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**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**

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

Christine Neylon O'Brien¹

ABSTRACT

The emergence of social media, from Facebook to Myspace and LinkedIn to Twitter—much like the earlier evolution of email, IM, and web 2.0—have changed the way people communicate, expanding the virtual horizons for social networking and business promotion on these popular communications platforms. Smartphones and other portable internet data generators such as iPads, and even internet hotspots incorporated into motor vehicles, have encouraged the blurring of work and personal time such that people are tethered to their devices, checking their work and personal messages wherever they are and whatever else they are doing.

In the first case of its kind, the National Labor Relations Board (Labor Board or NLRB) issued a complaint against an employer, American Medical Response of Connecticut (AMR), for the suspension and firing of an employee who posted negative comments about her supervisor on her Facebook page. The federal agency alleged that the employer retaliated against the terminated employee for her postings and for requesting the presence of her union representative at an investigatory interview that led to discipline. Most importantly, the Labor Board maintained that the employer's rules on blogging and internet posting, which included social media use, standards of conduct relating to discussing co-workers and superiors, and solicitation and distribution, were overbroad, interfering with employees' right to engage in concerted activities for mutual aid and protection under section 7 of the National Labor Relations Act (NLRA). The NLRB, as the federal agency that enforces the statutory rights of all employees covered by the NLRA—not just those who belong to unions—signaled that it is ready to prosecute companies

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with policies that unduly interfere with employee communication about work matters such as wages, hours, and working conditions, even on social media. The AMR case puts employers on notice that rules affecting employee communication, including the use of email and social media during nonwork time, should be reviewed to ensure that the rules do not violate the NLRA. This article outlines tips for employers and employees to stay within the boundaries of labor law.

I. INTRODUCTION

In the first labor law case of its kind in the United States, Region 34 of the NLRB issued a complaint against AMR. The complaint alleged AMR's firing of Emergency Medical Technician (EMT) Dawnmarie Souza for posting derogatory comments about her supervisor on the social media website Facebook violated sections 7, 8(a)(1), and 8(a)(3) of the NLRA.² The Board

2. Region 34 of the NLRB issued its complaint against AMR on October 27, 2010 in *American Medical Response of Connecticut, Inc.*, No. 34-CA-12576 (NLRB Region 34) [hereinafter AMR Case]. See Complaint & Notice Hearing, Am. Med. Response of Conn., Inc., No. 34-CA-12576 (NLRB Region 34 Oct. 27, 2010) [hereinafter AMR Complaint], available at <http://www.scribd.com/doc/41010696/American-Medical-Response-of-CT-NLRB-Nov-2010>. The Board issued a complaint after investigation of charges filed by the International Brotherhood of Teamsters, Local 443, that AMR of Connecticut had been engaging in unfair labor practices in violation of sections 7 and 8 of the National Labor Relations Act. 29 U.S.C. §§ 151, 157, 158(a)(1), 158(a)(3) (2006). Section 7 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 also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

29 U.S.C. § 157. 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). Section 8(a)(3) provides in relevant part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3). The Board's Office of Public Affairs issued a news release on the AMR case on November 2. See News Release, NLRB, Office of the Gen. Counsel, Complaint Alleges Connecticut Company Illegally Fired Employee over Facebook Comments, Release No. R-2794 (Nov. 2, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803c4e5e>.

Recent reports of similar Facebook firing cases in Canada and France reflect that the employee terminations were upheld by labor tribunal or board. See Jeremy Hainsworth, *Canadian Labor Board Upholds Firings of Workers for Negative Facebook Postings*, Daily Lab. Rep. (BNA) No. 213, at A3 (Nov. 11, 2010) (citing Loughheed Imps. Ltd. (W. Coast Mazda) v. United Food & Commercial Workers Int'l Union, Local 1518, 2010 CanLII 62482 (B.C. Labour Relations Bd.)), available at <http://canlii.ca/s/15r09> (upholding employer's right to fire employees because of derogatory postings about company and supervisors on Facebook); Rick Mitchell, *French Labor Tribunal Upholds Firings over Facebook Comments*, Daily Lab. Rep. (BNA) No. 225, at A4 (Nov. 23, 2010) (citing Southiphong v. Societe Alten SIR, No. RG-F 09/316 (Conseil de Prud'hommes de Boulogne-Billancourt Nov. 19, 2010) and Barbera v. Societe Alten SIR, No. RG-F 09/343 (Conseil de Prud'hommes de Boulogne-Billancourt Nov. 19, 2010)) (referencing "first in France" case where firing of

alleged that the employer threatened Ms. Souza with discipline for requesting union representation at an investigatory interview that she reasonably believed could lead to discipline, thus interfering with her *Weingarten* right.³ Under the rule in *Weingarten*, an employer violates section 8(a)(1) of the NLRA when it threatens to discipline an employee for requesting a union representative in this context.⁴ In addition, a violation of section 8(a)(3) of the NLRA may occur where an employer discriminates against an employee who exercises her *Weingarten* right if the employer does so to discourage membership in a labor organization.⁵ An employer is not required to acquiesce to a *Weingarten* request and may instead investigate matters without the interview.⁶ In the

employees for denigrating comments about employer on Facebook upheld). The firing was upheld by an industrial arbitration council because postings were deemed public as the employee's Facebook page was open to "friends of friends, was not in jest, and was incitement to rebellion."

The AMR case is the first reported Facebook firing case that involves the National Labor Relations Act, but within the United States there have been reports of other instances where employees have lost their jobs due to their ill-considered Facebook postings. See Ki Mae Heussner & Dalia Fahmy, *Teacher Loses Job After Commenting About Students, Parents on Facebook*, ABC NEWS (Aug. 19, 2010), <http://abcnews.go.com/Technology/facebook-firing-teacher-loses-job-commenting-students-parents/story?id=11437248> (last visited Feb. 3, 2011) (discussing teacher posting description of students as "germ bags" and parents as "snobby" and "arrogant"). These postings resulted in her acquiescence to her superintendent's request for her resignation. *Id.* Heussner and Fahmy also reference several other instances where Facebook posts resulted in the discipline or termination of employees. For example, the case of a sociology professor in Pennsylvania who was suspended because of Facebook posts where she complained about her work and jested about violence including needing a "hitman." *Id.* Additionally, the two authors discuss a stadium worker who was fired for posting an obscenity about the home team losing a star player and thirteen cabin crew members of a U.K. discount airline fired because their posts made fun of passengers and joked about defective engines. *Id.*; see also Ray Lane, *Privacy/Social Media Interplay Is Key Issue in Hospital Tech's Firing over Facebook Post*, Daily Lab. Rep. (BNA) No. 154, at A4 (Aug. 11, 2010) (discussing hospital's firing of medical technician who posted on Facebook). The Technician stated that she was "face to face" at work with a "cop killer." Because her posting purportedly included identifiable details that must be kept confidential under Health Insurance and Portability and Accountability Act's privacy rules and the hospital's own work rules on patient privacy, she was fired for the posting. Lane, *supra*; see also Jeanette Borzo, *Employers Tread a Minefield, Firings for Alleged Social-Media Infractions Sometimes Backfire on Companies*, WALL ST. J., Jan. 21, 2011, at B6 (referencing AMR case and three other similar cases). The three cases Borzo refers to involve employee blogging, Facebook and Myspace postings. Borzo, *supra*. One employer was sued because its blog mentioned patent suits tried by two other Texas lawyers against a company it also litigated against. *Id.* Another public employer was sued because a teacher was forced to resign over some photographs on Facebook that showed her with a glass of wine. *Id.* In the other case, an employer was sued because it violated the federal Stored Communications Act and its equivalent under New Jersey law for accessing an employee-only Myspace page. *Id.*

3. AMR Complaint, *supra* note 2, at 3; NLRB v. J. Weingarten, Inc., 420 U.S. 251, 257-58 (1975) (outlining right to request representative at investigatory interview that employee reasonably fears may lead to discipline). The *Weingarten* right is named after the case that first recognized and outlined the right's parameters.

4. See *Weingarten*, 420 U.S. at 264 (noting denial of request for union representative at investigatory interview violates section 8(a)(1)); see also 29 U.S.C. §§ 157-158(a)(1).

5. 29 U.S.C. § 158(a)(3).

6. See *Weingarten*, 420 U.S. at 258-59 (1975) (quoting Mobil Oil Corp., 196 N.L.R.B. 1052, 1052 (1972)). The NLRB has changed its position on whether *Weingarten* rights apply to nonunion employees four times, most recently retracting the full protection of the right for nonunion employees. Even nonunion

AMR case, however, Ms. Souza was allegedly required to complete an incident report without the assistance of her union representative despite her *Weingarten* request, and she was suspended and terminated shortly thereafter.⁷

According to the NLRB, AMR's blogging and internet-posting policy was also overbroad, constituting a violation of section 8(a)(1) of the NLRA because it unlawfully infringes on section 7-protected concerted activities.⁸ Shortly after the Board issued a press release on the case, news of the EMT who was terminated from her employment for posting negative comments about her supervisor on Facebook went viral due to its significant implications for workplace social media policies.⁹ Section 7 protects all employees who are covered by the NLRA, not just unionized employees, and thus the case has broad implications for employers.¹⁰ In light of the NLRB's attention to this issue, companies need to be cautious as they promulgate and enforce electronic communications and social media policies to ensure they do not infringe on employees' section 7 rights.¹¹

employees engage in protected activity when they make a *Weingarten* request, but the employer is not required to acquiesce to the request or forego the investigatory interview in a nonunion context. See *IBM Corp.*, 341 N.L.R.B. 1288, 1294 (2004); Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 LOY. U. CHI. L.J. 111, 114 (2005) (discussing history of, and limits to, *Weingarten* right). Notably, Ms. Souza was a union member who requested the assistance of a union steward.

7. See AMR Complaint, *supra* note 2, at 3. AMR denied this allegation. See Defendant's Answer to Complaint at 2, Am. Med. Response of Conn., Case No. 34-CA-12576 (NLRB Region 34 Oct. 27, 2010) (on file with author) [hereinafter Defendant's Answer]. The Defendant's Answer was provided pursuant to a Freedom of Information Act Request. See Letter of Jacqueline A. Young, Freedom of Info. Officer, NLRB Staff Member, Wash. D.C. (Nov. 23, 2010) (on file with author). Note that all facts outlined are as alleged in the charge and pleadings in light of the absence of a decision by an administrative law judge in the AMR case.

8. See AMR Complaint, *supra* note 2, at 3-4; see also *NLRB Alleges Company Illegally Fired Worker for Negative Facebook Comments*, Daily Lab. Rep. (BNA) No. 214, at A3 (Nov. 5, 2010) (interpreting Board's complaint against AMR).

9. The Board's Office of Public Affairs issued a news release on the AMR case on November 2. See News Release, NLRB, Office of the Gen. Counsel, Complaint Alleges Connecticut Company Illegally Fired Employee over Facebook Comments, Release No. R-2794 (Nov. 2, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803c4e5e>. Labor Relations Today reported on the case the next day. Seth Borden, *NLRB Regional Office Issues Complaint Against Employer Who Fired Employee for Facebook Postings*, LAB. REL. TODAY, Nov. 3, 2010, <http://www.laborrelationtoday.com/2010/11/articles/nlr-decisions/nlr-regional-office-issues-complaint-against-employer-who-fired-employee-for-facebook-postings> (last visited Feb. 3, 2011). Thereafter, the Daily Labor Report issued a report on the case. See *NLRB Alleges Company Illegally Fired Worker for Negative Facebook Comments*, Daily Lab. Rep. (BNA) No. 214, at A2 (Nov. 5, 2010). The New York Times followed with its story. Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES, Nov. 9, 2010, at B1.

10. See, e.g., News Release, NLRB, Office of the Gen. Counsel, Complaint Alleges Connecticut Company Illegally Fired Employee over Facebook Comments, Release No. R-2794 (Nov. 2, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803c4e5e>; Seth Borden, *supra* note 9; *NLRB Alleges Company Illegally Fired Worker for Negative Facebook Comments*, Daily Lab. Rep. (BNA) No. 214, at A2 (Nov. 5, 2010).

11. See Borzo, *supra* note 2 (noting experts recommend adopting SMP and training employees about it). This is something that less than half of employers have already done. Cf. Stephen D. Lichtenstein & Jonathan J. Darrow, *Employment Termination for Employee Blogging: Number One Tech Trend for 2005 and Beyond, or a Recipe for Getting Dooced?*, 2006 UCLA J.L. & TECH. 4, at 5 (recommending employee blogging policies be added to existing employer computer usage and monitoring policies).

The emergence of social networking means that people do all kinds of things on user-generated content websites that they used to do very differently. Workplace communication has evolved to such a degree that one can now say email supplants much face-to-face communication in many workplaces. Additionally, new media are arriving and growing even as we tweet. While the NLRB has been slow to adapt its historic rules to incorporate legal requirements for the commonplace and necessary communication medium of email in the workplace, it is likely that this will change under the new Obama Board.¹² Social networks have evolved and expanded over the past decade. Their reach is instantaneous and they provide a nearly unlimited ability to reach virtually the entire world. At the moment, it seems as though the current NLRB is poised to adapt existing legal doctrines to craft new rules and remedies regarding employer rules and restrictions concerning employee use of these social media sites.

Employers clearly have rights at stake with respect to employee communication on email and social media. These rights include protecting their reputation, image, culture, and preventing disclosure of confidential information. Other major employer interests are to avoid liability for harassment and noncompliance with laws of all types, including discrimination, privacy, etc. Correspondingly, employees have the right to speak and connect on their own time and on their own devices as long as they do not violate the employer's legitimate business interests. It is quite possible that the newly constituted NLRB may find that employees have the right to speak, email, and engage in social media on nonwork time. This may be the case even on the employer's equipment if the employer allows the equipment to be used for other nonwork related communications.

This paper analyzes the groundbreaking AMR Facebook firing case: the first instance where the NLRB issued a complaint in response to an employee who was discharged after posting comments on Facebook that violated the company's blogging and internet posting policy.¹³ This case highlights the importance of employer policies concerning social media and electronic communications in general. The labor law issues raised in the AMR case are vital to vast numbers of employees and managers because the NLRA protects the right to engage in concerted activities of all employees covered by the Act. Moreover, the scope of the conduct AMR and other employers seek to regulate

12. See *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007), *aff'd in part, rev'd in part*, 571 F.3d 53 (D.C. Cir. 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, 11 (Spring 2010) (noting former NLRB Chairman Wilma Liebman's vehement dissent in NLRB's *Register-Guard* decision). O'Brien also points out the likelihood that the Obama Board will revise the rule in *Register-Guard* to require reevaluation of workplace communication systems policies where they interfere with section 7 rights unless the policy is justified by a legitimate business reason.

13. See Borzo, *supra* note 2 (discussing AMR's NLRB case as first Board complaint linked to social media and broad legal implications of social media for employers who fire for alleged infractions).

with various communications policies is broad and includes increasingly popular social media networking activity. Such policies affect employee activities beyond work time and place, and on the employees' own equipment, and the impact of social media on human and thus employee communication and connection is vast.¹⁴

Part II of this article focuses on the labor law issues presented by the AMR case, analyzing the Board's position that the employee's Facebook postings regarding her supervisor were within the protection afforded by section 7 of the NLRA, as well as the procedure followed in the case.¹⁵ Part III outlines the limits of protection for employee conduct that is either disloyal to the company or is in violation of company policy, in light of relevant precedent on NLRA section 7 rights and dual-motive discharges. Because the Board alleged that AMR's policy was overbroad and interfered with employees in the exercise of their right to engage in protected concerted activity, AMR's policy and the recent Advice Memoranda from the NLRB's General Counsel's Office on related employer policies and disciplinary actions are analyzed in Part IV. Issues of employee use of profanity with a supervisor and egregious employee misconduct that may undercut the protection afforded by section 7 of the NLRA are also examined in NLRB and appellate court cases in Part IV. In Part V, the legal implications of the AMR case for both union and nonunion employees are examined and recommendations are made for crafting workplace communications and social media policies that will protect a company's legitimate business interests but not violate the NLRA.

14. See *Mark Zuckerberg Named Time 'Person of the Year'*, BOS. GLOBE, Dec. 15, 2010, http://www.boston.com/business/technology/articles/2010/12/15/mark_zuckerberg_named_time_person_of_year (last visited Feb. 3, 2011) (discussing Zuckerberg as *Time* Person of the Year fitting because of his influence on culture and news). *Time* cited Zuckerberg as "changing how we all live our lives" and noted Facebook is an international phenomenon with over 500 million users in a "more permeable definition of community." See *id.* Quoting from Zuckerberg's own Facebook page the Boston Globe printed, "[He] is trying to make the world a more open place." *Id.*; see also Alex Sherman, *Facebook Passes Google as Most Visited U.S. Site*, BOS. GLOBE, Jan. 1, 2011, http://www.boston.com/business/technology/articles/2011/01/01/facebook_passes_google_as_most_visited_us_site (last visited Feb. 3, 2011) (noting rapid ascendance of social networking over search engines and Internet portals); cf. Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 288, 291 (2007) (noting increasing importance of new source of communication such as blogging). Gely and Bierman also note that blogging and other nonpersonal communication are entitled to protection under NLRA where activities are concerted.

15. The AMR case is a labor law case, not a case dealing with other common-law causes of action or statutory equal employment opportunity discrimination issues. Some other legal issues that may arise relating to termination of an employee because of social media postings include violations of the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2711 (2006 & Supp. III 2009), and common-law causes of action relating to invasion of privacy and wrongful termination. See *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754, 2008 U.S. Dist. LEXIS 108834, at *4-5 (D.N.J. July 25, 2008) (unpublished opinion) (involving claims of violation of SCA, invasion of privacy, and wrongful termination). In *Hillstone*, terminations were preceded by MySpace postings that a manager gained access to through an employee. *Id.* at *2-3. Employee liability may ensue for breaches of confidentiality or trade secret that are discovered through such postings, and employers may create liability for themselves if they react to material posted on social media in a manner that amounts to unlawful discrimination against employees.

II. THE FACTUAL BACKGROUND OF THE AMERICAN MEDICAL RESPONSE OF CONNECTICUT CASE, CURRENT DISPOSITION, AND LEGAL ISSUES PRESENTED

It should be emphasized that the facts in the AMR case are as alleged, following the facts in the charge and pleadings and news reports, because there were no findings of fact reached in a decision by an administrative law judge. The complainant, Dawnmarie Souza, posted negative remarks about her supervisor, Frank Filardo, through her Facebook page on the same day he required her to complete a written incident report relative to complaints about her and denied her request for a union representative to assist her with the report.¹⁶ Her initial Facebook post stated that it “looks like I am getting some time off” and, using her workplace’s numeric code for a psychiatric patient, she commented, “love how the company allows a 17 to become a supervisor.”¹⁷ Ms. Souza’s Facebook friends responded with supportive remarks. One expressed relief at having left AMR, and Ms. Souza responded with further negative comments about her supervisor. She first said that Frank was “being a d***” and later, in response to another’s question about Frank being back, she responded, “yep, he’s a scum*** as usual.”¹⁸ On November 9, the day after Ms. Souza posted the remarks about her supervisor on her Facebook page, she was suspended and then terminated from employment on December 1, 2009.¹⁹

AMR maintains a blogging and internet posting policy that prohibits depicting the company in any way without prior company approval.²⁰ The company’s policy prohibits employees from making “disparaging, discriminatory or defamatory comments when discussing the company or the employee’s superiors, co-workers and/or competitors.”²¹ The company maintains that the real reason for Souza’s termination was not her Facebook postings but rather two complaints received from patients and hospital staff within a ten-day period leading up to her suspension and termination.²²

Souza’s union, International Brotherhood of Teamsters, Local 443, initially filed a charge against AMR at Region 34 of the NLRB on January 19, 2010.²³

16. News Release, NLRB, Office of the Gen. Counsel, Complaint Alleges Connecticut Company Illegally Fired Employee over Facebook Comments, Release No. R-2794 (Nov. 2, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803c4e5e>.

17. See Susanna Kim, *NLRB Backs Worker Fired over Facebook Posts Ripping Boss*, ABC NEWS (Nov. 10, 2010), <http://abcnews.go.com/Business/facebook-firing-labor-board-takes-stand/story?id=12099395> (last visited Feb. 3, 2011).

18. *Id.* (quoting Souza’s posts).

19. *Id.* (outlining events leading to Souza’s termination).

20. *See id.*

21. Kim, *supra* note 17 (quoting from AMR employee handbook).

22. *See id.*

23. *See* Charge Against American Medical Response, No. 34-CA-12576 (NLRB Region 34 Jan. 19, 2010) [hereinafter AMR Charge] (on file with author) (filed by International Brotherhood of Teamsters Local 443). The AMR Charge was provided pursuant to a Freedom of Information Act Request. *See* Letter from Jacqueline A. Young, Freedom of Info. Officer, NLRB Staff Member, Wash. D.C. (Nov. 23, 2010) (on file with author).

The first charge alleged violations of sections 8(a)(1) and 8(a)(5) of the NLRA and listed as the basis of the charge that:

The company did not allow Dawn Marie Souza her Weingarten Rights/Representation by the Union as she requested, when she was threatened with disciplinary action, which has resulted in her termination.

By the above and other acts, the above named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.²⁴

An amended charge was filed on April 29, 2010, asserting violations of sections 8(a)(1) and 8(a)(3).²⁵

On about November 9, 2009, the above named Employer, by its officers, agents, and representatives, suspended its employee Dawnmarie Souza, and on December 1, 2009, terminated Ms. Souza because she exercised her Weingarten rights to Union representation on about November 8, 2009 and engaged in concerted protected activities, and because she supposedly violated certain work rules which are overbroad and thereby in violation of the National Labor Relations Act, as amended, as these rules tend to restrict employees in the exercise of their Section 7 rights under the Act.

Within the past six months, and at all material times, the Employer has maintained and enforced the following work rules:

The "Blogging and Internet Posting Policy" that prohibits employees from making disparaging comments when discussing the company or superiors or coworkers,

The "Standards of Conduct" rules prohibiting language or action that is of a "generally offensive nature" and prohibiting "rude or discourteous behavior to a coworker;" and

A "no solicitation" policy that limits solicitation to "approved announcements."²⁶

24. See AMR Charge, *supra* note 23; see also *supra* note 2 (discussing provisions of sections 8(a)(1) and 8(a)(3)). Additionally, section 8(a)(5) provides: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employee" 29 U.S.C. § 158(a)(5)(2006).

25. See Amended Charge Against American Medical Response, No. 34-CA-12576 (NLRB Region 34 Apr. 29, 2010) [hereinafter AMR Amended Charge] (on file with author) (filed by International Brotherhood of Teamsters Local 443). The Amended Charge was provided pursuant to a Freedom of Information Act Request. See Letter of Jacqueline A. Young, Freedom of Info. Officer, NLRB Staff Member, Wash. D.C. (Nov. 23, 2010) (on file with author). Apparently the section 8(a)(5) failure to bargain in good faith allegation was dropped from the amended charge. See AMR Amended Charge, *supra*.

26. See AMR Amended Charge, *supra* note 25; Letter of Jacqueline A. Young, Freedom of Info. Officer, NLRB Staff Member, Wash. D.C. (Nov. 23, 2010) (on file with author).

After an investigation, and in the absence of settlement of the charges, the Acting Regional Director of Region 34 issued a complaint and notice of hearing.²⁷ The complaint alleged violations of sections 8(a)(1) and 8(a)(3) of the NLRA by the company maintaining and enforcing its overbroad policies and rules, by threatening Ms. Souza with discipline in response to her *Weingarten* request, and by terminating her to discourage employees from engaging in protected concerted activities.²⁸ A hearing was scheduled for January 25, 2011 and consecutive days thereafter at the NLRB's Region 34 office in Hartford, Connecticut.²⁹ The hearing before an administrative law judge was postponed to February 8 in order to allow the parties to discuss a settlement, which was reached on the evening before the rescheduled hearing.³⁰ The terms of the settlement are included here and analyzed throughout the remainder of the paper.³¹

27. See AMR Complaint, *supra* note 2, at 5.

28. *Id.* at 3-4.

29. *Id.* at 5.

30. See *Conn. Facebook Firing Settlement Talks in Works*, ABC NEWS (Jan. 25, 2011), <http://abcnews.go.com/Business/wireStory?id=12760460>. The hearing was rescheduled for February 8, 2011 in order to afford the parties an opportunity to discuss the possibility of a settlement.

31. See Telephone interview by Margo E.K. Reder, with Acting Reg'l Dir. John S. Cotter, Region 34, NLRB, and Elizabeth Pearson, Sec'y to the Reg'l Dir. of Region 34, NLRB (Feb. 8, 2011) (copy on file with author). The AMR case will remain open for 60 days after the signing of the agreement in order to ensure compliance with the agreement. Notably, by entering into the agreement, the Charged Party (AMR) does not admit that it violated the National Labor Relations Act. *Id.* In accordance with the standard form NLRB-4775 (8-05), the Notice Posted pursuant to the Settlement Agreement reached on Feb. 7, 2011 must be posted physically and distributed electronically by email, posting on an intranet or internet site, or other electronic means if the Charged Party customarily communicates with its employees by such means. The key provisions of the agreement are as follows:

WE WILL *NOT* do anything that interferes with these rights. More specifically, WE WILL *NOT* maintain or enforce any rules in our employee handbook, or elsewhere, that improperly restrict your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees and others while not at work. WE WILL *NOT* maintain or enforce any rules in our employee handbook, or elsewhere, that improperly restrict your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees anywhere on Company property during working hours. WE WILL *NOT* deny your request for union representation for an investigatory interview or require you to participate in an investigatory interview without union representation, including the preparation of an incident report, where you reasonably believe that the incident report may result in disciplinary action against you. WE WILL *NOT* threaten to discipline you because you request union representation for an investigatory interview, including the preparation of an incident report, where you reasonably believe that the incident report may result in disciplinary action against you. WE WILL *NOT* discharge or discipline you because of your union activities, or because you discuss your wages, hours and working conditions with your fellow employees and others while not at work. WE WILL *NOT* in any similar way interfere with your rights under Federal Law described above. WE WILL revise the following rules that appear in our employee handbook, and advise you in writing of such revision:

"Blogging and Internet Posting Policy," which improperly restricts your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees and

The key issues that would have been resolved at a hearing in the AMR case included the actual facts leading up to the charging party's suspension and termination; whether the employer retaliated against Ms. Souza because she requested her union representative; whether she was retaliated against for posting derogatory comments on Facebook about her supervisor; whether the employer's social media policy (SMP) and other rules unduly interfered with the exercise of the complainant's statutorily protected right to engage in concerted activities; and finally, whether the employer had an independent and legally sufficient reason to terminate Ms. Souza. Thus, the employer would rely upon a mixed or dual-motive analysis with respect to Ms. Souza's termination. If the NLRB proved that the employer's disciplinary decisions were motivated in part by Ms. Souza's protected concerted activities, then the employer would have to prove that Ms. Souza's conduct prior to the morning of January 8, 2009 was, on its own, a sufficient basis for her termination.

A. The Timing of the Denial of a Weingarten Right and the Burden in Dual-Motive Cases

In the AMR case, the NLRB's complaint alleged that the company, through Frank Filardo and general manager Charles Babson, illegally threatened to discipline Ms. Souza for requesting the accompaniment of a union representative at an investigatory interview she had reasonable grounds to believe would result in disciplinary action; in essence, illegally denying Ms. Souza her *Weingarten* right.³² Further, Ms. Souza was required to complete the written report without union representation.³³ If this employer conduct had been substantiated at hearing, it would have constituted an unfair labor practice that occurred immediately prior to the terminated employee's Facebook

others; "Standards of Conduct" rules, which improperly restrict your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees and others; and "Solicitation and Distribution Policy," which improperly restricts your right to engage in union activities or to discuss your wages, hours and working conditions with your fellow employees anywhere on company property during working hours. WE WILL remove from our records any documents that you signed requiring you to abide by the above-described rules, and notify you in writing that this has been done and that such documents will not be used against you in any way in the future.

Id. The terms required AMR to revise its overly broad rules and stated that under the NLRA, employees may discuss the terms and conditions of their employment with co-workers and others. 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/settlement-reached-case-involving-discharge-facebook-comments> (last visited Feb. 12, 2011) (discussing terms of settlement); see also Melanie Trotman, *Facebook Firing Case Is Settled*, WALL ST. J., Feb. 8, 2011, at B3 (noting case "had become a test of how much latitude employees may have when posting comments about work matters from their home computers on social media sites such as Facebook").

32. AMR Complaint, *supra* note 2, at 3.

33. *Id.* at 3. Respondent denied both of these allegations. See Defendant's Answer, *supra* note 7, at 2.

postings. As such, the unfair labor practice during the day could be said to have provided an incendiary for Ms. Souza's Facebook postings that same evening. The argument for Ms. Souza would have been that, but for the employer's unfair labor practice, the employee posting would never have taken place. At the very least, the timing of the employer's unfair labor practice was an ameliorating circumstance for Ms. Souza's venting to her Facebook friends and co-workers about her immediate supervisor, the agent of the company who denied her an appropriately requested and statutorily protected right. Because AMR alleged that there were other serious complaints about the employee that caused her termination aside from her request for union representation or her Facebook postings, the considerations surrounding a dual-motive discharge were likely to have been examined and weighed if there had been a hearing.

In a dual-motive case under section 8(a)(3) of the NLRA, the Board's General Counsel initially needs to make a *prima facie* showing that the employee's protected conduct was a motivating factor in the employer's decision to discipline her.³⁴ This is established by showing that the employee engaged in protected concerted activity, that the employer knew about the activity, and that the activity was a substantial motivating factor for the employer's action.³⁵ The Board has the burden to persuade that antiunion sentiment was a substantial or motivating factor, but the burden then shifts to the employer to demonstrate that the employee would have been terminated anyway, even absent her protected conduct.³⁶ The question is whether the complainant's conduct, both at work and after work, constituted a separate legitimate basis for the resulting discipline and discharge. Thus, in the AMR case, if the employer proved that it was justified in terminating Ms. Souza anyway, even without a discriminatory reason, then it would have avoided a finding of a section 8(a)(3) violation.³⁷

B. Do Two Wrongs Make a Right?

The denial of a *Weingarten* right by AMR, if it were proven, would have been a distinct unfair labor practice that violated section 8(a)(1). On the facts as alleged, the employer was aware of the *Weingarten* request through its agents who purportedly threatened Ms. Souza for making the request.³⁸ The

34. See *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980); 29 U.S.C. § 158(a)(1) (2006).

35. *Wright Line*, 251 N.L.R.B. at 1089.

36. *Id.* The employer then establishes its affirmative defense. The *Wright Line* test in dual-motive cases was affirmed by the Supreme Court in *NLRB v. Transportation Management*, 462 U.S. 393, 403-04 (1983); see also DAVID P. TWOMEY, *LABOR & EMPLOYMENT LAW* 151 (14th ed. 2010) (discussing dual-motive standards).

37. See TWOMEY, *supra* note 36, at 151. The Board's General Counsel ultimately carries the burden of persuasion in dual-motive, as opposed to pretext, cases where the employer's proffered reasons are deemed inadequate justification for discharge. *Id.*

38. AMR Complaint, *supra* note 2, at 3.

next day, Ms. Souza was suspended and later terminated.³⁹ In addition to the presumption that the timing of the discipline—occurring shortly after the *Weingarten* request—was based on antiunion animus, the timing of the alleged unfair labor practice was such that it may have motivated the employee's misconduct with respect to her Facebook postings.⁴⁰ If the Board had established that the employer illegally denied Ms. Souza her *Weingarten* right and threatened her for requesting the same, then the timing of the employer's unfair labor practices could have provided some immunization against Ms. Souza's responsibility for her own alleged wrongdoing later that same day. The Board's argument in representing the complainant's interest would likely have been that the employer's wrong preceded, and thus engendered, the employee's subsequent online reaction. Further, in order for the complainant's Facebook remarks to receive section 7 protection, the General Counsel would have had to establish that the online communication involved concerted activity for mutual aid or protection. Doing this would establish that the post was in furtherance of a group concern relating to working conditions.

The whole area of social networking is one that has yet to be litigated in the labor-law context. Therefore, the scope of section 7 activity regarding social media may at best be analogized to section 7 protected communications via other methods, such as oral or written communications, including email. Nonetheless, there is some relevant advice regarding social media policies from the NLRB's Division of Advice in two cases that present some similar legal issues to the AMR case, as will be discussed next.

III. RECENT NLRB ADVICE MEMORANDA PROVIDE INSIGHT FOR THE FACEBOOK FIRING CASE

A. *Sears*

The NLRB's Office of the General Counsel's Division of Advice has issued

39. *Id.* at 3.

40. It is a violation of section 8(a)(1) of the NLRA to interfere with the exercise of section 7 rights and to threaten an employee for exercise of her section 7 rights. It is a violation of section 8(a)(3) to discriminate with respect to discipline and discharge because of an employee's engaging in protected concerted activity. To place Ms. Souza's Facebook postings in the context of her reaction to her employer's unfair labor practice, it is clear that the employer's unfair labor practice was likely a motivating factor that provoked her postings. An employer's unfair labor practice provides some justification for the complainant's misconduct. *See infra* notes 83-87 and accompanying text (discussing *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979)). An *Atlantic Steel* inquiry takes into account an employer's unfair labor practice as one prong for determining whether a complainant's misconduct is so egregious that it causes her to lose the protection of the Act. *Atlantic Steel*, 245 N.L.R.B. at 819. One could also analogize to the Board's treatment of strikers where an employer commits an unfair labor practice and employees retaliate with a strike. An unfair labor practice striker has greater job protection upon conclusion of the strike than a mere economic striker who stops work in quest of better wages, hours, or working conditions. *See TWOMEY, supra* note 36, at 240-41 (comparing reinstatement rights of economic and unfair labor practice strikers).

two memoranda in cases that are relevant to the AMR case.⁴¹ In the first memorandum (Sears Advice Memo), the NLRB Division of Advice responded to the question whether an employer's SMP could reasonably be construed to chill section 7 protected activities. The union in question was using various online media including Facebook and MySpace to organize service technicians.⁴² The service technicians communicated regarding union campaigns and other work-related concerns by subscribing to an email listserv named "s-tech," a free Yahoo! service that was not sponsored by or affiliated with the employer.⁴³

Sears promulgated an SMP regarding employees' use of blogs, message boards, social networks, and other online media, announcing that this was in response to companies whose reputations suffered because of inappropriate conduct of employees using social media.⁴⁴ The stated intent of the policy was to "minimize the risk to the Company and its associates" and thus the SMP prohibited discussion of a number of subjects by associates through social media in order to "maintain the Company's reputation and legal standing."⁴⁵ The list of prohibited subjects included use of company or clients' confidential or proprietary information, embargoed information, company intellectual property or "[d]isparagement of [the] company's or [its] competitors' products, services, executive leadership, employees, strategy, and business prospects," as well as "[e]xplicit sexual references, [r]eference to illegal drugs, [o]bscenity or profanity, [or] [d]isparagement of any race, religion, gender, sexual orientation, disability or national origin."⁴⁶

After Sears established its SMP, the members of the s-tech listserv debated

41. See Advice Memorandum, Office of the Gen. Counsel, Sears Holdings (Roebucks), No. 18-CA-19081 (NLRB Dec. 4, 2009) [hereinafter *Sears Advice Memo*], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45802d802f>; Advice Memorandum, Office of the Gen. Counsel, MONOC, No. 22-CA-29008, -29083, -29084, -29234 (NLRB May 5, 2010) [hereinafter *MONOC Advice Memo*], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803f7e3b>. The role of the NLRB's Division of Advice is outlined within its rules and the description of the Board's central organization and function as embodied in the Federal Register at the Board's website:

The Associate General Counsel for Advice is responsible for legal research on and analysis of broad areas of labor law administration, for legal advice to Regional Directors on all unfair labor practice cases involving novel or difficult legal issues, including questions involving mandatory or discretionary injunction proceedings, for litigating injunction cases on appeal from a district court adjudication, for legal information retrieval systems, and for analyses and digests to be used by both the Agency staff and the public.

See NLRB, Revision of Statement of Organization and Functions, 44 Fed. Reg. 34,215, 34,216 (June 14, 1979), reprinted in NLRB RULES AND REGULATIONS 207, available at <https://www.nlr.gov/sites/default/files/documents/254/rulesregsfull.pdf>.

42. *Sears Advice Memo*, *supra* note 41, at 1.

43. *See id.* at 2.

44. *See id.*

45. *See id.* at 2, 3.

46. *See Sears Advice Memo*, *supra* note 41, at 3.

its applicability to their online discussions, and many continued to use the listserv to discuss the union campaign and the merits of unionization.⁴⁷ The Union challenged the entire SMP, but Region 18 specifically selected the portion italicized above to send for review to the Board's Division of Advice.⁴⁸ The Sears Advice Memo noted that the Employer had not used the policy to discipline any employee for engaging in protected activity, nor was the policy a reaction to the union campaign, and advised that the complaint should be dismissed because the policy "cannot reasonably be interpreted to prohibit Section 7 protected activity."⁴⁹

The Sears Advice Memo outlined that the appropriate inquiry is whether the rule explicitly restricts section 7 protected activities. If the rule does not explicitly restrict section 7 activities, it will only violate section 8(a)(1) if: "(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 . . . Section 7 rights."⁵⁰ Because the last two prongs were not evident, the Sears Advice Memo instructed that the focus of the inquiry "must begin with a reasonable reading of the rule" in order to determine if employees would reasonably construe the language as prohibiting section 7 activity.⁵¹ The context of the rule is critical to its interpretation, according to the Board.⁵² A prohibition against "negative conversations" about managers within a list of policies about working conditions was deemed unlawful due to its "potential chilling effect," because an employee could reasonably construe the rule as limiting the right to engage in section 7 protected protest.⁵³ In contrast, a rule that prohibited statements "slandorous or detrimental to the company" within a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not reasonably be understood to restrict section 7 activity because the context listed examples of "egregious misconduct."⁵⁴

The Sears Advice Memo noted that Sears's policy included a list of similar egregious misconduct, the majority of which could not be construed to include section 7 protected activities, and that the preamble to the policy further enlightened employees as to its legitimate purposes.⁵⁵ Sears employees continued to use the listserv for section 7 protected activities, providing further

47. *See id.*

48. *See id.*

49. *See id.* at 4.

50. *See* Sears Advice Memo, *supra* note 41, at 4-5 (citing Martin Luther Mem'l Home, Inc. (Lutheran Heritage Village-Livonia), 343 N.L.R.B. 646, 647 (2004)).

51. *See id.* at 5 (requiring reasonable interpretation of rule, not literal interpretation).

52. *See id.* (indicating context vital to reasonable interpretation of rule).

53. *See id.* (citing KSL Claremont Resort, Inc. (Claremont Resort & Spa), 344 N.L.R.B. 832, 836 (2005)).

54. *See* Sears Advice Memo, *supra* note 41, at 5-6 (citing Tradesmen Int'l, 338 N.L.R.B. 460, 462 (2002)).

55. *See id.* at 6.

evidence that employees' section 7 rights were not chilled by the policy.⁵⁶ It should be noted that a critical fact in the *Sears* case that distinguishes it from the facts as alleged in the AMR case, is that in *Sears* there was no evidence that the employer ever disciplined an employee for engaging in protected activity. This clearly lessened any chilling effect that the *Sears* policy would have on employees' section 7 rights.

B. MONOC

Just five months after the issuance of the *Sears* Advice Memo, the Division of Advice responded to numerous questions in a case involving Monmouth Ocean Hospital Service Corporation's (MONOC) discipline of emergency medical employees for their Facebook postings.⁵⁷ The similarities between the MONOC case and the AMR case are striking in that both involved unionized emergency medical employees who were disciplined after posting on Facebook. MONOC reacted to the Facebook postings of Acting Union President Deborah Ehling, and union delegates Chris Dalton and Ken Baker, who were posting information regarding bargaining and other union activities as well as criticizing management policies, by suspending them.⁵⁸ Management obtained copies of the Facebook postings from other unspecified employee(s) with "friend" access.⁵⁹ Because of FOIA exemptions, many of the actual postings are deleted from the MONOC Advice Memo. This makes it difficult to compare the facts in the MONOC case to the AMR case, but nonetheless, it is clear that because of the employees' postings, MONOC management expressed concern that the three employees in question "might withhold care if they were personally offended by the patients."⁶⁰

The MONOC employees were suspended with pay pending psychological exams that they thereafter passed and thus were returned to duty within two weeks.⁶¹ The employer's general counsel notified the state Board of Nursing of the pending investigation, enclosing copies of the Facebook postings in question.⁶² Upon their return to work, the employees received memoranda asserting that they had violated the employee behavior policy, which stated: "Any conduct that adversely affects the operations of MONOC or MONOC's reputation, or is determined to be offensive to MONOC's employees, management, members, professional colleagues, or the general public, will not

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

57. *See* MONOC Advice Memo, *supra* note 41.

58. *Id.* at 2, 3-4.

59. *Id.* at 2.

60. *Id.* at 3.

61. *See* MONOC Advice Memo, *supra* note 41, at 3-4.

62. *See id.* at 4. The state Office of Emergency Medical Services (OEMS) later notified the employer that there was insufficient evidence of a violation of OEMS rules or failure to meet standards of patient care. *Id.* at 4-5.

be tolerated.”⁶³ The employees were further notified that such incidents would lead to progressive discipline.⁶⁴

In the MONOC case, the employer proffered evidence of other disciplinary proceedings it had administered for comparable employee misconduct. These included incidents where an EMT posted a banner at her work station reading, “Be Nice to Me or I May Circle the Block a Few More Times,” and left a poster in an ambulance that stated, “Just Because It’s Your Emergency Doesn’t Mean It’s Mine”; she was suspended pending a psychological exam, which she passed and was returned to duty.⁶⁵ In contrast to the three union adherents’ treatment mentioned above, this banner-posting EMT received ten disciplinary points on her record.⁶⁶ The employer maintained that the additional discipline was warranted because the banners were found “at the workplace.”⁶⁷ In a third instance, MONOC took no action against an employee who posted comments on the social networking website MySpace because her postings did “not interfere with her patient care responsibilities” and instead chided the employer’s failure to grant raises and spoke in favor of the union campaign.⁶⁸ Obviously, the latter postings qualify as protected concerted activity under section 7 in that they refer to wages and organizing a union.

The Division of Advice noted that the three employees in MONOC, who were union adherents, were not disciplined for their protected activity, and that the reasons cited by MONOC for the employees’ suspensions were related to patient-care concerns.⁶⁹ No impression of unlawful surveillance of protected activity was created because the employer notified the employees in question that the Facebook postings were brought to the managers’ attention by another concerned employee rather than from the employer’s own surveillance of the employees’ Facebook pages.⁷⁰ With respect to the alleged unfair labor practices that related to the Facebook postings, the MONOC Advice Memo advised dismissal of the charges.⁷¹

The rationale for the suspensions in the MONOC case was patient care concern, providing a legitimate business reason for the emergency healthcare provider to suspend employees until further examination proved them ready to return to work. This seems like a different matter from the AMR case where, on the facts as alleged, the employee’s Facebook postings included several

63. *Id.* at 4.

64. *Id.*

65. See MONOC Advice Memo, *supra* note 41, at 4.

66. *Id.*

67. *Id.* at 4-5. This on-site misconduct was contrasted to the employee statements made on Facebook by Ehling, Dalton, and Baker as in the MONOC case. *Id.*

68. *Id.* at 5.

69. See MONOC Advice Memo, *supra* note 41, at 8 (noting patient-care concerns qualify as legitimate business reasons).

70. *Id.* at 10.

71. *Id.* at 12.

profane and pejorative terms referencing a supervisor.⁷² However, there allegedly were customer complaints about Ms. Souza that led to her supervisor requiring her to complete a written incident report.⁷³ In some respects, the employer policies at MONOC and AMR were similar in that both strove to restrict employees from misbehaving or causing offense to others or damaging the reputation of the company by placing derogatory material about fellow employees, superiors, or the company on the internet. A key factor that could have distinguished MONOC from the AMR case would have been the determination of whether AMR had a legitimate business reason for disciplining and discharging Ms. Souza, a fact that was never determined in light of the settlement of the case before a hearing.

While the Sears Advice Memo and the MONOC Advice Memo provide insight into the questions raised in the AMR case, it is clear that the Board's Acting General Counsel's decision to issue a complaint in the AMR case signaled a change of direction with respect to the Board's views on employer policies that restrict internet communications. The AMR SMP raised some of the same issues as those raised by Sears and MONOC, yet the Board alleged the AMR policy was overly broad in its maintenance and enforcement.⁷⁴ NLRB Advice Memoranda provide valuable clarification of unsettled areas of the law in light of the expertise of the agency and its seasoned personnel. Nevertheless, Advice Memoranda do not carry the same weight as adjudication and the Associate General Counsel who composes Advice Memoranda clearly takes his or her cues from the reigning General Counsel.⁷⁵ The current Acting General Counsel for the Board, Lafe Solomon, has gone on record that while the AMR case is the first time the NLRB has issued a complaint over discipline related to comments on Facebook, it will not be the last case the NLRB will see in this fast-changing environment.⁷⁶ Beyond the specific and complex facts in the AMR case, the current Board is likely to scrutinize employer social media policies that unnecessarily limit employee ability to engage in protected concerted activities, and further require that such SMPs serve a legitimate business purpose.⁷⁷ The public may not have long to wait before there is a

72. See *supra* notes 17-18 and accompanying text.

73. See News Release, NLRB, Office of the Gen. Counsel, Release No. R-2794, available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803c4e5e> (last visited Feb. 14, 2011).

74. See *id.*; see also Telephone interview by Margo E.K. Reder, with Acting Reg'l Dir. John S. Cotter, Region 34, NLRB, and Elizabeth Pearson, Sec'y to the Reg'l Dir. of Region 34, NLRB (Feb. 8, 2011) (copy on file with author).

75. See generally Gerard F. Lutkus, *Are We Really Surprised? NLRB Takes on Facebook Comments*, <http://tlnt.com/2010/11/16/are-we-really> (last visited Feb. 3, 2011). Lutkus notes, "We all knew it would come. Sooner or later the 'New NLRB' was going to focus on social networking policies and find a broadly written and overreaching social networking policy to violate Section 7 of the National Labor Relations Act." *Id.*

76. See Sam Hananel, *Feds: Woman Illegally Fired over Facebook Remarks*, MY FOX D.C. (Nov. 10, 2010), <http://www.myfoxdc.com/dpp/news/offbeat/feds-woman-illegally-fired-over-facebook-remarks-110910> (last visited Feb. 3, 2011).

77. See generally O'Brien, *supra* note 12 (noting former NLRB Chairman Wilma Liebman's vehement

hearing involving a case that clearly focuses on an employer maintaining an electronic communications and/or SMP that allegedly, in and of itself, interferes with the exercise of section 7 rights.⁷⁸

There are changing winds at the NLRB with respect to its composition and its new initiatives, which are leading specialists in the field to predict how the Board will deal with cases regarding social media. While there are, as yet, no actual NLRB decisions regarding social media, there remain some decisions that speak to other issues existing in the AMR case that shed significant light on the complex concerns presented in a case where an employee posts negative remarks about a supervisor on social media. First, in a recent NLRB decision dealing with an employee's use of profanity towards his supervisor, the Board held that the conduct did not defeat the employee's statutory protection. Next, several cases are analyzed where protected conduct could become unprotected if it were deemed so egregious or disloyal to the employer's interests that there would be another "for cause" basis for the employment action.

IV. WHEN PROTECTED ACTIVITY LOSES PROTECTION BECAUSE OF EGREGIOUS MISCONDUCT

Although occurring in somewhat different circumstances than Ms. Souza's comments, a recent NLRB decision sheds light on the issue of workplace profanity, at least where the profanity is used in the context of a heated debate about wages, hours, and working conditions.⁷⁹ In *Plaza Auto Center, Inc.*, the

dissent in NLRB's *Register-Guard* decision). O'Brien also discusses former Chairman Liebman's strong advocacy of section 7 rights and her insistence that overly broad employer rules be justified by legitimate business reasons. *Id.* at 11. In an earlier article, O'Brien recommends employer communications systems policies that are overbroad with respect to restricting and interfering with employees affirmative rights under section 7 should be justified by legitimate business reasons in order to withstand Board scrutiny. See Christine Neylon O'Brien, *Employees on Guard: Employer Policies Restrict NLRB-Protected Concerted Activities on E-mail*, 88 OR. L. REV. 195, 249 (2009); see also Seth Borden, *Labor Disputes Arising out of Social Media*, LAW TECH. NEWS (Sept. 28, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472588424&slreturn=1&hbxlogin=1>. Borden states that the current NLRB

will advance [the] notion that board law must be more responsive to fast-evolving technological realities. The board will likely forge new standards for social media use and other similar developments, patterned on the long-standing *Republic Aviation* framework, which requires a balancing of employees' § 7 rights with the employer's legitimate business interests.

See Borden, *supra*.

78. See Seth Borden, *NLRB, Parties Settle "Facebook Firing" Case*, LAB. REL. TODAY (Feb. 7, 2011), <http://www.laborrelationstoday.com/2011/02/articles/nlra/nlrb-parties-settle-facebook-firing-case/> (last visited Feb. 12, 2011) (citing Charge Against Student Transportation of America, No. 34-CA-12906 (NLRB Region 34 Feb. 4, 2011) (on file with author) (filed by Connecticut State Employees Association, Local 2001, Service Employees International Union)) (discussing recently filed charge containing no disciplinary issue). The charge is a simple section 8(a)(1) charge based upon maintenance of an electronic communications policy. *Id.*

79. See generally *Plaza Auto Ctr. Inc.*, 355 N.L.R.B. No. 85, 189 L.R.R.M. (BNA) 1001 (Aug. 16, 2010). The current composition of the Obama Board includes two Democratic appointees—Becker and Pierce—and

Board reinstated a salesman who called his supervisor numerous profane names in the context of a meeting where such matters were discussed.⁸⁰ The Board noted that the outburst was a reaction to the supervisor's own use of profane language, his failure to respond to the salesman's concerns, and the supervisor's suggestion that if the salesman did not trust the company, he could work elsewhere.⁸¹ The language the salesman used during his outburst is included in the decision and appears at least as offensive as that allegedly used by Ms. Souza in the AMR case.⁸² In addition, the verbiage in *Plaza Auto Center* was used in a face-to-face context within the workplace where an employer has a legitimate business reason to maintain order.⁸³ If *Plaza Auto Center* is any indication of where the Obama Board is headed in terms of judging when otherwise protected conduct loses protection because it is so egregious, then it appears Ms. Souza could have won reinstatement, unless AMR established other misconduct or shoddy work performance providing an independent basis for termination.⁸⁴

A. *The Atlantic Steel Inquiry Regarding Egregious Conduct*

As the Board noted in the *Plaza* decision, the relevant inquiry as to whether conduct is so egregious that it loses the protection of the NLRA derives from the Board's decision in *Atlantic Steel Co.*⁸⁵ Four factors are considered: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any

one Republican appointee—Member Hayes. Another Republican nominee, Terence Flynn, who is currently serving as Chief Counsel for Member Hayes, is awaiting confirmation. See *Obama Nominates Lafe Solomon, Terence Flynn to Key Labor Law Posts*, Daily Lab. Rep. (BNA) No. 3, at A11 (Jan. 5, 2011); *Who We Are: The Board*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/who-we-are/board> (last visited Sept. 29, 2011).

80. See *Plaza Auto Ctr. Inc.*, 355 N.L.R.B. No. 85, 189 L.R.R.M. (BNA) at 1002-03, 1005 (Aug. 16, 2010). Of the three-member panel in *Plaza*, the two Board members who ordered reinstatement were then-Chairman Liebman and Member Pierce. Former Member Schaumber, whose term has now expired, dissented on this point, agreeing with the administrative law judge that the salesman's conduct was unprotected. *Id.*

81. *Id.* at 1004.

82. *Id.* at 1002-03. The salesman in *Plaza Auto Center* told his supervisor that "he was an 'F'ing mother F'ing, F'ing crook, [and] an asshole." *Id.* He also said that the supervisor "was stupid, nobody liked him, and everybody talked about him behind his back." *Id.*

83. It should be noted that employee use of social media to vent discontent is more likely to extend beyond the workplace and damage a company's reputation than an on-site verbal confrontation. This comparison is similar to libel, which is considered more serious than slander because it is permanent and has the potential to reach more people, especially on the internet. Nonetheless, maintaining production and discipline in the workplace has long been considered a legitimate business concern for an employer. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 (1945) (holding employer allowed to make reasonable rules for employee conduct during working time). This is allowed in order to maintain production and discipline, but rules banning oral solicitation on nonworking time are an unreasonable impediment to self-organization absent special circumstances. *Id.*

84. See Lutkus, *supra* note 75 (discussing *Plaza Auto Center* decision as indication new NLRB will "aggressively protect workers' perceived rights").

85. See *Plaza Auto Ctr. Inc.*, 355 N.L.R.B. No. 85, 189 L.R.R.M. (BNA) 1001, 1003 (Aug. 16, 2010) (citing *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979)).

way, provoked by the employer's unfair labor practices."⁸⁶ The NLRB's own Facebook page outlines this same four-point test to be applied when evaluating the legal limits on protection of concerted activities on Facebook postings.⁸⁷ When you apply the first factor of the four-point analysis to the facts as alleged in the AMR case, the place of discussion was the Facebook page of the employee rather than the worksite. The Facebook page where Ms. Souza posted comments about her supervisor was visible to Ms. Souza's Facebook friends and could have had a detrimental impact on order at the company as well as the employer's reputation. However, that the place of discussion was not at work seemed to weigh in Ms. Souza's favor, especially because the language of the employer's Standards of Conduct prohibited "use of language or action that is inappropriate *in the workplace* . . . of a general offensive nature."⁸⁸ The employer's Blogging and Internet Posting Policy also prohibited "disparaging . . . or defamatory comments when discussing . . . the employee's superiors," which could have provided an additional basis for discipline of Ms. Souza—that is, if the AMR policy had not been deemed to be overbroad by the Board.⁸⁹

The second factor from the four-point analysis in *Atlantic Steel* considers the subject matter of the discussion, which, in the facts alleged in the AMR case, was Ms. Souza's discontent with her supervisor, including how he had treated her at work that day. If the Board had found that the supervisor unlawfully denied Ms. Souza her *Weingarten* right, then her complaint about an unfair labor practice would have been entitled to greater protection than an ordinary expression of dissatisfaction. In either event, her complaints about the supervisor related to working conditions, a topic protected under section 7. Consistent with the third factor in *Atlantic Steel*, the nature of the employee's outburst as alleged in the AMR case was short but profane, derogatory and defamatory towards her supervisor. In comparison to the *Plaza Auto Center* obscenities, Ms. Souza's profanity was not necessarily worse, and her alleged reference to the supervisor as a "17"—code for psychiatric patient—might have been considered a sarcastic comment in reaction to the supervisor's denial of her *Weingarten* request. In that sense, the nature of the outburst was not so

86. *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

87. On the NLRB's own Facebook page, the following test is posted:

What's the line? When do Facebook comments lose protected concerted activity status under the National Labor Relations Act? A four point test applies: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

NLRB, *What's the Line?*, NLRB FACEBOOK PAGE (Nov. 9, 2010, 12:23 PM), <http://www.facebook.com/NLRBpage/posts/141052949280338>.

88. AMR Complaint, *supra* note 2, at 2 (emphasis added).

89. AMR Complaint, *supra* note 2, at 2-4.

beyond the pale that it would have outweighed the other factors. However, if, as alleged, the comment was made on her Facebook page, this expanded the potential audience beyond an immediate face-to-face encounter with another employee.

As far as the fourth factor of the *Atlantic Steel* test is concerned, Ms. Souza's alleged outburst seemed to have been provoked, at least in part, by the employer's purported unfair labor practice with respect to denial of a *Weingarten* right. This certainly mitigates to some degree the seriousness of Ms. Souza's outburst. In sum, applying the *Atlantic Steel* factors to the AMR case, Ms. Souza's conduct may not have been so egregious as to cause her to lose the protection of the NLRA.

In further discussion of MONOC's discipline of its employees, the MONOC Advice Memo noted situations where otherwise protected communication might lose protection because the statements made were "so egregious" or "so disloyal, reckless, or maliciously untrue" and lacking the "requisite nexus between the statements and ongoing labor disputes."⁹⁰ The so-called "disloyalty" standard cited by the Division of Advice in the MONOC Advice Memo has recently been the subject of debate in light of differing treatment by various courts of appeal.⁹¹

B. When Concerted Activities Are 'Disloyal' to the Employer—Jefferson Standard as a Wavering Benchmark for Ascertaining When Employee Conduct Loses NLRA Protection

1. The Supreme Court—When Disloyalty Obviates Section 7 Protection

Section 7 of the NLRA protects "concerted activities" of employees for "mutual aid or protection."⁹² The key to conduct being classified as concerted and thus protected is that the employee acts to further a group concern.⁹³ Nonetheless, some employee conduct may be so disloyal to the employer that it

90. See MONOC Advice Memo, *supra* note 41, at 7 (citing Valley Hosp. Med. Ctr., 351 N.L.R.B. 1250, 1252-54 (2007) and Endicott Interconnect Techs., 345 N.L.R.B. 448, 450-52 (2005)).

91. See Matthew W. Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541, 551-57 (2007) (arguing legal and ideological underpinnings of *Jefferson Standard* decision eroded since 1953). Additionally, Finkin points out that disloyalty is worthless as a guide and chills the speech of social value. *Id.* See generally Gil A. Abramson & Emily J. Glendinning, *When Employee Disloyalty Makes Otherwise Protected Conduct Unprotected: The NLRB's Decisions Under Jefferson Standard Get Mixed Reception in Appellate Courts*, AM. BAR ASS'N (Feb. 4, 2011, 10:23 PM), <http://www.abanet.org/labor/dlcomm/mw/papers/2009/papers/mw-d.pdf> (discussing appellate court reaction in D.C., First, and Sixth Circuits to NLRB decisions utilizing disloyalty standard).

92. 29 U.S.C. §157 (2006).

93. See *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 51 (1st Cir. 2008) (enforcing NLRB order). The order was enforced because the drivers' letters protesting the same employment-related concerns as raised in union meetings were concerted activities, and thus the employer refused to hire these drivers because of their protected activity. *Id.*

loses statutory protection. As the United States Supreme Court outlined in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard)*, an employer need not retain an employee whose conduct is cause for discharge because of his or her disloyalty to the employer.⁹⁴ In *Jefferson Standard*, employees who distributed handbills that made a "sharp, public, disparaging attack on the quality of the company's product and its business policies" and that did not mention a labor dispute were not protected from discharge by the NLRA.⁹⁵ Justice Frankfurter's dissent in *Jefferson Standard* was prescient of the problems the Court's disloyalty exception would cause in future. He lamented that the decision should have turned on whether the NLRB applied an improper criterion when it used the term "indefensible" to brand the conduct in question as the "legal litmus" instead of looking to whether the conduct was "unlawful."⁹⁶ Because the Court relied upon the disloyalty of the employees as a for-cause basis for discharge regardless of whether their activities were concerted, Justice Frankfurter's dissent noted that much conduct that occurs in a labor controversy could be deemed disloyal, and that the use of this "imprecise" standard would "needlessly stimulate litigation."⁹⁷

2. *The NLRB's Two-Part Test Applying Jefferson Standard—Mountain Shadows*

In *American Golf Corp. (Mountain Shadows)*, the NLRB outlined a two-pronged analysis for determining when otherwise protected communication loses its protection because of a *Jefferson Standard* disloyalty exception.⁹⁸ The Board held that

employee communications to third parties in an effort to obtain their support are protected where the communication indicated that it is related to an ongoing labor dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection.⁹⁹

The first prong requires establishing that there is mention of a labor dispute. The second prong requires evaluation of whether the communication is so egregious that it would supply an independent cause for discharge.

94. *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 476-77 (1953).

95. *Id.* at 471-72.

96. *Id.* at 479-80 (Frankfurter, J., dissenting) (Justice Frankfurter's dissent was joined by Justices Black and Douglas).

97. *See id.* at 480-81. Justice Frankfurter noted that the statute was "designed to put labor on a fair footing with management" and that in the course of labor controversies such as strikes "loose and even reckless language is properly discounted." *Id.* at 481.

98. *Am. Golf Corp. (Mountain Shadows I)*, 330 N.L.R.B. 1238, 1240 (2000).

99. *Id.*

The discharged employee in *Mountain Shadows* was terminated for contacting a competitor of the Respondent employer, distributing a flier that disparaged the Respondent's operation of a municipal golf course and seeking to have Respondent's competitors take over the contract.¹⁰⁰ The Board found that the telephone call was protected but that the distribution of the flier outside a city council meeting was not protected under the *Jefferson Standard* disloyalty exception.¹⁰¹ The flier did not establish the appropriate labor nexus as it was not part of an appeal for support in an ongoing labor dispute, as required in the first prong of the test. The flier purported to appeal to the interest of the public rather than that of employees.¹⁰² The Board remanded the *Mountain Shadows* case to an administrative law judge to determine if the employee would have been terminated for cause because of his disloyal conduct independent of his protected activity under the Board's dual-motive *Wright Line* standard.¹⁰³ Although the judge concluded that the complainant would not have been terminated despite his protected conduct, the Board disagreed and upheld the legality of the discharge because of the disloyalty, which it concluded was an independent cause for termination.¹⁰⁴ The Board's two-prong test in *Mountain Shadows* highlights that in order for an employee appeal to be protected under section 7, the appeal must reference an ongoing labor dispute and the impact on employees rather than the generalized interests of the public or the employer's customers in improved service.

3. Appellate Court Treatment of the NLRB's Two-Part Standard

a. Endicott Interconnect Technologies—D.C. Circuit

As the appellate courts have sought to apply the *Jefferson Standard* disloyalty exception as interpreted by the NLRB, the results have proven true to Justice Frankfurter's prediction that disloyalty would be a difficult or imprecise standard to apply as a separate legal justification for termination. The results in these cases tend to hinge upon the individual interpretation of each set of facts and whether the evidence satisfies both prongs of the Board's test from *Mountain Shadows*. In *Endicott Interconnect Technologies, Inc.*, the Court of Appeals for the District of Columbia refused to enforce a Board order to reinstate an employee who made a disparaging remark to a newspaper reporter about the loss of technical expertise after a company layoff and was terminated

100. See *Am. Golf Corp. (Mountain Shadows II)*, 338 N.L.R.B. 581, 581 (2002).

101. See *Mountain Shadows I*, 330 N.L.R.B. at 1238.

102. *Id.* at 1241.

103. See *Mountain Shadows II*, 338 N.L.R.B. at 581. The *Mountain Shadows II* court cites *Wright Line*, 251 N.L.R.B. 1083 (1980). See *supra* notes 34-36 and accompanying text (discussing Board's analysis in dual-motive cases from *Wright Line*).

104. *Mountain Shadows II*, 338 N.L.R.B. at 581.

after posting a message that criticized the new owner's managerial ability.¹⁰⁵ The appellate court concluded that the employee's communications "were so disloyal to EIT as to remove them from section 7's protection."¹⁰⁶ As the D.C. court noted in *Endicott*, the Board misapplied the second prong of its two-part test as to whether an employee's communication to a third party is protected under section 7.¹⁰⁷ The first part of the test relates to whether there is an ongoing labor dispute; the second part tests whether the communication is "so disloyal, reckless, or maliciously untrue as to lose the Act's protection."¹⁰⁸ The appellate court found that the employee's communications were "unquestionably detrimentally disloyal."¹⁰⁹ The employee's initial comment to the newspaper was enough to terminate the employee, in the court's view, due to the comment's "critical nature and injurious effect." Thereafter, the employer gave the employee a second chance and the employee agreed not to repeat the conduct.¹¹⁰ Nonetheless, two weeks later the employee posted critical comments on the internet, which the court found were equivalent to the "sharp, public, disparaging attack" on the company at a "critical time" that occurred in *Jefferson Standard*.¹¹¹ Thus, the D.C. court found that this constituted legitimate cause for discharge.¹¹²

Comparing *Endicott* to the AMR case, the first part of the test—an ongoing labor dispute—appears to be satisfied, in that Ms. Souza protested the manner in which she was required to fill out an incident report without assistance from her union representative—a matter protected within section 7's right to mutual aid or protection. The second part of the test—whether the communication was sufficiently "disloyal, reckless, or maliciously untrue"—is harder to gauge. Ms. Souza's alleged comment that the supervisor was a '17' was certainly disparaging; however, it could be concluded that it was a tongue-in-cheek exaggeration. The reader would have to be a person in the work environment who understood what the number meant in order to interpret the reference, and even then, would not necessarily believe that the statement was meant to be true. In the context as alleged, it seemed an expression of exasperation as to how Frank Filardo treated Ms. Souza that day, that Souza was getting some unwanted time off and that, in general, the supervisor was unworthy of his position. This comment and the further slurs were hardly politically correct, and it was unwise for Ms. Souza to post them on the internet. However, in the context of AMR's alleged unfair labor practice earlier that same day, it is quite

105. *Endicott Interconnect Techs. v. NLRB*, 453 F.3d 532, 533 (D.C. Cir. 2006).

106. *Id.*

107. *Id.* at 537.

108. *Id.* (quoting *Am. Golf Corp. (Mountain Shadows I)*, 330 N.L.R.B. 1238, 1240 (2000)).

109. *Endicott*, 453 F.3d at 537.

110. *Id.*

111. *Endicott Interconnect Techs. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006).

112. *Id.* at 538.

possible that Souza's remarks might not have been so extreme that she would have lost protection under the NLRA pursuant to the disloyalty standard as interpreted in *Endicott*.¹¹³ Unlike the comments to a newspaper in *Endicott*, the alleged postings in the AMR case were theoretically limited to Ms. Souza's Facebook friends—a much more limited audience. The alleged comments in the AMR case focused on one manager, a far less injurious assault on the company's reputation than in *Endicott*, where technical expertise was undermined by the complainant's remarks in a newspaper. Furthermore, in *Endicott*, even after the employee was warned and had promised not to repeat his conduct, he posted remarks on the internet that undermined the managerial expertise of the company's new owners in, what the court deemed, a sharp, public, disparaging attack. In contrast, Ms. Souza's alleged posts ostensibly sought to garner support for her position that discipline was being unfairly imposed upon her. She reached out to friends and fellow employees, and thus her actions fell within the protected scope of mutual aid or protection.¹¹⁴

b. Five Star Transportation—First Circuit

In contrast to the *Endicott* decision, where the D.C. Circuit Court of Appeals held that the employee conduct was not protected, recent decisions from appellate courts in the First and Sixth Circuits have held similar conduct to be within section 7's protection.¹¹⁵ In *Five Star Transportation v. NLRB*, the Court of Appeals for the First Circuit enforced a Board order stating the employer committed an unfair labor practice when it refused to consider applicants who wrote letters that were critical of their prospective employer, because the letters were protected concerted activity under section 7 of the NLRA.¹¹⁶ The drivers worked for First Student, a company that lost the bid for busing public school students in Belchertown, Massachusetts at the time that Five Star Transportation won the contract.¹¹⁷ The drivers' union, the United Food and Commercial Workers Union, Local 1459, sought to maintain the benefits its employees had under their contract with First Student.¹¹⁸ The school district's bid specifications required that new vendors give current drivers first consideration for employment.¹¹⁹ First Student employees who had previously written critical letters about Five Star to the school district in an attempt to forestall the district from awarding the contract were not hired by

113. See *id.* at 537 (describing "disloyal, reckless or maliciously untrue" language as falling outside the protection of NLRA); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257-58 (1975).

114. 29 U.S.C. § 157 (2006).

115. See *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46 (1st Cir. 2008); *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008).

116. See *Five Star*, 522 F.3d 46 at 54-55.

117. *Id.* at 49.

118. See *id.* at 48 (describing United Food and Commercial Workers Union's representative position).

119. *Id.* (explaining District's bid requirements).

Five Star and the company admitted that the critical letters were the reason.¹²⁰

The NLRB found that those drivers whose letters raised group concerns were entitled to the protection of the NLRA, and thus they were entitled to reinstatement and back pay.¹²¹ The Court of Appeals for the First Circuit enforced the Board's order despite Five Star's contention that the letters were unprotected because of their intent "to sabotage, impugn, and undermine Five Star's reputation and prevent the awarding of the Bus Contract to Five Star."¹²² Because the letters raised group concerns and the content was employment-related, they were within the protection of section 7. The only remaining concern was whether the letters should "lose the veil of protection . . . [because the campaign was] carried out through abusive means."¹²³ The court held that there was evidence of a labor dispute and that the letters were not "excessively disloyal, reckless or maliciously untrue."¹²⁴ The employees' actions "appeared necessary to effectuate the employees' lawful aims [of] . . . safeguarding their . . . employment conditions."¹²⁵ The letters were tailored to the employees' legitimate aims, were addressed to the District rather than the public, and requested that the award of the contract to Five Star be reconsidered so that the drivers might maintain their current working conditions.¹²⁶ The letters did not unnecessarily disparage Five Star, so the Court of Appeals for the First Circuit enforced the Board's order. The court stated the Board's order was congruent with the court's interpretation of the *Jefferson Standard* test and the role of the court in reviewing Board decisions.¹²⁷

When applying the *Jefferson Standard* test as elucidated in *Five Star* to the alleged facts in the AMR case, it seems that Ms. Souza's Facebook communication related to her treatment by her supervisor at work in a situation where the facts alleged an unfair labor practice by the employer. Therefore, her posts had the necessary relationship to working conditions or mutual aid and protection under section 7. While the posts were profane, they were made on her Facebook page to her circle of friends, including a former employee and potentially other co-workers. There was a group concern expressed relating to working conditions, the employee's prediction of time off and perceived ill

120. See *Five Star*, 522 F.3d at 49. The letters raised concerns about working conditions, wages, and safety at Five Star—common employment-related concerns—and, consequently, most of the content was protected by section 7 of the Act. *Id.*

121. See *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 49 (1st Cir. 2008) (describing NLRB's findings).

122. See *id.* at 50 (describing Five Star's contentions against NLRB's findings).

123. See *id.* at 52 (explaining potential loss of protection due to abusive activity).

124. See *id.* at 53 (describing court's holding).

125. *Five Star*, 522 F.3d at 54 (citing *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982)).

126. See *id.*

127. *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 54-55 (1st Cir. 2008) (citing *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976)). The court stated, "It is precedent in this circuit that we leave the balancing of countervailing employer and employee interests in the first instance to the NLRB." *Id.* at 54.

treatment by a supervisor in denying her a *Weingarten* right. Notably, her posts did not contain references to her *Weingarten* request, which could weigh against the strength of its labor nexus. In terms of the second part of the *Jefferson Standard* test, the question remains whether Ms. Souza's posting was "necessary to effectuate the employee's lawful aims."¹²⁸ It is possible that Ms. Souza thought it would bolster the strength of her position at work if other employees discovered how she had been treated. Because she was off work at the time, her Facebook page perhaps seemed a natural outlet for such a discussion. In this sense, it could be said that the action was an attempt to effectuate her lawful aims.

c. Joliff (TNT Logistics)—*Sixth Circuit*

The third recent appellate decision interpreting the *Jefferson Standard* disloyalty test involved truck drivers at TNT Logistics in Ohio.¹²⁹ In *Joliff v. NLRB*, the terminated employees wrote letters complaining about working conditions to TNT's corporate management and to one of its largest customers, Honda. An administrative law judge held that the complaining letters were protected concerted activity.¹³⁰ The Board, however, ruled that the activities "were stripped of the Act's protection because the letter contained a false statement made with actual malice."¹³¹ Upon review, the Court of Appeals for the Sixth Circuit held that the Board's decision was not based upon substantial evidence.¹³² The Board's 2-1 decision that the letter lost the NLRA's protection was authored by then-Chairman Battista.¹³³ He wrote that the statement in the letter regarding employees being asked to fix their logbooks was "maliciously false" because the statement was made "with knowledge of its falsity or reckless disregard for its truth," noting one employee "admitted that management never made such a request" and no other contradicting evidence was introduced.¹³⁴ The dissenter from the Board's decision in *Joliff*, former Member Walsh, contended that the statement regarding the logbooks was "at most . . . an exaggeration," rather than "deliberately or recklessly false."¹³⁵

Upon review, the appellate court noted that the "logbooks statement was sufficiently factual to be capable of carrying a defamatory meaning" based upon the following four factors:

128. See *id.* at 54 (citing *Mount Desert Island Hosp.*, 695 F.2d at 640).

129. See *Joliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008).

130. See *id.* at 606.

131. See *id.* at 605-06.

132. See *id.* at 605.

133. See *Joliff*, 513 F.3d at 606.

134. *Id.*

135. *Joliff v. NLRB*, 513 F.3d 600, 607 (6th Cir. 2008).

(1) The common usage or meaning of the allegedly defamatory words themselves, whether they are commonly understood to be loose, figurative, or hyperbolic words; (2) The degree to which the statements are verifiable, whether the statement is objectively capable of proof or disproof; (3) The immediate context in which the statement occurs; and (4) The broader social context into which the statement fits.”¹³⁶

Nonetheless, the court stated that the evidence from the record was “surprisingly thin.”¹³⁷ The Sixth Circuit, in *Joliff*, noted that in defamation suits, where defendants assert the truth of a statement in their defense, they bear the burden of proving the truth of the statement.¹³⁸ The court explained that neither the administrative law judge nor the Board provided a detailed analysis regarding the statement’s truth or falsity, and more problematically, the Board concluded that the statement was false instead of accurately stating that the General Counsel had not proven it to be true.¹³⁹ Consequently, although the Board found that the statement was made with actual malice, the Sixth Circuit ruled that this finding was not supported by substantial evidence and remanded the issue to the Board.¹⁴⁰ Thus, the appellate court in *Joliff*, ruled in favor of the employees because the evidence did not meet the second prong of the Board’s *Mountain Shadows* standard—that the communication be so egregious that it would supply an independent cause for discharge.

What does the Sixth Circuit’s decision in *Joliff* add to the *Jefferson Standard* disloyalty exception as the Board has applied it in recent years?¹⁴¹ The court in *Joliff* simply required that actual malice be adequately established in the record evidence in order to bar a plaintiff from the protection of the NLRA when the conduct is otherwise protected by section 7 of the NLRA. Applying this rule to the facts as alleged in the AMR case, Ms. Souza’s postings on Facebook related to her supervisor and her working conditions, even if not specifically to the employer’s alleged unfair labor practice. Thus, the conduct would be otherwise protected by the NLRA. The second aspect of the Board’s interpretation of

136. *Id.* at 611-12.

137. *See id.* at 613.

138. *Id.* at 614.

139. *Joliff*, 513 F.3d at 614.

140. *Id.* at 615. The Sixth Circuit so concluded based upon four factors. First, the Board was removed from the witnesses and did not weigh the ALJ’s credibility determinations. Secondly, the Board “conflated falsity with knowledge of falsity.” Thirdly, the Board allowed the testimony of one employee to be conclusive, and finally, the Board misinterpreted other statements of that same employee. *Id.* (internal quotations omitted). On remand, a two-member Board ruled that the decision of the Sixth Circuit to remand was the law of the case and consequently found that TNT Logistics violated Section 8(a)(1) by discharging the three employees, and ordered relief including reinstatement and back pay. *See TNT Logistics N. Am.*, 353 N.L.R.B. 449 (Oct. 30, 2008).

141. *See Am. Golf Corp. (Mountain Shadows I)*, 330 N.L.R.B. 1238, 1240 (2000). The Board’s two-part test requires that, for the employee’s communication to be protected, it must relate to a labor dispute and be “not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” *Id.*

Jefferson Standard—whether Souza’s conduct was “so disloyal, reckless or maliciously untrue as to the lose the Act’s protection”—would require weighing whether her posts referring to her supervisor as a ‘17’ as well as her other profanities towards him could be considered maliciously untrue.

The Sixth Circuit, in *Joliff*, remanded to the Board because the record was not adequate to establish actual malice. In the AMR case, the alleged posts that existed were brief and it could be argued that a reasonable person would construe them to be exaggeration or hyperbole. Thus, under *Joliff*, in light of the supervisor’s alleged conduct that may have instigated Ms. Souza’s actions and probably constituted an unfair labor practice, Ms. Souza’s conduct likely would not have been egregious enough to remove her actions from the scope of the NLRA’s *Jefferson Standard* exception.

Under the standards set in all three recent decisions from the D.C., First, and Sixth Circuits interpreting the *Jefferson Standard* disloyalty exception, the alleged conduct of the complainant in the AMR case might have been viewed as insufficient to remove her actions from the protection of the NLRA. It is clear from her alleged postings that Ms. Souza was unhappy with her supervisor. She allegedly used negative, pejorative terms to describe him in several short bursts that were rewarded by sympathy and some reinforcement regarding her situation. In the context of AMR’s policies, her alleged postings were disparaging of a superior in violation of the internet and blogging policy, and the profanities were of an offensive nature. However, the Board challenged those policies as overbroad and interfering with section 7 rights and is requiring their revision pursuant to the settlement terms in the AMR case.¹⁴² The most demanding standard of behavior on the disloyalty exception appears to apply in the D.C. Circuit where an appeal might have arrived in the AMR case had it not settled.

Critical to determining an outcome in a case such as *AMR* were two questions. The first is whether the employer’s unfair labor practice provoked the employee’s outburst. The second is whether the SMP was overly broad such that it unduly interfered with employees’ section 7 rights when balanced against the employer’s legitimate business interests. AMR’s alleged denial of Ms. Souza’s *Weingarten* right may have motivated the employer to settle, because, if proven, this would have established employer knowledge of Ms. Souza’s engagement in section 7 activities, and such denial of the right would have established antiunion animus and a specific unfair labor practice. The proximity in time of the alleged denial of the right to Ms. Souza’s venting on Facebook provided an ameliorating precursor to her postings. Thus, even if her conduct was in violation of the employer’s internet policy, her discipline and

142. See Telephone interview by Margo E.K. Reder, with Acting Reg’l Dir. John S. Cotter, Region 34, NLRB, and Elizabeth Pearson, Sec’y to the Reg’l Dir. of Region 34, NLRB (Feb. 8, 2011) (copy on file with author) (discussing AMR Settlement).

discharge may have been caused by her protected conduct rather than her misconduct. The Board's settlement in AMR necessitates the employer's revision of its policies on blogging and internet posting, standards of conduct, and solicitation and distribution.¹⁴³ Thus, the question of the lawful parameters of employer policies on electronic and internet communication and other policies that unlawfully restrict section 7 rights is catching the interest of employers and employees alike because of its broad applicability to the U.S. workforce.

V. THE LEGALITY OF THE EMPLOYER'S SMP AND THE IMPORTANCE OF A LEGAL COMMUNICATIONS POLICY

A. *AMR's Policies*

Perhaps the most interesting labor law issue raised by the Board in the AMR case is the unlawfulness of the employer's SMP and other policies because the policies unreasonably interfered with protected concerted communication under the NLRA. AMR's electronic media policy prohibited employees from posting about the company without advance permission, and prohibited making disparaging or defamatory comments about the company, its competitors, co-workers, or superiors. In addition, AMR's published standards of conduct prohibited rude or discourteous behavior, or offensive language or conduct in the workplace. Finally, the company's solicitation and distribution policy prohibited nonemployees from soliciting and distributing material on the premises or through company mail and email. Employees were permitted to solicit or distribute only as outlined regarding sale of material goods, contests, donations, etc., and such were limited to employer-approved announcements posted on designated break room bulletin boards. First, the general issues and potential problems with AMR's policies are discussed, and secondly, how the policies particularly applied in the AMR case.

As far as the policy prohibiting employees from posting without advance permission is concerned, this interferes with spontaneity and discussion. It could be argued that advance notice protects the employer from sudden scurrilous and unwarranted attacks by a disgruntled employee. However, the larger question remains whether the employer's legitimate business reasons for instituting advance notice and permission justify the unavoidable chilling effect of this aspect of AMR's policy on employees' section 7 protected activities. The prohibition on disparaging and derogatory remarks about the company, superiors, and competitors likely has its genesis in a legitimate concern for the business, protecting the company's management and external relations with competitors. Nonetheless, prohibiting disparagement or criticism certainly may

143. *See id.*

interfere with employees' section 7 rights to converse or post about wages, hours, and working conditions, as well as the right to discuss one's treatment by a superior. To some extent, it makes sense to limit discussion of competitors on social media because ill-considered comments could lead to damage to the reputation of the company or to litigation over defamation. However, the downside in terms of infringing upon employees' section 7 rights is that employees would be limited in their ability to compare employment policies, wages, and working conditions at competitors to that of their own employer.

The prohibition on rude, discourteous behavior, or offensive language and conduct in the workplace once again seems to be rooted in the employer's legitimate interest in maintaining a civil and courteous environment for all at the workplace. The danger of the provision is that rudeness, discourtesy, and offensive language and conduct are often subjectively determined. Part of the subjective determination may relate to the rank or status of the individual making the remark or engaging in the behavior. It could be argued that if an employee says something fresh or profane to a superior, it is much more likely to be perceived as rude or offensive than if the superior makes the remark to an underling. In the latter case, the remark might be perceived as corrective rather than offensive. Unfortunately, such perception is misguided as it tends to encourage the inequities of class or rank to persist, leaving employees in a lesser position of power with respect to communication in the workplace than their superiors, arguably a type of imbalance that the NLRA was designed to redress.

Clearly, the NLRB takes into account the context of any disputes that result in discipline. If a supervisor is initially in the wrong in the altercation, this will ameliorate the employee's subsequent misconduct. Who swears first, most, and dirtiest may determine who was in the wrong in terms of the use of offensive language. Discussing matters about unionization, wages, hours, working conditions, or matters of mutual aid or protection is commonly perceived by management as disloyal when, in labor law terms, these are statutorily protected subjects. An employer must tread a careful line when regulating civility, making sure that there is a zone for engagement in protected concerted activities such that employees are free to discuss legitimate statutorily protected concerns on nonworking time. At the same time, conduct that approaches harassment, including a hostile work environment, should be prohibited.

Finally, AMR's prohibition on employee solicitation and distribution without advance notice treads another wary line. The labor law rules in this area permit employees to solicit during nonworking time and distribute material during nonworking time and in nonworking areas. The examples of approved solicitations in the AMR policy did not include solicitations regarding organization, unionization, or other section 7 concerted activities; rather, they

focused on the sale of material goods, contests, and donations. The policy, while labeled ‘Solicitation and Distribution,’ prohibited both for nonemployees and then allowed employees to solicit only in so far as they could seek advanced permission to post announcements regarding limited subjects on designated break room bulletin boards. The policy did not address email, except to mention that nonemployees could not use the system to solicit or distribute. AMR’s solicitation and distribution policy unduly restricted section 7 activities without illustrating countervailing legitimate business reasons. Its policy requiring advance notice and approval was an inhibiting prerequisite that was an unjustified prior restraint on protected speech. The examples provided of approved solicitations did not include concerted activities, implicitly inferring that such were not appropriate.

The AMR settlement terms require the company to post a notice that they will not interfere with section 7 protected activities, and to revise their policies so as not to unduly restrict, rather to allow engagement in union activities, and discussion of wages, hours, and working conditions on company property during working hours, or while not at work.¹⁴⁴ As far as email communication is concerned, it seems likely that the current Board may be inclined to follow former Chairman Liebman’s dissent in *Register-Guard*, where she opined that a communications systems policy that allows nonwork-related email use but bans nonjob-related solicitations is presumptively invalid.¹⁴⁵ Further, Member Liebman indicated in her dissent in *Register-Guard* that the test for oral solicitation on nonwork time should apply to employee email use, deeming employer restrictions unlawful unless special circumstances that relate to the employer’s need for production and discipline are at stake.¹⁴⁶ Certainly whether employees use email or social media to communicate about workplace issues makes no great difference where the content of the communications is statutorily protected, and no counterbalancing legitimate business interests of the employer are satisfactorily asserted.

As to how AMR’s policy would have applied and fared before an administrative law judge if the case had been heard, Ms. Souza’s alleged offensive language was not used “in the workplace” as prohibited in the AMR policy. Furthermore, her alleged remarks on Facebook may have seemed to be more of a reaction to her supervisor’s purported unfair labor practice than an independent outburst, and may have been deemed more an exaggeration than defamatory material. In many respects, if AMR had gone to hearing, the success of Ms. Souza’s case would have hinged on the strength of the complaints that the employer alleged were lodged against her by customers,

144. *See id.*

145. *See* *Guard Publ’g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1127 (2007) (Liebman, Member, dissenting), *aff’d in part, rev’d in part*, 571 F.3d 53 (D.C. 2009).

146. *Id.* at 1124 (citing *Republic Aviation v. NLRB*, 324 U.S. 793 (1945)).

because those could have provided AMR with an independent basis for her termination.

*B. Tips for Employers and Employees Regarding Communications and SMPs:
Use and Consequences*

What general guidelines for email and social media policies might employers follow in light of the issues raised and settled in the AMR case? It is clear that the prevalence of social media requires employers to react to this latest rising tide of employee communication by setting forth lawful policies that will limit their company's exposure to management problems and legal liability. Technology has been running ahead of the rules of the workplace. Social norms for exposing personal information have adapted to social networks, but employers are not as comfortable as employees with the amount of sharing that takes place on these networks, particularly where the items shared may reflect poorly on the company or its managers. Employers and the legal environment need to catch up to the current technological setting of work and socializing on various forms of user-generated content networks.

Employers are well advised to enact SMPs that will navigate the current legal thicket, train employees to abide by these policies, monitor for compliance, and enforce the policies. At the same time, employees need to be aware of the pitfalls of baring their souls on social networks. Employees must realize that friends can turn into foes, and that potential employers scour social media sites when considering whom to hire. One source found that thirty-five percent of employers rejected job applicants based upon unsavory discoveries on social media.¹⁴⁷ The most common problem uncovered by employers that led to rejection of an applicant is listed as provocative/inappropriate photographs or information.¹⁴⁸ Other issues that resulted in rejection of an applicant included content about drinking or using drugs, and bad-mouthing previous employers, co-workers, or clients.¹⁴⁹ Evidence of poor communication skills, discriminatory comments, misrepresentation of qualifications, and sharing confidential information from a previous employer were the other bases mentioned for rejecting an applicant.¹⁵⁰

Once an employee is hired, she must continue to beware of postings that could result in discipline or discharge. Anything that reveals the violation of laws or employer rules is a taboo area for social media posting, just as it would be problematic in a workplace email. The more work-related an employee's

147. Thomas Ahearn, *Employers Firing Employees over Information Found on Popular Social Media Sites Face Legal Risks*, EMPLOYMENT SCREENING RESOURCES (Jan. 25, 2011), <http://www.esrcheck.com/wordpress/2011/01/25/employers-firing-employees-over-information-found-on-popular-social-media-sites-face-legal-risks>.

148. *Id.*

149. *Id.*

150. *Id.*

post, the more likely that it will be protected under section 7 of the NLRA. However, fitting under the umbrella of content deserving NLRA protection requires some familiarity with the language of labor law, a language that many nonunion employees have yet to learn. Some questions that need to be answered before one can decide whether postings or comments are protected under the NLRA include: Is there a labor nexus to the content posted? Is the activity concerted? Does the post relate to wages, hours, or working conditions or involve efforts for mutual aid or protection? These categories provide protection for employees under the NLRA, but most individuals who are on the social network communicate rapidly about what is on their minds without concern for such categories.¹⁵¹ Even where an employer has a communications systems or SMP, many employees are oblivious to the policy or do not concern themselves with whether it applies to their own email and social media posts. Both managers and employees need to be educated about the protection afforded to communication by the NLRA and its limits in order to avoid conduct that is not protected and ensuing litigation.

One labor and employment law attorney recommends that employer policies on social media should begin by “encouraging innovation and dialog” and then provide guidance rather than restrictions.¹⁵² A series of “dos” is preferable to a series of “don’ts,” and employees should be advised to be “respectful and thoughtful and always to distinguish between their own opinions and those of their employer.”¹⁵³ Where employee comments are “disloyal” and “have the potential to damage the employer’s business and reputation or . . . breach confidentiality,” such discussion is not acceptable and should be distinguished from the traditionally protected lunch table or water cooler conversations about terms and conditions of employment.¹⁵⁴

Employers who outline codes of conduct and rules of civility within their policies should make certain to outline the protections afforded by section 7 of the NLRA while at the same time noting that the statute does not protect

151. See *Feds Settle Case of Woman Fired over Facebook Comments*, TAMPA BAY ONLINE (Feb. 8, 2011), <http://www2.tbo.com/news/breaking-news/2011/feb/07/feds-settle-case-of-woman-fired-over-facebook-site-ar-9992> [hereinafter *Feds Settle Case*]. One wonders just how much protection is truly afforded to a terminated employee such as Dawnmarie Souza whose private settlement with AMR was financial and did not include reinstatement, as the Regional Director of the Hartford office noted. See *id.* How will Ms. Souza find another job after her name has become a household word associated with the Facebook firing case?

152. See *NLRB’s ‘Facebook Firing’ Complaint and Your Social Media Policy*, HR.BLR.COM (Dec. 6, 2010), <http://hr.blr.com/HR-news/Unions/Unions/NLRBs-Facebook-Firing-Complaint-and-Your-Social-Me> (quoting Attorney Anthony Haller of law firm Blank Rome’s Philadelphia office).

153. *Id.*

154. *Id.* As Attorney Haller noted, there is little case law as of yet in the area of cybertalk and the NLRA, as opposed to lunch table and water cooler conversations. *Id.* But he ventures that it is “something else entirely to post comments on the Internet.” *Id.* The labor law group with which Attorney Haller is affiliated at Blank Rome represents employers. This may affect his perspective that Internet comments represent a different category entirely from traditional workplace discussions. See BLANK ROME, LLP, <http://www.blankrome.com/index.cfm?contentID=14&itemID=68> (last visited Feb. 4, 2011).

egregious misconduct including violations of law or rules that are justified by the employer's legitimate business concerns. Such rules should be spelled out and examples of egregious misconduct and extreme disloyalty that would undercut protection should be included for the education of employees and management.

The NLRB's new Acting General Counsel is much more attuned to employee rights than his predecessor, and the present Board members currently include two Democrats and one Republican. This is a composition that is more inclined to take notice of the affirmative rights guaranteed by section 7 of the NLRA than the previous Bush Board.¹⁵⁵ The Board's rules on technology have already changed in the remedial arena, requiring unions and employers to post notices electronically where electronic communication is the norm. Furthermore, the rules on electronic communications are likely to change in additional ways that will reinforce employees' section 7 rights.¹⁵⁶

The issuance of the complaint in the AMR case should be viewed as a sign that the NLRB is ramping up its efforts to oversee workplace policies that unnecessarily infringe on employees' section 7 rights. Since the February settlement in the AMR case, the Board continues to closely monitor and pursue cases where employers' SMPs infringe upon employees' protected concerted activities.¹⁵⁷ The Acting General Counsel has mandated all cases "involving employer rules prohibiting [employee activities], or [the] discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter" be submitted to the Division of Advice.¹⁵⁸ In April, the New York Times reported on what could have been the first NLRB complaint against an employer that disciplined an employee for her use of Twitter to criticize management at Thomson Reuters.¹⁵⁹ The Board's complaint in the Reuters case was placed on hold as the union members negotiated a tentative contract that would include the settlement of pending unfair labor practice charges, including those surrounding imposition of the

155. In particular, former Chairman Liebman has long been a champion of the affirmative right to engage in concerted activities afforded by section 7. See *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1129 (2007) (Liebman, Member, dissenting), *aff'd in part, rev'd in part*, 571 F.3d 53 (D.C. Cir. 2009).

156. See *J & R Flooring, Inc.*, 356 N.L.R.B. No. 9, 188 L.R.R.M. (BNA) 1273 (Oct. 22, 2010) (requiring remedy of posting notice electronically where such is normal means of workplace communication). Member Pierce noted at a recent conference that the Board will be updating its rules on electronic communication. See Mark Gaston Pierce, Member, NLRB, Keynote Address at the 37th Annual Robert Fuchs Labor Law Conference: New Directions and New Faces at the NLRB and the DOL (Oct. 21, 2010).

157. Even as the AMR case settled, another complaint involving a SMP at Student Transportation of America emanated from the same Region (34). See *supra* note 78.

158. See OFFICE OF THE GEN. COUNSEL, NLRB, MEMORANDUM GC 11-11, MANDATORY SUBMISSIONS TO ADVICE (Apr. 12, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458047021e>; *NLRB Updates Regional Office Instructions Requiring Submissions to Division of Advice*, Daily Lab. Rep. (BNA) No. 71, at A2 (Apr. 13, 2011).

159. Steven Greenhouse, *Labor Panel to Press Reuters over Reaction to Twitter Post*, N.Y. TIMES, Apr. 7, 2011, at B3.

reprimand upon the union-represented reporter for her use of Twitter to communicate with co-workers about working conditions.¹⁶⁰ An NLRB administrative law judge recently ordered a nonprofit employer in New York to reinstate five employees who were fired for posting comments on a Facebook page regarding their co-worker's criticisms of their work performance because the employees were engaged in protected concerted activity.¹⁶¹ In another case recently reviewed by the Board's Division of Advice, however, the General Counsel Memorandum advised dismissing a charge involving an employee who was terminated for posting unprofessional and inappropriate tweets that did not involve protected concerted activity to a work-related Twitter account.¹⁶² The Advice Memorandum advised that the charging party was terminated for misconduct, not for engaging in conduct that related to terms and conditions of employment or involving other employees in issues related to employment.¹⁶³ Other recent NLRB activity reported on the social media issue involved the Board's issuance of a complaint against Knauz BMW, a dealership in the Chicago area, because it terminated a salesman who posted critical remarks about the dealership on his Facebook page.¹⁶⁴ The posts related to the unsatisfactory hot dog and bottled water menu provided for a dealership event to promote a new BMW model, a meager menu which the employee was concerned would hinder sales and commissions; thus, the comments related to wages and working conditions.¹⁶⁵ Thereafter, the Acting General Counsel issued a report outlining the outcome of investigations in fourteen cases involving use of social and general media policies in "the hope that this openness [would] encourage compliance with the Act and cooperation with Agency personnel."¹⁶⁶

The Board is presently looking at the use of technology in a new light and viewing SMPs from the perspective of what policies will unnecessarily chill employee section 7 rights. As Stanford Law Professor William Gould, former

160. See Susan R. Hobbs, *Newspaper Guild Members to Vote on Tentative Contract with Thomson Reuters*, Daily Lab. Rep. (BNA) No. 84, at A12 (May 2, 2011).

161. See *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872 (NLRB ALJ Sept. 2, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580622877>; Lawrence E. Dubé, *Firing Five for Facebook Posts Violated NLRA; ALJ Awards Staffers Reinstatement, Back Pay*, Daily Lab. Rep. (BNA) No. 173, at AA1 (Sept. 7, 2011).

162. See Advice Memorandum, Office of the Gen. Counsel, *Lee Enterprises, Inc.*, No. 28-CA-23267, at 7 (NLRB Apr. 21, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580495256>.

163. *Id.* at 6; see also Lawrence E. Dubé, *NLRB Memo Finds No Unfair Labor Practice In Firing Reporter for Offensive Twitter Posts*, Daily Lab. Rep. (BNA) No. 91, at AA1 (May 11, 2011) (discussing Advice Memorandum).

164. See *Chicago Car Dealership Wrongfully Discharged Employee for Facebook Posts, Complaint Alleges*, NLRB (May 24, 2011), <http://www.nlr.gov/news/chicago-car-dealership-wrongfully-discharged-employee-facebook-posts-complaint-alleges>.

165. *Id.*

166. See OFFICE OF THE GEN. COUNSEL, NLRB, MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Aug. 18, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743> (last visited Sept. 29, 2011).

NLRB chairman, said of the AMR case:

This is a very ordinary, garden variety case that comes up countless times under the law. For the life of me, I don't see what it is about Facebook that would make this [speech] unprotected. The [social] network is a more effective way of getting the message to more people, but I think that simply that it is more effective and can reach a larger audience doesn't make it unprotected.¹⁶⁷

In news following the settlement of the AMR case, Jonathan Kreisberg, the NLRB Regional Director in Hartford who approved the settlement, noted that

it certainly sends a message about what the NLRB views the law to be. The fact that they agreed to revise their rules so that they're not so overly restrictive of the rights of employees to discuss their terms and conditions with others and with their fellow employees is the most significant thing that comes out of this.¹⁶⁸

Regional Director Kreisberg told the Bureau of National Affairs that AMR will distribute its revised rules once they are approved by the NLRB to its employees nationwide, not just to those in Connecticut.¹⁶⁹ Mr. Kreisberg also cautioned businesses that "the board is looking at a growing number of complaints that explore the limits of corporate internet policies."¹⁷⁰

VI. CONCLUSION

The AMR case is important because it provides a warning to both employers and employees that the area of electronic communication, including social media, requires their immediate attention. In fact, all employer policies that regulate employee conduct require careful consideration to best address the company's reputational, managerial, and legal concerns, while at the same time taking into consideration whether an employee's NLRA section 7 rights are unduly restricted without a legitimate business reason, thus exposing an

167. Jennifer Martinez, *Hearing Postponed for Conn. EMT Fired for Facebook Posting*, EMS1.COM, Jan. 26, 2011, <http://www.ems1.com/ems-social-media/articles/962493-Hearing-postponed-for-Conn-EMT-fired-for-Facebook-posting>. But see Marie Cramer, *Facebook Comments Bring Firing and a Fight*, BOS. GLOBE, May 27, 2011, http://www.boston.com/news/local/massachusetts/articles/2011/05/27/facebook_comments_bring_firing_and_a_fight (noting labor lawyer Seth Borden's opinion that printed words have more impact than spoken words). Borden claims this is so because of their duration, mentioned in reference to the case of a fired firefighter from Bourne, Massachusetts, who filed a complaint in U.S. District Court on May 26, 2011, seeking reinstatement and back pay after his termination for posting comments about working conditions that included obscenities and slurs against colleagues, superiors, and gay people on his Facebook page. *Id.*

168. *Feds Settle Case*, *supra* note 151.

169. Michelle Amber, *AMR's Revised Internet Posting Policy Will Apply to All Its Employees Nationwide*, Daily Lab. Rep. (BNA) No. 26, at A13 (Feb. 8, 2011).

170. See *Feds Settle Case*, *supra* note 151.

employer to potential liability for unfair labor practices. In the AMR case, the company's policies unduly restricted employees' section 7 rights, providing a clear illustration of what employers do wrong when they go too far in trying to protect themselves and do not consider employees' labor law rights.

Although an employer is entitled to have rules regarding internet activity, the rules should be carefully crafted to allow employees to discuss section 7 matters. Social media is now a substitute for face-to-face communication. The web is where employees gather for what used to be onsite "water cooler" discussions regarding terms and conditions of employment. Employers are well advised to outline what types of online communications damage the company and, consequently, what conduct will give rise to discipline and discharge, while making clear that employees may still engage in protected concerted activities. In fact, a general catchall phrase in the employer's policies should note that all employment rules are interpreted to comply with current federal, state, and local laws. Within an employer policy, violations of confidentiality, trade secret, or other intellectual property rights, defamation, or any illegal conduct should be noted as matters that employers will take seriously, and that will lead to termination and additional legal repercussions when warranted. Beyond egregious misconduct, employees should be free to engage in concerted activities on their own time whether at work or not, and certainly on their own computers or portable devices. A social media and communications policy should outline that there is no intention to interfere with employee rights under section 7 and spell out what this means, namely, that employees are free to discuss wages, hours, and working conditions as well as matters of mutual aid or protection on their own time and during nonworking time such as breaks and lunch within established working hours. In light of the current composition of the Obama Board, employers would do well to revise their communications policies so that where employees are allowed to use company equipment to communicate by email or social media for nonwork related communications, they are also able to use the same for concerted activities on nonworking time in the absence of a countervailing legitimate business reason of the employer, as this may be the rule in the near future.