cir. May 7, 2013), available at <http://www.laborrelationsupdate.com/files/2013/05/National-Association-of-Manufacturers-et.-al.-v.-NLRB-DC-Cir.-May-7-2013.pdf>

<sup>6</sup> The percentage of union members as a percentage of total employees fell to 11.3% in 2012, down from 11.8% in 2011. In 2012, private sector workers (the population covered by the NLRA) were 6.6% union members, while public sector workers were 35.9% union members. See Economic News Release, Union Members Summary 2012, Bureau of Labor Statistics (Dep't of Labor Jan. 23, 2012), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>7</sup> Memorandum from Lafe Solomon, Acting Gen. Counsel, NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers, Report of the Acting Gen. Counsel Concerning Social Media Cases, Mem. OM 11-74, (Aug. 18, 2011) [hereinafter AGC's First Report], available at <http://www.nlr.gov/news-outreach/news-releases/acting-general-counsel-releases-report-social-media-cases>; Memorandum from Lafe Solomon, Acting Gen. Counsel, NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers, Report of the Acting Gen. Counsel Concerning Social Media Cases, Mem. OM 12-31, (Jan. 24, 2012) [hereinafter AGC's Second Report], available at <http://www.nlr.gov/news-outreach/news-releases/acting-general-counsel-issues-second-social-media-report>; Memorandum from Lafe Solomon, Acting Gen. Counsel, NLRB to All Regional Directors, Officers-in-Charge, and Resident Officers, Report of the Acting Gen. Counsel Concerning Social Media Cases, Mem. OM 12-59 (May 30, 2012) [hereinafter AGC's Third Report], available at <http://www.nlr.gov/news-outreach/news-releases/acting-general-counsel-releases-report-employer-social-media-policies>; see also Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957 (2012)(discussing social media cases considered by NLRB through early 2012).

<sup>8</sup> See Advice Memorandum, Office of the Gen. Counsel, Sears Holdings (Roebucks), No. 18-CA-19081 (N.L.R.B. Dec. 4, 2009); Advice Memorandum, Office of the Gen. Counsel, MONOC, No. 22-CA-29008, -29083, -29084, -29234 (N.L.R.B. May 5, 2010). For several years the Board directed all social media cases to the Division of Advice, but now the Board requires submission of cases only "if they raise new or difficult issues not covered by previously-issued Advice memoranda." See Lafe E. Solomon, Office of the Gen. Counsel, Report on the Midwinter Meeting of the ABA Practice & Procedure Committee of the Labor & Employment Law Section, Mem. GC 13-04, at 16 (N.L.R.B. Mar. 19, 2013). The memorandum noted that "[t]here are no immediate plans to issue another General Counsel report concerning social media policies or other employer rules/policies." *Id.* at 17.

<sup>9</sup> See Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES, Nov. 9, 2010, at B1, available at <http://www.nytimes.com/2010/11/09/business/09facebook.html> (discussing AMR case); Advice Memorandum, Office of the

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General Counsel, American Medical Response of Connecticut, No. 34-CA-12576 (N.L.R.B. Oct. 5, 2010) [hereinafter *AMR Advice Memo*], available at <https://www.nlr.gov/case/34-CA-12576>; Christine Neylon O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK UNIV. L. REV. 29 (2011) (discussing *AMR* case and the law concerning social media and section 7 of NLRA).

<sup>10</sup> See News Release, NLRB, *Settlement Reached in Case Involving Discharge for Facebook Comments*, Release No. 2815 (Feb. 7, 2011), available at <http://www.nlr.gov/news-outreach/news-releases/settlement-reached-case-involving-discharge-facebook-comments> (last visited Mar. 29, 2013).

<sup>11</sup> *AMR Advice Memo supra* note 9, at 2-4.

<sup>12</sup> This was problematic because the EMT was a union member and she was allegedly threatened with discipline for requesting a union representative at an investigatory interview that reasonably could (and did) lead to discipline. See *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 257-58 (outlining the *Weingarten* right, so named for the Court recognized this right for the first time).

<sup>13</sup> See O'Brien, *supra* note 9, at 49.

<sup>14</sup> See N.L.R.B. Settlement Agreement, No. 34-CA-12576 (Feb. 7, 2011), <http://www.nlr.gov/category/case-number/34-ca-012576> (accessed pursuant to a Freedom of Information Act (FOIA) Request, 5 U.S.C. § 552 (2012), copy on file with author); Melanie Trotman, *Facebook Firing Case is Settled*, WALL ST. J., Feb. 8, 2011, available at <http://online.wsj.com/article/SB10001424052748704422204576130631738779412.html>; *Connecticut Company Settles ULP Charges Prior to ALJ Hearing in Facebook Firing Case*, Daily Lab. Rep. (BNA) No. 25, at A-2 (Feb. 7, 2011)(discussing settlement).

<sup>15</sup> N.L.R.B. Settlement Agreement, *supra* note 14.

<sup>16</sup> Advice Memorandum, Office of the Gen. Counsel, Walmart, No. 11-CA-067171 (N.L.R.B. May 30, 2012), at 5. The SMP was revised in response to unfair labor practice charges. *Id.* at 1.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 4-5.

<sup>23</sup> *Id.* at 1. Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. §158(a)(1)(2012).

<sup>24</sup> Advice Memorandum, Office of the Gen. Counsel, Walmart, No. 11-CA-067171 (N.L.R.B. May 30, 2012), at 4-5.

<sup>25</sup> *Id.* at 5 (citing *The Continental Group, Inc.*, 357 N.L.R.B. No. 39, slip op. at 5 (2011)).

<sup>26</sup> Advice Memorandum, Office of the Gen. Counsel, Walmart, No. 11-CA-067171, at 5 (N.L.R.B. May 30, 2012).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.* at 2-4.

<sup>32</sup> *Id.* at 1.

<sup>33</sup> *Id.* at 2-4, 5.

<sup>34</sup> *Id.* at 2-3.

<sup>35</sup> The Office of General Counsel's Division of Operations Management released Memorandum OM12-59, "Report of the Acting General Counsel Concerning Social Media Cases," its third report on social media which notably singled out Walmart's revised SMP for approval, stating that the "Employer's entire revised social media policy - - with examples of prohibited conduct - - is lawful." See AGC's Third Report, *supra* note 7, at 19. There was some media scrutiny regarding AGC Lefe Solomon's participation in the meeting that led to settlement of this Walmart charge in light of the conflict of interest existing- that at the time of the meeting, he owned some shares in Walmart that he had inherited from his mother. See Sam Hananel, *IG says top NLRB Lawyer violated code of ethics*, WASH. TIMES (Sept. 17, 2012), available at <http://www.washingtontimes.com/news/2012/sep/17/ig-says-nlr-lawyer-violated-code-of-ethics/>.

<sup>36</sup> See *Waco, Inc.*, 273 N.L.R.B. 746, 748 (1984); see also Section II.5 *infra* (discussing reasonable employee standard).

<sup>37</sup> AGC's Third Report on Social Media, *supra* note 7, at 20.

<sup>38</sup> AGC's Third Report on Social Media, *supra* note 7, at 20.

<sup>39</sup> AGC's Third Report on Social Media, *supra* note 7, at 20.

<sup>40</sup> Costco Wholesale Corp., 358 N.L.R.B. No. 106, at \*1 (Sept. 7, 2012).

<sup>41</sup> *Id.* at \*7.

<sup>42</sup> *Id.*

<sup>43</sup> 358 N.L.R.B. No. 106, at \*7-8.

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<sup>44</sup> *Id.* at \*2.  
<sup>45</sup> *Id.* (citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004)).  
<sup>46</sup> *Costco*, 358 N.L.R.B. No. 106, at \*2.  
<sup>47</sup> *Id.* at \*9.  
<sup>48</sup> *Id.*  
<sup>49</sup> *Id.* at \*1-2.  
<sup>50</sup> 358 N.L.R.B. No. 106, at \*2.  
<sup>51</sup> *Id.* at \*2, \*13.  
<sup>52</sup> *Id.* at \*13.  
<sup>53</sup> *Id.* at \*13-14.  
<sup>54</sup> *Id.* at \*13 (emphasis added).  
<sup>55</sup> *Id.* (citing Lutheran Heritage Village, 343 N.L.R.B. 646 (2004)).  
<sup>56</sup> 358 N.L.R.B. No. 106, at \*1.  
<sup>57</sup> 358 N.L.R.B. No. 106, at \*2.  
<sup>58</sup> 358 N.L.R.B. No. 106 at \*3.  
<sup>59</sup> 358 N.L.R.B. No. 164 (Sept. 28, 2012).  
<sup>60</sup> *Id.* at \*7-10. Robert Becker was not a member of a union.  
<sup>61</sup> As the ALJ noted in the facts of the case, three elements contribute to the salespersons' pay: a percentage of profit on sales, the volume of sales, and a customer satisfaction index based upon customer survey. *Id.* at \*6-7.  
<sup>62</sup> *Id.* at \*7-8.  
<sup>63</sup> *Id.* at \*7.  
<sup>64</sup> *Id.* at \*11.  
<sup>65</sup> *Id.* at \*1.  
<sup>66</sup> *Id.*  
<sup>67</sup> *Id.*  
<sup>68</sup> *Id.*  
<sup>69</sup> *Id.*  
<sup>70</sup> *Id.*  
<sup>71</sup> *Id.* at \*1-2 (citing Costco Wholesale Corp., 358 N.L.R.B. No. 106, at \*1 (Sept. 7, 2012)).  
<sup>72</sup> *Knauz*, 358 N.L.R.B. No. 164, at \*2 (Sept. 28, 2012) (citing Flex Frac Logistics, LLC, 358 N.L.R.B. No. 127, at \*2 (2012)).  
<sup>73</sup> *Knauz*, 358 N.L.R.B. No. 164, at \*3 (Member Hayes dissenting).  
<sup>74</sup> *Id.* (citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646 (2004)).  
<sup>75</sup> *EchoStar Techs., L.L.C.*, N.L.R.B. Case No. 27-CA-066726 (A.L.J., Sept. 20, 2012), *aff'd*, (N.L.R.B., Nov. 1, 2012), available at <http://www.nlrb.gov/case/27-CA-066726> .  
<sup>76</sup> *Id.* at 1. Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer...to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. §158(a)(1)(2012).  
<sup>77</sup> *EchoStar*, N.L.R.B. Case No. 27-CA-066726, at 3, 15, 19-20.  
<sup>78</sup> *Id.* at 3, 21-24.  
<sup>79</sup> *Id.* at 3, 24-25.  
<sup>80</sup> *Id.* at 3-4, 28-30.  
<sup>81</sup> *Id.* at 4, 30-31.  
<sup>82</sup> *Id.* at 4-5, 33-34.  
<sup>83</sup> *Id.* at 10-11.  
<sup>84</sup> 326 N.L.R.B. 824, 825, 827 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).  
<sup>85</sup> *EchoStar*, N.L.R.B. Case No. 27-CA-066726, at 11.  
<sup>86</sup> *Id.*  
<sup>87</sup> *Id.*  
<sup>88</sup> *Id.* at 12-13.  
<sup>89</sup> *Id.* at 19-20.  
<sup>90</sup> *Id.* at 18.  
<sup>91</sup> *Id.* at 21.  
<sup>92</sup> *Id.* at 24.  
<sup>93</sup> *Id.*  
<sup>94</sup> *Id.* at 22.  
<sup>95</sup> *Id.* at 27-28.  
<sup>96</sup> *Id.* at 27.  
<sup>97</sup> *Id.* at 30.

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<sup>98</sup> *Id.* at 28-30.  
<sup>99</sup> *Id.* at 30.  
<sup>100</sup> *Id.*  
<sup>101</sup> *Id.* at 33.  
<sup>102</sup> *Id.* at 31.  
<sup>103</sup> *Id.*  
<sup>104</sup> *Id.* at 36.  
<sup>105</sup> *Id.* at 35.  
<sup>106</sup> *Id.* at 34.  
<sup>107</sup> *Id.* at 35.  
<sup>108</sup> Hispanics United of Buffalo, Inc. [HUB], 359 N.L.R.B. No. 37 (2012).  
<sup>109</sup> *Id.* at \*1 (2012).  
<sup>110</sup> *Id.* at \*2.  
<sup>111</sup> *Id.*  
<sup>112</sup> *Id.*  
<sup>113</sup> *Id.* at \*8; *see also* Steven Greenhouse, *supra* note 1.  
<sup>114</sup> *Id.*  
<sup>115</sup> HUB, 359 N.L.R.B. No. 37, at \*2.  
<sup>116</sup> *Id.*  
<sup>117</sup> *Id.*  
<sup>118</sup> *Id.* at \*8.  
<sup>119</sup> *Id.* at \*2, 11.  
<sup>120</sup> *Id.* at \*8 (quoting Myers Industries (Myers 1 & 11), 268 N.L.R.B. 493 (1984); 281 N.L.R.B. 882 (1986)).  
<sup>121</sup> HUB, 359 N.L.R.B. No. 37, at \*9.  
<sup>122</sup> HUB, 359 N.L.R.B. No. 37, at \*9.  
<sup>123</sup> *Id.* at \*3, n. 13.  
<sup>124</sup> This case contrasts sharply with the NLRB's finding of no unfair labor practice with respect to Walmart's promptly revised and implemented SMP. *See supra* notes 16-35 and accompanying text (discussing Advice Memorandum, Office of the Gen. Counsel, Walmart, No. 11-CA-067171 (N.L.R.B. May 30, 2012)).  
<sup>125</sup> DirecTV, 359 N.L.R.B. No. 54, at \*4 (Jan. 25, 2013).  
<sup>126</sup> *Id.*  
<sup>127</sup> *Id.* at \*4-5.  
<sup>128</sup> *Id.* at \*6-7.  
<sup>129</sup> *Id.* at \*1.  
<sup>130</sup> *Id.* at \*1-2.  
<sup>131</sup> *Id.* at \*2.  
<sup>132</sup> *Id.*  
<sup>133</sup> *Id.*  
<sup>134</sup> *Id.* at \*3.  
<sup>135</sup> *Id.*  
<sup>136</sup> *Id.* at \*3-4.  
<sup>137</sup> *Id.* at \*4.  
<sup>138</sup> *Id.* at \*5; *see also* Lawrence E. Dube, *Board Rules DirecTV Handbook Policies Interfered With Employees' NLRA Rights*, Daily Lab. Rep. (BNA) No. 18, at AA-1. (Jan. 25, 2013) (analyzing holding of the Board in the *DirecTV* case).  
<sup>139</sup> *DirecTV*, 359 N.L.R.B. No. 54, at \*6.  
<sup>140</sup> *Id.* at \*1, n.2 (citing *The Guard Publ'g Co. d/b/a The Register Guard*, 351 N.L.R.B. 1110 (2007), *enforced in part sub nom.* *Guard Publ'g Co. v. N.L.R.B.*, 571 F.3d 53 (D.C. Cir. 2009)). For a discussion of these decisions concerning employer rules regarding use of company equipment and systems, *see* Christine Neylon O'Brien, *Employees on Guard: Employer Policies Restrict NLRA-Protected Concerted Activities on E-mail*, 88 OR. L. REV. 195 (2009); Christine Neylon O'Brien, *Employer E-Mail Policies and the National Labor Relations Act: D.C. Circuit Bounces Register-Guard Back to the Obama Board on Discriminatory Enforcement Issue*, 61 LAB. L. J. 5 (Spring, 2010); *see also* Christine Neylon O'Brien, *The Impact of Employer E-Mail Policies on Concerted Activities under the National Labor Relations Act*, 106 DICK. L. REV. 573-589 (2002)(discussing earlier rulings of NLRB on employer email policies).  
<sup>141</sup> Jones & Carter, Inc., A.L.J., No. 16-CA-027969 (Nov. 26, 2012), *aff'd*, (N.L.R.B., Feb. 8, 2013), *available at* <http://www.nlr.gov/case/16-CA-027969>.  
<sup>142</sup> *Id.* at 1, 9.  
<sup>143</sup> *Id.* at \*12.  
<sup>144</sup> *Id.* at \*13.

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<sup>145</sup> *Id.* at \*14.

<sup>146</sup> *Id.*

<sup>147</sup> Design Tech. Group, d/b/a Bettie Page Clothing, 359 N.L.R.B. No. 96, at \*1 & n.4 (Apr. 19, 2013).

<sup>148</sup> Lawrence E. Dube, *NLRB Finds Firings for Facebook Use Illegal, Rejects Clothing Firm's Entrapment Defense*, 79 Daily Lab. Rep. (BNA) A-1 (Apr. 24, 2013).

<sup>149</sup> *Bettie Page Clothing*, 359 N.L.R.B. No. 96, at \*1, n. 4.

<sup>150</sup> *Id.* at \*3.

<sup>151</sup> See UPMC, N.L.R.B. Case No. 6-CA-81896 at 4-7 (A.L.J., N.L.R.B. Apr. 23, 2013). In *UPMC*, several hospitals that were subsidiaries of health care holding company UPMC were found to have violated the NLRA by maintaining overly broad and ambiguous employment policies: prohibiting solicitation in work, patient care, or treatment areas, and on employer electronic messaging systems or email, and restricting use of information technology resources to authorized activities and prohibiting disparaging or misleading statements regarding the company. See also Lawrence E. Dube, *ALJ Finds Email and Computer Rules Illegal, Citing Nonwork Use, Ambiguous Restrictions*, Daily Lab. Rep. (BNA) No. 82, at A-4 (Apr. 29, 2013) (describing unfair labor practices found in UPMC policies).

<sup>152</sup> Dish Network Corp., 359 N.L.R.B. No. 108, at \*1 (Apr. 30, 2013).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*5 (citing Costco Wholesale Corp., 358 N.L.R.B. No. 106, at 2 (2012); Knauz BMW, 358 N.L.R.B. No. 164 (2012)).

<sup>156</sup> *Dish Network*, 359 N.L.R.B. No. 108, at \*6.

<sup>157</sup> *Id.* (citing *Knauz BMW*, 358 N.L.R.B. No. 164)).

<sup>158</sup> *Dish Network*, 359 N.L.R.B. No. 108, at \*5 (citing *Costco*, 358 N.L.R.B. No. 106, at \*2; *Knauz*, 358 N.L.R.B. No. 164)).

<sup>159</sup> See Advice Memorandum, Office of the Gen. Counsel, Tasker Healthcare Group, d/b/a Skinsmart Dermatology, Case 04-CA-094222 (N.L.R.B. May 8, 2013).

<sup>160</sup> See JEFFREY M. HIRSCH, PAUL M. SECUNDA & RICHARD A. BALES, UNDERSTANDING EMPLOYMENT LAW, 80 (2d ed. 2013) (noting NLRA section 7 protection of speech for nonunion employees in private sector).

<sup>161</sup> The entire Walmart SMP is appended to the AGC's Third Report. See AGC's Third Report, *supra* note 7, at 22-24. The SMP is reprinted here:

**Social Media Policy**

Updated: May 4, 2012

At Walmart, we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for Wal-Mart Stores, Inc., or one of its subsidiary companies in the United States (Walmart).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

**GUIDELINES**

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with Walmart, as well as any other form of electronic **communication.**

The same principles and guidelines found in Walmart policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of Walmart or Walmart's legitimate business interests may result in disciplinary action up to and including termination.

**Know and follow the rules**

Carefully read these guidelines, the Walmart Statement of Ethics Policy, the Walmart Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be

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tolerated and may subject you to disciplinary action up to and including termination.

**Be respectful**

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Walmart. Also, keep in mind that you are more likely to resolved work -related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as **malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers**, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

**Be honest and accurate**

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about Walmart, fellow associates, members, customers, suppliers, people working on behalf of Walmart or competitors.

**Post only appropriate and respectful content**

- Maintain the confidentiality of Walmart trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a Walmart website without identifying yourself as a Walmart associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for Walmart. If Walmart is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of Walmart, fellow associates, members, customers, suppliers or people working on behalf of Walmart. If you do publish a blog or post online related to the work you do or subjects associated with Walmart, make it clear that you are not speaking on behalf of Walmart. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of Walmart."

**Using social media at work**

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use Walmart email addresses to register on social networks, blogs or other online tools utilized for personal use.

**Retaliation is prohibited**

Walmart prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any 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.

**Media contacts**

Associates should not speak to the media on Walmart's behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

**For more information**

If you have questions or need further guidance, please contact your HR representative.

<sup>162</sup> AGC's Third Report, *supra* note 7, at 3-11.

<sup>163</sup> AGC's Third Report, *supra* note 7, at 12.

<sup>164</sup> AGC's Third Report, *supra* note 7, at 12-13.

<sup>165</sup> AGC's Third Report, *supra* note 7, at 3(citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004)).

<sup>166</sup> AGC's Third Report, *supra* note 7, at 3.

<sup>167</sup> AGC's Third Report, *supra* note 7, at 3.

<sup>168</sup> AGC's Third Report, *supra* note 7, at 3.

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<sup>169</sup> See *supra* note 159.

<sup>170</sup> See *supra* notes 44-45, 163-66 and accompanying text.

<sup>171</sup> See *supra* notes 67-71 and accompanying text.

<sup>172</sup> See *supra* notes 89-107 and accompanying text.

<sup>173</sup> See *supra* notes 121-23 and accompanying text.

<sup>174</sup> See *supra* notes 129-31 and accompanying text.

<sup>175</sup> See *supra* note 132 and accompanying text.

<sup>176</sup> See *supra* notes 130, 136 and accompanying text.

<sup>177</sup> See *supra* notes 134-35 and accompanying text.

<sup>178</sup> See *supra* note 141 and accompanying text.

<sup>179</sup> See *supra* note 147 and accompanying text.

<sup>180</sup> See *supra* notes 153, 157 and accompanying text.

<sup>181</sup> See *supra* notes 155-56 and accompanying text.

<sup>182</sup> See *Wright Line*, 251 N.L.R.B. 1083 (1980).

<sup>183</sup> *Id.* The Board's *Wright Line* test was upheld in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW 151 & n.34 (15<sup>th</sup> ed. 2013) (discussing *Wright Line* case).

<sup>184</sup> See *id.* at 2-3 (citing *Meyers Industries*, 281 N.L.R.B. 882, 885 (1986) (*Meyers II*)); see also Lawrence E. Dube, *Slamming Firm on Facebook Not Protected; NLRB Memo Says No Talk of Shared Concern*, Daily Lab. Rep. (BNA) No. 98, at A-1 (May 21, 2013) (discussing Tasker Advice Memo).

<sup>185</sup> See *id.* at 3 (citing *Tampa Tribune*, 346 N.L.R.B. 369, 371-72 (2006)).

<sup>186</sup> Marshall McLuhan introduced the concept of "the medium is the message" in his book, MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 8, 9, 12 (1964).