RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 42 **2014-2015**

#FIREDFORFACEBOOK: THE CASE FOR GREATER MANAGEMENT DISCRETION IN DISCIPLINE OR DISCHARGE FOR SOCIAL MEDIA ACTIVITY

CHRISTINA JAREMUS[1]

With the turn of the century, people in the United States and abroad experienced a rapid evolution in the way information was disseminated. Facebook, a social networking service, was launched in 2004.[2] Facebook's founders set their website apart from preceding social media sites, in part, by creating the "Facebook status:" "an update feature which allows users to discuss their thoughts, whereabouts, or important information with their friends"[3] as well as the "like" feature, which Facebook defines as, "an easy way to let someone know that you enjoy [something], without leaving a comment."[4] Similar to a comment, the fact that you "liked" it is noted beneath the post.[5]

[1] J.D., Chicago-Kent College of Law, 2014; B.A., University of Illinois at Chicago. Special thanks is due to Professor Martin H. Malin, who patiently read countless drafts of this Article, provided comments and proposed edits, and met with me on numerous occasions to discuss revisions and focus my thoughts. This Article was enriched by Professor Malin's vast knowledge of labor and employment law and his dedication to helping his students succeed. I also wish to thank, for their unwavering support, time, and helpful comments, Nicholas Barcelona, J.D., and my parents, Shanda and Rolfe Jaremus.

[2] *History of Facebook*, WIKIPEDIA, http://en.wikipedia.org/wiki/History_of_Facebook (last visited Mar. 16, 2014).

[3] Definition: Facebook Status, WhatIs.com, http://whatis.techtarget.com/definition/Facebook-status (last visited Mar. 16, 2014).

[4] *Connecting: What Does It Mean to "Like" Something?*, FACEBOOK, http://www.facebook.com/help/like (last visited Mar. 16, 2014).

[5] *Id.*

Facebook's social media descendants, like Twitter, Instagram, and Pinterest, revolve around the success of the particular conduits they create to supply users with information. Subsequently created social media websites, riding on the coattails of Facebook's success (1.23 billion monthly active users as of December 31, 2013)[6], incorporated one or both of these features into their social media sites. These social media providers have recognized that social media has a unique ability to amplify the power to transmit information. It is now commonplace for businesses and political campaigns to have a Facebook page; requests from entities to users to, "like us on Facebook" are ubiquitous.[7] In 2008, Barack Obama famously sought campaign support, spending $643,000 of his Internet budget to promote his campaign, via his Facebook account.[8] The overarching goal is to connect the individual to the outside world: other users, political groups, businesses, educational institutions, and other organizations. Through conduits such as Facebook's "Newsfeed," or Twitter's "Twitter feed," social media sites have successfully become a source of news. Depending on how people configure their online preferences, these "feeds" can provide users with activity and information from a smaller network of close, personal friends or from a larger network, of virtually the world at large, including larger news sources such as CNN, Scientific American magazine, and National Public Radio.[9] Individual social media users may share and electronically document any aspect of life: relationships, emotions, social gatherings, educational achievements, life events, and, of course, work.

---

[6] *Key Facts: Statistics*, FACEBOOK, https://newsroom.fb.com/key-Facts (last visited Mar. 16, 2014).

[7] *See, e.g.*, *NIKEiD*, FACEBOOK, https://www.facebook.com/nikeid (last visited Mar. 16, 2014); *The Anti-Cruelty Society*, FACEBOOK, https://www.facebook.com/AntiCruelty?_sk=questions&filter=2 (last visited Mar. 16, 2014); *Chicago-Kent College of Law*, FACEBOOK, https://www.facebook.com/ChicagoKentLaw (last visited Mar. 16, 2014).

[8] Barack Obama, Facebook, https://www.facebook.com/barackobama (last visited Mar. 16, 2014); WIKIPEDIA, *Barack Obama on Social Media*, http://en.wikipedia.org/wiki/Barack_Obama_on_social_media (last visited Mar. 16, 2014).

[9] *News Feed: How News Feed Works*, FACEBOOK, https://www.facebook.com/help/327131014036297/ (last visited Mar. 16, 2014); *CNN*, FACEBOOK, https://www.facebook.com/cnn (last visited Mar. 16, 2014); *National Public Radio*, FACEBOOK, https://www.facebook.com/NPR (last visited Mar. 16, 2014); Scientific American Magazine, Facebook, https://www.facebook.com/ScientificAmerican (last visited Mar. 16, 2014).

In the context of employment, labor relations boards and courts have inevitably been called upon to determine whether employers can discipline and/or fire employees for engaging in activity or speech on social media. Discipline or discharge of employees in both the public and private sector for speech or activity on social media potentially raises issues under national and state-specific labor relations' statutes. In addition, discipline or discharge of employees in the public sector for speech or activity on social media may raise issues under the First Amendment as well as teacher tenure and civil service statutes. The legal doctrine under each of the various protections is framed differently, but, as a general matter, each approach weighs employee autonomy and voice against management's legitimate business interests.

Under national and state-specific labor relations' statutes, public and private sector employees are shielded from discipline or discharge for social media activity when it is concerted (group) activity for mutual aid or protection. However, even when concerted, certain conduct is so opprobrious, or egregious, that it loses legal protection from discipline or discharge. Similarly, public sector employees enjoy protection against discharge or discipline under the First Amendment for individual speech or activity on social media if it is made as a private citizen on a matter of public concern. In that scenario, the court balances the employee's free speech interests against management's interests in providing efficient and effective services to the public in weighing whether the speech is protected from discipline or discharge. However, a public employer may discipline or discharge an employee for speech, on social media or otherwise, if the speech is made pursuant to the employee's official duties.[10] A public employer may discipline or discharge an employee for such speech regardless of whether the employee's interest in making the speech outweighs management's interests and regardless of whether it was on a matter of public concern.[11] Public sector employees that are covered by civil service or teacher tenure statutes are protected

[10] Garcetti v. Ceballos, 126 S.Ct. 1951 (2006).
[11] *Id.*

from discipline or discharge when management fails to conduct a due process hearing for alleged misconduct or imposes too severe of a penalty in proportion to the offense.[12] Here, once again, the nature of the activity or conduct and the interference with a public employer's legitimate business objectives goes to the heart of the reasonableness of discipline or discharge imposed in proportion to the offense.[13]

So far, labor relations boards and courts have largely analogized activity and speech on social media to activity and speech made in a more private forum.[14] Labor relations boards and courts have thus applied existing law governing labor relations to social media usage without taking into account the unique nature of social media in the analysis.[15] This raises the question: should the law treat employee activity on social media differently than other activity?

Social media should be treated differently than private conversations, over dinner for example, because people act differently on social media. Before the widespread use of online social media outlets like Facebook, employees who had a hard day at work or who disliked their boss might have expressed frustration by talking things over with a parent or a spouse or by venting at the water-cooler with a co-worker or friend. Such a conversation would have been private, either face-to-face or over the phone. However, in the race to digitize every aspect of life, it is not surprising that employees have taken to venting on the Internet. What is different about this type of venting is that the activity engaged in and speech made are often much more brazen and uninhibited than activity engaged in and speech made face-to-face.[16]

---

[12] *See infra* pp. 40.
[13] *See infra* pp. 36.
[14] *See infra* pp. 7 - 23
[15] *Id.*
[16] Paul Hiebert, *The Real Reason Why So Many People Overshare on Facebook*, http://www.slate.com/blogs/future_tense/2013/08/19/oversharing_on_facebook_researchers_weigh_in.html (last visited Apr. 27, 2014); Blake Landau, *5 Ways To Avoid the Oversharing Epidemic*, http://www.huffingtonpost.com/blake-landau/6-ways-to-avoid-the-overs_b_2782850.html (last visited Apr. 27, 2014).

Social media activity also differs from private conversation because it is preserved in the recess of cyberspace. Although a social media user may opt to retroactively delete activity or deactivate a social media account, erasing one's electronic footprint is virtually impossible once a posting has gone viral and spread rapidly via the Internet.[17] Thus, even though a company may not endorse a particular employee's actions, views, or comments, an online posting can create a lingering public record online linking a company to the actions of an individual employee.

Take, for example, the woman who dressed up as a Boston Marathon bombing victim for Halloween. She posted a picture of herself costumed in fake blood, a marathon badge, and jogging shorts standing next to her cubical at work.[18] Not surprisingly, Twitter was fuming with rage over her nonsensical and insensitive costume, and her Twitter posting went viral on the Internet.[19] In addition to various remarks calling her repulsive and disturbing, since she posted the picture at work, one Twitter user took her employer to task for allowing her in the office despite her attire, stating, "Where do you work that this is tolerated in the work place??"[20]

Before social media, the consequences of this posting likely would have been limited to a small, closed group of people—perhaps the attendees of a Halloween party. Akin to the response on Twitter, many partygoers would likely be turned off by her insensitive attempt to satirize a national tragedy. In any event, however, her costume choice would likely be totally divorced from her employer. But in the age of the Internet, her posting went viral, and, as a result, her employer, who has an interest in avoiding this kind of sick humor, has been drawn in and associated with her poor taste. Since social media has the capacity to amplify employee voice and exposure, courts and labor boards should take into account the greater potential for employee activity or speech on social

[17] Brian Stelter, *Ex-PR Exec Justine Sacco Apologizes for AIDS in AfricaTweet*, http://www.cnn.com/2013/12/22/world/sacco-offensive-tweet/ (last visited Apr. 29, 2014).
[18] *Boston Marathon Bombing Victim Halloween Costume Prompts Online Fury*, http://www.huffingtonpost.com/2013/11/03/boston-marathon-victim-costume_n_4208720.html (last visited May 4, 2014).
[19] *Id.*
[20] *Id.*

media to be widely disseminated and negatively impact management's business. Management has a legitimate interest in wanting to distance itself from employee activity or speech on social media because it has the capacity to significantly undermine management's business objectives, reputation, business relationships, or its efficient operations in a public forum.

This article will detail employee protections available under national and state-specific labor relations statutes. First, this article will detail specific National Labor Relations Board decisions and general counsel advice memorandums concerning private sector employee discipline or discharge and policies related to social media activity under the National Labor Relations Act. Although the National Labor Relations Act does not apply to employees engaged in public employment for the government, most states have enacted statutes with language that mirrors the relevant language of the National Labor Relations Act discussed herein. Accordingly, state employee labor relations boards consider National Labor Relations Board decisions and general counsel advice memorandums highly persuasive precedent and decide cases along the same lines. Second, this article will discuss protections afforded to public sector employees under the First Amendment of the United States Constitution and teacher tenure and civil service statutes.

As discussed herein, depending on the nature of the activity or speech, the law should encourage more thoughtful and responsible conduct by employees on social media. Labor relations boards and courts should consider activity or speech that is widely disseminated on social media as characteristically more opprobrious and disruptive to management's efficient operations than if the activity or speech is conducted in a more private context. Therefore, in certain instances, the fact that activity or speech occurred on social media should weigh in favor of protecting management's discretion in disciplining or discharging employees.

For the purposes of this article, as stated by Lafe E. Solomon, acting general counsel for the Board from 2010 to 2013, "social media include various online technology tools that enable people

to communicate easily via the Internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications."[21]

I. Social Media and Labor Relations Statutes

The National Labor Relations Act ("NLRA"), enacted by Congress in 1935, guarantees basic employment rights to workers in the private sector who fall under the NLRA's definition of "employee."[22] The private sector is the part of the economy or an industry that is free from direct government regulation.[23] Statutory exclusions explicitly omit individuals from the definition of "employee" who are employed as: "agricultural laborers, domestic workers of any family or person at his home, individuals employed by a parent or spouse, independent contractors, supervisors, and individuals employed by an employer subject to the Railway Labor Act."[24] Whether an individual qualifies as an "employee," especially whether the individual is a "supervisor" or "independent contractor," is a frequently litigated topic and is beyond the scope of this article.

Section 7 of the NLRA 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**."[25]

Although Section 7 does not specifically define "concerted activity," the National Labor Relations Board, an independent federal agency that enforces the NLRA ("the Board"), has concluded, in light of legislative history, that Congress intended this concept to mean "individuals united in pursuit of a common goal."[26] The Board has further established that the wording of

---

[21] Memorandum on OM 11-7 from Lafe E. Solomon, Acting Gen. Counsel for the Natl. Lab. Rel. Bd., *Report of the Acting Gen. Counsel Concerning Social Media Cases*, 2 (Aug. 18, 2011) (on file with the National Labor Relations Board).
[22] 29 U.S.C.A. § 151-169 (West 2012).
[23] *Private Sector*, BLACK'S LAW DICTIONARY (9th ed. 2009).
[24] 29 U.S.C.A. § 152 (West 2012).
[25] 29 U.S.C.A. § 157 (West 2012) (emphasis added).
[26] Meyers Indus., 268 NLRB 493, 493 (1983), *rev'd. sub. nom* Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985).

Section 7 demonstrates that the NLRA envisions "'concerted' action in terms of collective activity—the formation of or assistance to a group, or action as a representative on behalf of a group."[27] This definition does not include activity done solely by and on behalf of an employee, but does include those "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[28] "The lone act of a single employee is concerted if it 'stems from' or 'logically grew' out of prior concerted activity."[29]

Section 7 of the NLRA does not apply to employees engaged in public employment for the government. However, many states have enacted statutes protecting public employees' right to organize and, in doing so, turned to the language of the NLRA in drafting their own statutes.[30] In fact, most states that have enacted collective bargaining statutes for public sector employees have copied the language of the NLRA's Section 7 practically verbatim.[31] In these states, unfair labor

---

[27] *Id.*

[28] *Meyers Indus.*, 281 NLRB 882 (1986), *aff'd. sub nom* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

[29] Karl Knauz Motors, Inc., 358 NLRB 164 (2012) (quoting N.L.R.B. v. Mike Yurosek & Son, Inc., 53 F.3d 261, 265 (9th Cir. 1995)).

[30] MARTIN C. MALIN ET AL., Protecting the Right to Organize, *in* PUBLIC SECTOR EMPLOYMENT, CASES AND MATERIALS 295 (2d ed., West 2011).

[31] *Id.* at 296; *see, e.g.*, MICH. COMP. LAWS ANN. § 423.8 (West 2012) ("Sec. 8. Employees may do any of the following: (a) Organize together or form, join, or assist in labor organization; **engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection**; or negotiate or bargain collectively with their employers through representatives of their own free choice. (b) Refrain from any or all of the activities identified in subdivision (a)" (emphasis added)); FLA. STAT. ANN. § 447.301 (West 2012) ("Public **employees shall have the right to engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection**. Public employees shall also have the right to refrain from engaging in such activities" (emphasis added)); 5 ILL. COMP. STAT. ANN. 315/6 (West 2012) ("Employees of the State and any political subdivision of the State, excluding [certain employees] have, and are protected in the exercise of the right . . . **to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion**. Employees also have, and are protected in the exercise of, the right to refrain from participating in any such concerted activities" (emphasis added)); WIS. STAT. ANN. § 111.04 (West 2012) ("Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection**; and such employees shall also have the right to refrain from any or all of such activities" (emphasis added)); HAW. REV. STAT. § 377-4 (Lexis 2012) ("Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and such

practice violations for constraining social media activity undergo the same analysis as the NLRA cases discussed below.[32]

A. Concerted Activity for Mutual Aid or Protection.

Section 7 limits the employee rights it grants to the examples of concerted activity specifically stated in the NLRA: "self-organization"; forming, joining, or assisting labor organizations; bargaining collectively through representatives; and engaging in "*other concerted activities* for the purpose of collective bargaining or other mutual aid or protection" related to terms and conditions of employment.[33] This provision applies to any individual in the private sector that falls within the NLRA's definition of "employee" regardless of whether the individual is a member of a union or another employee organization.[34]

If an employer discharges or disciplines an employee engaged in Section 7 protected activity, it commits an unfair labor practice under Section 8(a)(1) of the NLRA. According to Section 8(a)(1),an employer commits an unfair labor practice by "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in [section 7] of this title."[35] An employer violates Section 8(a)(1) if an employee can establish four elements. First, the activity engaged in by the employee was "concerted" within the meaning of Section 7 of the NLRA. Second, the employer knew of the concerted nature of the employee's activity. Third, the concerted activity was protected

---

employees shall also have the right to refrain from any and all such activities, provided that employees may be required to join a union under an all-union agreement as provided in section 377-6(3)" (emphasis added)).

[32] *See, e.g.*, Mid-Mich. Comm'y College, Pub. v. AFT Mich., Am. Fedn. of Teachers, AFL-CIO, Lab. Org., No. C11-A-015, 2012 WL 2620707 (Mich. Pub. Employee Relations Comm'n June 18, 2012) (upholding termination of teacher who posted negative comments about students on Facebook; comments did not constitute protected concerted activity); Christine Sharpe v. Brevard Co. Clerk of Ct., No. Ca-2011-117, 2012 WL 739354 (Fla. Pub. Employees Relations Comm'n February 15, 2012) (finding a lack of protected concerted activity when clerk posted newspaper articles about the county clerk's outsourcing of work on her Facebook account during work time and dismissing her wrongful termination charge because she was not terminated for engaging in protected concerted activity).

[33] *Meyers Indus.*, 268 NLRB at 493-94 (emphasis original).

[34] 29 U.S.C.A. § 151-169 (West 2012).

[35] 29 U.S.C.A. § 158 (West 2012).

by the NLRA. Fourth, the discipline or discharge was motivated by the protected, concerted activity.[36]

The epitome of such activity is *NLRB v. Washington Aluminum Co.*[37] In *Washington Aluminum*, employees collectively left work at a factory on a bitterly cold day because the furnace was broken and had not been repaired. As a result, Washington Aluminum fired all of the workers who left.[38] The United States Supreme Court found that the conduct of the workers to protest the company's failure to supply adequate heat in the factory was concerted activity, protected by Section 7.[39] The Court also stated that the employees did not lose their right to engage in protected activity just because they did not make a specific demand to the company to turn on the heat.[40] The language of Section 7 is broad enough to protect activity whether it takes place before, after, or during a demand for better working conditions.[41] Accordingly, the Court held Washington Aluminum committed an unfair labor practice in violation of Section 8(a)(1) by discharging the workers because the company's action interfered with the workers' Section 7 rights.[42]

In the public sector, a few states have confined the scope of protected activity.[43] For example, Section 202 of New York's Public Employees Fair Employment Law states, "public employees shall have the right to form, join, and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing."[44] In *Duchess Community College*, the New York Public Employee Relations Board ("PERB") found, and New York's higher courts agreed, that even though teachers who raised concerns to their employer regarding salaries,

---

[36] Hispanics United of Buffalo, Inc., 359 NLRB 37, at *2 (2012); *Meyers Indus.*, 268 NLRB at 497.
[37] NLRB v. Wash. Aluminum Co., 370 U.S. 9 (1962).
[38] *Id.* at 11.
[39] *Id.* at 12-13.
[40] *Id.* at 14.
[41] *Id.* at 14.
[42] *Id.* at 13.
[43] MARTIN C. MALIN ET AL., *Protecting the Right to Organize*, *in* PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 296 (3d ed., 2011).
[44] N.Y. CIVIL SERVICE LAW § 202 (McKinney 2012); *Id.* at 296.

classroom size and course load were engaged in concerted activity, their activity did not amount to participation in an employee organization.[45] Accordingly, their activity was not protected under Section 202.[46] This case illustrates a critical demarcation from NLRA protection, under which, as discussed above, a private sector employee need *not* be a member of union to enjoy protection for engaging in protected concerted activity for mutual aid or protection. Accordingly, the protections available in many of the cases discussed in Section B below would not be available to a non-unionized employee working in the public sector if the language of the state's collective bargaining statute confines protection covering collective activity to employees who participate in employee organizations and unions.

B. Specific Instances of Employer Discipline For Social Media Activity Under the NLRA.

In 2010, the Board began receiving charges in its regional offices for specific disciplinary actions against private sector employees who made social media posts and for employer social media policies.[47] In some cases, the Board found cause to believe the specific disciplinary action or policy violated the NLRA, and, in other cases, the Board did not.[48]

In *Hispanics United of Buffalo, Inc.*, the Board majority upheld the administrative law judge's ("ALJ") findings that five employees engaged in protected concerted activity by posting comments on Facebook that responded to a co-worker's criticism of their job performance.[49] Hispanics United is a domestic violence assistance program.[50] The dispute arose when two co-workers, Marianna

[45] MARLIN ET. AL., *supra* note 37, at 303; Duchess Community College, 17 PERB 3093 (1984), *rev'd* 128 Misc.2d 628, 490 N.Y.S.2d 705 (Sup. Ct. Duchess Cnt'y) *rev'd sub nom* Rosen v. PERB, 125 A.D.2d 657, 510 N.Y.S.2d 180 (2d Dep't 1986) *aff'd* 72 N.Y.2d 42, 530 N.Y.S.2d 534, 526 N.E.2d 25 (1988).
[46] *Id.*
[47] Nat'l Lab. Rel. Board, The NLRB and Social Media, http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited Mar. 16, 2014)
[48] *Id.*
[49] Hispanics United of Buffalo, Inc., 359 NLRB 37 (2012).
[50] *Id.* at *1.

Cole-Rivera and Lydia Cruz-Moore were sending each other text messages.[51] Cruz-Moore stated that she intended to discuss concerns she had with the Executive Director about her co-workers' work habits and failure to provide timely and adequate assistance to clients.[52] After the text conversation, Cole-Rivera used her own personal computer, during non-working hours, to post the following status on her Facebook page: Cruz-Moore "feels that we don't help our client[s] enough at [Hispanics United]. I about had it! My fellow coworkers how do u feel?"[53] Four employees responded by posting messages objecting to the idea that their work performance was deficient.[54]

Cruz-Moore complained to the Executive Director and showed her printed versions of the Facebook comments.[55] The next working day, Cole-Rivera tried to meet with the Executive Director, but was told that the she was busy.[56] Cole-Rivera was later called into the Executive Director's office and fired, as were the four other employees later that day.[57] The Executive Director stated that the employees were fired for violating Hispanics United's zero tolerance policy on bullying and harassment.[58] The five employees filed an unfair labor practice charge under the NLRA, and the Board found that only the first and third elements of the test for a Section 8(a)(1) violation, as discussed above, were in dispute.[59] Thus, the Board had to decide whether the employees' Facebook comments constituted concerted activity for mutual aid or protection and, if so, whether that activity was protected by the NLRA.[60]

The Board majority found that the first element was satisfied because the activities engaged in by the five employees were unquestionably concerted for the "purpose of mutual aid or

---

[51] *Id.*
[52] *Id.*
[53] *Id.* at *2
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*

protection" as required by Section 7.[61] Cole-Rivera's coworkers' responses joined common cause with her, and together their actions were concerted.[62] The Board agreed with the ALJ that the comments "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management."[63] The Board further stated that the goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate.[64] Akin to *Washington Aluminum*, discussed above, it can be inferred from the way employees discuss or seek to address their concerns about working conditions.[65] Even though Cole-Riviera did not say that Cruz-Moore planned to complain about her and her co-workers to management, her Facebook communications had a clear "mutual aid" goal of preparing her coworkers for a group defense.[66]

The Board also found that the employees' concerted activity was protected and the third element for the test was met.[67] The Board stated that it has "long held that Section 7 protects employee discussions about their job performance, and the Facebook comments plainly centered on that subject."[68] The employees were directly responding to criticism of giving poor service to clients in light of the negative impact such criticisms could have on their jobs. The Facebook postings directly implicated terms and conditions of employment in preparation for a meeting with a supervisor to discuss the same.[69] Accordingly, the Board found that Hispanics United violated Section 8(a)(1) of the NLRA by firing the five employees based on their Facebook comments.[70] In 2011, in his Report Concerning Social Media Cases, acting general counsel for the Board, Lafe E.

---

[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at *3.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Memorandum on OM 11-74 from Lafe E. Solomon, Acting Gen. Counsel for the Natl. Lab. Rel. Bd., *Report of the Acting Gen. Counsel Concerning Social Media Cases* 4 (Aug. 18, 2011) (on file with the National Labor Relations Board).
[70] Hispanics United of Buffalo, Inc., 359 N.L.R.B. at *3.

Solomon, described *Hispanics United* as "a textbook example of concerted activity, even though it transpired on a social network platform."[71]

Along these same lines, in *Design Tech. Group, LLC d/b/a Bettie Page Clothing and Dtg California Mgt., LLC d/b/a Bettie Page Clothing, A Single Employer and Vanessa Morris*, the Board found that when three employees who presented concerns about working late in an unsafe neighborhood to their supervisor and the owner of their company, they were engaging in protected concerted activity.[72] The Board held that the employer violated Section 8(a)(1) of the NLRA by firing the employees for subsequent Facebook posts in continuation of protected concerted activity to complain about management's refusal to address their concerns.[73]

However, not all discipline or discharge for social media activities constitutes an unfair labor practice. For instance, the first case in which the Board ruled on an unlawful discharge involving Facebook posts, *Karl Knauz Motors, Inc.*,[74] involved posts about two separate incidents made by a BMW salesman, Bob Becker, via his Facebook account.[75] The first posts ("BMW posts") were about a sales event for a new BMW model.[76] Among the BMW posts were sarcastic remarks and photographs implying that the quality of the food (hot dogs, cookies, chips, and bottled water) being served at a marketing event was not on par with the automobile image and luxury brand.[77] The second post ("Land Rover post") involved a picture with commentary of an accident at an adjoining Land Rover dealership in which a customer's 13-year-old child had been sitting in the vehicle's driver's seat. The vehicle accelerated over the customer's foot into a pond while the child was inside

[71] Memorandum on OM 11-74 from Lafe E. Solomon, Acting Gen. Counsel for the Natl. Lab. Rel. Bd., *Report of the Acting Gen. Counsel Concerning Social Media Cases*, 4 (Aug. 18, 2011) (on file with the National Labor Relations Board).
[72] Design Tech. Group, LLC and DTG Cal. Mgt., LLC and Vanessa Morris, 359 N.L.R.B. 96, at *1 (2013).
[73] *Id.*
[74] Karl Knauz Motors, Inc., 358 NLRB 164 (2012)
[75] *Id.*
[76] *Id.* at *10-*11.
[77] *Id.*

and knocked a sales person into the pond.[78] Becker's relatives, friends, and co-workers posted further mocking comments on both posts.[79] When the posts were brought to management's attention, Becker was discharged.[80]

The Board adopted the ALJ's findings that the auto dealership did not violate the NLRA by discharging Becker because it found that the Land Rover post, which ultimately led to his termination, was not protected by the NLRA.[81] The Board upheld the discharge even though the BMW posts were considered protected concerted activity.[82] Specifically, the ALJ found that the BMW posts were protected concerted activity despite their mocking and sarcastic tone.[83] Becker and his coworker had previously expressed their opinion at a pre-event meeting that the food being offered by BMW was sub-par.[84] Even though Becker alone complained further on his Facebook page without further input from other salespersons, the ALJ found that the activity was concerted because it stemmed from or logically grew out of Becker and his coworkers' prior comments at the meeting.[85] The ALJ found that, although unlikely, the food served at the event could have had an effect upon Becker or his co-workers' compensation by decreasing car sales, thereby decreasing commissions, or by causing negative customer satisfaction surveys.[86]

However, the ALJ found that, and the Board agreed, Becker was fired solely because he made negative comments about the dealership in a public forum, satirized a car accident that harmed several people and greatly embarrassed the company.[87] In addition, Becker alone made the Land Rover post, which had no connection to his or any coworkers' terms and conditions of

[78] *Id.* at *11-*12.
[79] *Id.* at *12.
[80] *Id.* at *13.
[81] *Id.* at *18.
[82] *Id.* at *17.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at *14, *18.

employment.[88] The ALJ stated, "[i]t is so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting further affects the nature of the posting."[89] Accordingly, because the Land Rover post did not amount to protected concerted activity, the Board affirmed the ALJ's decision that the discharge was lawful.[90]

Likewise, in *Lee Enterprises, Inc., d/b/a Arizona Daily Star*, general counsel for the Board found, in an advice memorandum, that a newspaper publisher, did not violate Section 8(a)(1) when it fired an employee for posting unprofessional, inappropriate, and offensive tweets from a work-related Twitter account.[91] The posts consisted of disparaging remarks about the intelligence level of a local television station and satirized the homicide rate in Tucson.[92] The posts neither related to the terms and conditions of the employee's employment nor sought to involve other employees in employment-related issues and, accordingly, did not constitute Section 7 concerted protected activity.[93]

An important distinction lies where an employee's social media activity is directed at coworkers, but fails to generate a group response. The Board's Division of Advice has found that in certain circumstances, even if the employee seeks to engage coworkers in a group message or post, comments made "solely on behalf of the employee himself" are not concerted and instead constitute "mere griping."[94] For example, in *Tasker Healthcare Group, d/b/a Skinsmart Dermatology*, general counsel for the Board issued an advice memorandum finding a skincare group, did not violate

---

[88] *Id.* at *18.
[89] *Id.*
[90] *Id.*
[91] Lee Enter., Inc., No. 28-CA-023267, at *1-*3, *6-*8 (2011).
[92] *Id.*
[93] *Id*; *see also* JT's Porch Saloon & Eatery, Ltd., No. 13-CA-046689 (2011). In an advice memorandum, general counsel for the Board found that an employer, a restaurant and bar, did not violate Section 8(a)(1) for firing an employee over a Facebook post in which the employee complained about the employer's tipping policy and made other disparaging remarks about the owners because the post did not constitute a logical outgrowth of concerns expressed by the employees collectively such that it constituted concerted activity protected by Section 7. The employee did not discuss his Facebook post with any employees before or after he wrote it and no employees responded to it, and, thus, he was engaged in activity solely by and on behalf of himself. *Id.*
[94] *Meyers Industries*, 281 NLRB 882, 885 (1986), *aff'd sub. nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

Section 8(a)(1) when it fired an employee over a Facebook "group message" to coworkers, where the employee said that her employer was "full of shit" and should be fired.[95] The employee's comments "merely expressed an individual gripe" and personal contempt for her supervisor did not express any shared concerns about working conditions.[96] Moreover, coworkers' indicating that they found the comments humorous was not sufficient to garner Section 7 protection.[97]

In *Karl Knauz Motors, Inc.*, *Lee Enterprises, Inc., d/b/a Arizona Daily Star*, *Tasker Healthcare Group, d/b/a Skinsmart Dermatology*, and similar cases, the Board looks for either a lack of concerted activity or a lack of connection to terms and conditions of employment to justify discipline or discharge. However, even if either element was present, this type of conduct should remain unprotected if the social media activity at issue was widely disseminated across the Internet and if the employer could show that the comments had a negative impact on business. An employee's conduct or statements about management, competitors, or other businesses on the Internet can have much further-reaching and lasting consequences on business and business relationships than conduct made privately, such as that made during a face-to-face conversation or to a limited group of people.

Thus, employers should be permitted to raise an affirmative defense to justify discipline or discharge if the employer can show that an employee's conduct on social media undermined its business objectives, reputation, business relationships or its efficient operations *because it was widely disseminated on social media or the Internet.* Such a test could mirror the burden-shifting framework typically used in employment discrimination cases where direct evidence of discrimination is

[95] Tasker Healthcare Group, No. 04-CA-094222 at *2 (2012).
[96] *Id.* at *3-*4.
[97] *See* Wal-Mart, No. 17-CA-025030 (2011) (finding that employee's Facebook postings criticizing his manager and making disparaging remarks about her was not concerted action despite subsequent messages of support from fellow employees because the comments did "looked toward group action" and constituted mere griping).

lacking.[98] Management would be permitted to make such a showing after establishing that the employee's conduct was concerted for mutual aid or protection concerning terms and conditions of employment. Then, the employee would be given the opportunity to rebut this evidence by showing that the activity was not disseminated to a larger pool of the general public, potential customers, investors, or other parties, and/or did not otherwise disrupt the company.

C. Derogatory Remarks.

Mark Gaston Pearce, Chairman of the National Labor Relations Board commented on *Karl Knauz Motors, Inc.*, stating, "concerted activity is not always courteous."[99] Indeed, many of the cases discussed thus far have concerned derogatory remarks or profanity made in conjunction with the exercise of rights protected by NLRA. Traditionally, the NLRA protects statements made during the course of protected conduct, unless statements are so egregious, abusive, or "opprobrious" that they are removed from the NLRA's protection.[100] As discussed, the NLRA should expand this rule when statements or activity widely disseminated on social media harm a company's business objectives, reputation, business relationships, or its efficient operations. These statements or activity on the Internet should be seen as more opprobrious than statements made in a private context.

The Board, however, has afforded employees protection even despite harsh remarks. For example, in *American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443*, American Medical Response ("AMR") discharged an employee, Dawnmarie Souza, a paramedic, for violating AMR's "Blogging and Internet Posting Policy" (the "Policy") and refusing

---

[98] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (stating that after plaintiff establishes a prima facie case of discrimination, burden of production shifts to employer to provide legitimate, nondiscriminatory reason for discipline or discharge of employee; and that employee may prevail if he can show that employer's articulated reason is pretext for discrimination).

[99] Ben James, LAW360, *NLRB May Weigh in on Facebook 'Likes,' Chairman Says*, http://www.law360.com/articles/390016/nlrb-may-weigh-in-on-facebook-likes-chairman-says (last visited Mar. 16, 2014).

[100] Am. Med. Response of Conn., Inc. and Int'l. Bd. of Teamsters, Loc. 443, No. 34-CA-012576 at *9 (2010).

to prepare an incident report without Union representation.[101] Souza and her partner responded to a minor car accident during which an antagonistic dispute ensued between the drivers.[102] One of the drivers refused medical care, but later that day, when Souza and her partner responded to a "fall" at a police station they found the same driver.[103] Souza notified the driver that she had to come file a report, however, the driver felt dizzy and lost consciousness.[104] They transported the driver to the hospital.[105] Souza told the triage nurse at the hospital that the accident was minor, but once driver's husband arrived he disputed Souza's description of the accident.[106]

The next day, a supervisor called Souza into his office and told her the driver had filed a complaint against her; and as part of AMR protocol for investigating patient complaints, she was asked write an incident report.[107] Souza requested a union representative be present when she made her report, but her supervisor denied the request.[108] Shortly thereafter, Souza posted comments onher Facebook page regarding the confrontation with her supervisor in which former and current employees of AMR responded and showed support.[109] Her supervisor discovered the posts, then mentioned them in his written report regarding the incident.[110] Souza was later terminated, and her "derogatory" Facebook posts were noted in her discharge letter.[111]

General counsel for the Board opined that Souza did not lose protection for complaining about her supervisor despite referring to her supervisor as a "17," (a company term for a psychiatric patient), a "dick" and a "scumbag" because (1) the comments occurred outside of the workplace when Souza and her coworkers were off work; (2) the comments were made in the context of an

---

101 *Id.* at *1.
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.* at *2.
106 *Id.*
107 *Id.* at *3.
108 *Id.*
109 *Id.* at *3-*4.
110 *Id.* at *4.
111 *Id.* at *4-*5.

online employee discussion of supervisory action that constituted Section 7: protected activity; (3) the name-calling was not accompanied by verbal or physical threats; and (4) the comments were provoked by her supervisor's unlawful refusal to provide her with a union representative to complete her incident report, along with her supervisor's unlawful threat to discipline her.[112] Thus, the Board has held that regardless of whether conduct occurs on social media, "unpleasantries in the course of otherwise protected concerted activity does not strip away the [NLRB's] protection."[113]

The NLRB considers four factors when determining whether an employee has lost protection for otherwise protected activity by engaging in opprobrious conduct:

(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.[114]

Despite the mocking and sarcastic manner of Becker's Facebook posts, the tone did not rise to the level of disparaging necessary to deprive the activities of the NLRB's protection as discussed in *Karl Knauz Motors, Inc.* above.[115] However, in weighing the first factor, the Board should place greater weight on the public nature of employee activity in social media cases and find such conduct to be more opprobrious than if the same conduct occurred in a more private, closed forum. Ultimately, if an employer can make a showing that an employee's comments went viral and not only caused the company to become a laughing stock on the Internet, but also undermined its business objectives, reputation, business relationships, and/or its efficient operations, this activity should fall outside the scope of statutory protection.

D. Internet and Blogging Policies in the Private and Public Sector.

The National Labor Relations Board and state labor boards have also examined employer

[112] *Id.* at *9-*10.
[113] Karl Knauz Motors, Inc., 358 NLRB at *17 (quoting Timekeeping Systems, Inc., 323 NLRB 244, 249 (1997)).
[114] *Id.* (citing Atlantic Steel Co., 245 NLRB 814, 816 (1979)).
[115] Karl Knauz Motors, Inc., 358 NLRB at *17.

policies regarding social media to determine whether or not they were lawful. In the context of employee discipline or discharge for violating a social media policy, labor boards have taken a more balanced approach in weighing the employer's legitimate business objectives against avoiding restrictions on employee social media usage.

In *American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443,* general counsel for the Board issued an advice memorandum regarding, in part, whether AMR violated the NLRA for maintaining the Policy discussed above, which prohibits employees from depicting AMR "in any way, including but not limited to a [AMR] uniform, corporate logo or an ambulance," unless the employee receives written approval from AMR in advance ("AMR Related Postings.")[116] Pursuant to the Policy, employees were also prohibited from making "disparaging, discriminatory or defamatory comments when discussing [AMR] or the employee's superiors, co-workers and/or competitors" ("Disparaging Remarks Postings").[117]

After finding that Souza engaged in protected activity by discussing supervisory actions with her coworkers on Facebook, general counsel also concluded that AMR violated Section 8(a)(1) by maintaining the Policy because, "it would either explicitly prohibit Section 7 activity, or employees would reasonably construe it as prohibiting Section 7 activity" which could "reasonably tend to chill employees in the exercise of their Section 7 rights."[118] Specifically, general counsel found that the portion of the Policy on AMR Related Postings would expressly prohibit an employee from engaging in protected activity, such as posting a picture of employees carrying picketing signs while wearing an AMR uniform or a t-shirt displaying AMR's logo.[119] General counsel also found that the portion of the Policy on Disparaging Remarks Postings was unlawful because it contained no

[116] *Id.* at *5.
[117] *Id.* at *5.
[118] *Id.* at *6, *9, *11.
[119] *Id.* at *13.

limiting language or context that would clarify to employees that it did not restrict Section 7 rights.[120]

The case resulted in a settlement agreement after general counsel concluded that the regional director for the Board should issue a complaint alleging AMR violated the NLRA for, among other violations, maintaining the Policy.[121] Since then, general counsel has issued numerous advice memorandums regarding whether or not employer social media policies are lawful.[122] The Board's advice memorandums emphasize that "employer policies should not be so sweeping that they prohibit the kinds of activity protected by [the NLRA], such as the discussion of wages or working conditions among employees."[123] This is consistent with Board precedent that discipline made per an unlawfully overbroad policy violates the NLRA "in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7."[124] Employee discipline or discharge will be upheld despite a violation for an overbroad rule if the employer can show that the employee's conduct actually interfered with his or her own work, coworker's work or the employer's operations and that the interference was the reason the employee was disciplined or discharged.[125]

---

[120] *Id.*

[121] *Id.* at *15.

[122] Memorandum on OM 12-31 from Lafe E. Solomon, Acting Gen. Counsel for the Natl. Lab. Rel. Bd., *Report of the Acting Gen. Counsel Concerning Social Media Cases*, (Jan. 24, 2012) (on file with the National Labor Relations Board); Memorandum on OM 12-59 from Lafe E. Solomon, Acting Gen. Counsel for the Natl. Lab. Rel. Bd., *Report of the Acting Gen. Counsel Concerning Social Media Cases*, (May 30, 2012) (on file with the National Labor Relations Board).

[123] NAT'L LAB. REL. BD., *The NLRB and Social Media*, http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited Mar. 16, 2014).

[124] The Continental Group, Inc., 357 NLRB 39, at *4 (2011); *see also* Memorandum on OM 12-31 from Lafe E. Solomon, Acting Gen. Counsel for the Natl. Lab. Rel. Bd., *Report of the Acting Gen. Counsel Concerning Social Media Cases*, (Jan. 24, 2012) (on file with the National Labor Relations Board).

[125] The Continental Group, Inc., 357 NLRB at *4; *see also* Memorandum on OM 12-31 from Lafe E. Solomon, Acting Gen. Counsel for the Natl. Lab. Rel. Bd., *Report of the Acting Gen. Counsel Concerning Social Media Cases*, (Jan. 24, 2012), 7-8, 11-12 (on file with the National Labor Relations Board) (stating that home improvement store's social media policy unlawful and overbroad when it applied to all social networking communications and stated that employees should not identify themselves as employees of employer "unless "there was a legitimate business need to do so or when discussing terms and conditions of employment in an 'appropriate' manner" because employees could reasonably interpret rule to prohibit Section 7 protected activity; however, discharge for explicit Facebook posts about company upheld because posts were not protected concerted activity and merely expressed an individual gripe); *see also id.* (finding employer's social media policy overbroad when it prohibited employees from using social media to engage in unprofessional or inappropriate communication that could negatively impact or interfere with employer or members of employer's community because employees could reasonably interpret rule to prohibit Section 7 protected activity; however,

Akin to cases decided under the NLRA, at least one public sector labor relations' board has held that an employer's social media policy was overly broad and unlawful when the policy restricted employees' personal use of social media during nonworking hours on personal devices.[126] However, more recently, public employers have instituted more restrictive guidelines without challenge. For example, in early 2013, the New York Police Department ("NYPD") issued new social media guidelines, restricting what New York police officers may post on social media sites, even during nonworking hours.[127] Under these guidelines, officers may not disclose or allude to their status in the NYPD, and doing so may disqualify them for secretive positions.[128] The NYPD may also discipline or discharge employees for posting photographs of crime scenes or information about witnesses that jeopardizes the integrity of a case investigation.[129]

These rules are more in line with how the NLRA and public sector labor statutes *should* protect management's ability to discipline or discharge employees for disrupting the workplace or creating negative publicity about management online.

E. Employer Email and Internet Systems in the Private and Public Sector.

In addition, the Board has held that under the NLRA a private employer has a property right in its email and Internet systems to completely prohibit employees from using such systems to solicit coworkers or for personal use, but its rule must be applied evenly and not designed to interfere with,

---

employee, phlebotomist's angry rant on Facebook indicating that she hated coworkers and her employer and wanted to be left alone did not constitute protected concerted activity protected by Section 7 even though one coworker commented that she had gone through the same thing).

[126] *See e.g.*, Orange Co. Prof. Fire Fighters, I.A.F.F., Loc. 2057, v. Orange Co. Bd. of Co. Commissioners, 2011 WL 5025557 (September 16, 2011) (finding portion of employer, fire department's social media policy restricting employees from using their own personal devices with Internet access – such as cell phones and computers – was overly broad which could be construed to interfere with, restrains, or coerces employees regarding their rights guaranteed under Chapter 447, Part II, Florida Statutes).

[127] *NYPD Introduces Strict Social Media Rules for its Officers*, THE VERGE (last visited Mar. 16, 2014).

[128] *Id.*

[129] *Id.*

restrain or prohibit protected concerted activity.[130] Thus, a private employer can lawfully institute a rule restricting employees from using the Internet for personal purposes, like social media, during work hours or allowing use only during designated times, like personal or lunch breaks, so long as it makes employees aware of its policy, and disciplines or discharges employees consistently under its policy.[131]

Similarly, many public sector labor boards have followed the NLRA model regarding employee use of employer email systems and Internet use on company time, holding that a public employer may prohibit *all* non-business use of email systems and Internet. However, it is an unfair labor practice if a public employer *enforces* its blanket rule prohibiting non-business email or Internet discriminatorily against union related usage, but not other personal use. [132] Many public sector labor boards have likewise found an unfair labor practice when a public employer allows use of e-mail and Internet for personal matters, but prohibits any such use for union related reasons or concerted

---

[130] The Guard Publ'g Co. d/b/a The Register Guard, 351 N.L.R.B. 1110, 1114 (2007) *rev'd*, 571 F.3d 53 (D.C. Cir. 2009) (finding that the Board recognized that the employer had a "basic property right" in its e-mail system, noting that employers may "have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails"; and as such, employers may "regulate and restrict" the use of its property); MALIN ET AL., *supra* note 31, at 318; TECH. & LAB. LAW, SR035 ALI-ABA 79, 85-86.

[131] *See e.g.*, Pettyjohn v. Unemployment Comp. Bd. of Rev., 863 A.2d 162, 1641-165 (Pa. Commw. 2004) (upholding discharge of employee when employer had a clear policy in place against Internet usage and employee willfully used Internet for personal use in violation of policy); *id.* ("The Board maintains that no formal rule prohibiting use of employer property for personal use is necessary and that there can be little doubt that an employer expects employees to refrain from personal pursuits during work hours."); Curran v. Unemployment Comp. Bd. of Rev., 752 A.2d 938, 941 (Pa. Commw. 2000) (upholding discharge of employee when employer established that it had a policy regarding use of the Internet during work hours, and claimant had violated that policy.); Delgado v. Combs, No. A-09-CA-571-SS, 2010 WL 3909398 (W.D. Tex. 2010) (upholding discharge of employee for violating Defendant's Internet policy which stated, in relevant part: "Occasional personal use of local telephones, email, and the Internet must be kept to a minimum and must adhere to all division and agency policies and procedures. This minimal use may not interfere with the conduct of agency business or disrupt the work place and must be purely incidental to the performance of assigned job duties.").

[132] Serv. Empl. Int'l Union Local 503 v. State, Jud. Dept., 149 P.3d 235 (Or. App. 2006) (stating that in the absence of evidence of employer's knowing discriminatory enforcement of its anti-solicitation e-mail policy, employer's preclusion of use of its e-mail system for union-related messages did not constitute unfair labor practice in violation of Oregon's public employee labor relations statute); Benson v. Cuevas, 741 N.Y.S.2d 310 (N.Y. App. Div. 3d Dept. 2002) (finding that the Public Employment Relations Board determined that employer did not violate New York's Taylor Law by cutting off state employee's e-mail privileges for using e-mail to transmit matters of union business and comments critical of employer, despite claim that employer was interfering with union activities; termination was pursuant to long-standing restriction of e-mail to official purposes, and employee had been warned that his usage was improper.); MALIN ET AL., supra note 31, at 318 (citing Oakland County, 15 Mich. Pub. Emp. Rptr. (LRP) ¶ 33018 (Mich. Emp. Rel. Comm'n 2001) (holding that the county did not violate the Michigan Employment Relations Commission when it denied all non-business use, including prohibiting use for union activities)).

activities.[133] Wisconsin, however, took a slightly different approach and balanced the interests of employees having access to a public employer's email system against the employer's desire to block all access, finding that a state hospital violated Wisconsin's employee labor relations statute by prohibiting all employee access to the public employer's email system for union activities.[134]

II. Public Sector: Social Media in the Context of the First Amendment, Teacher Tenure and Civil Service Statutes.

A. The First Amendment

There are also protections available under the First Amendment for public sector employee speech made via social media. The First Amendment, as relevant here, states, "Congress shall make no law . . . abridging the freedom of speech."[135] The Fourteenth Amendment's Due Process Clause makes the First Amendment right to free speech applicable to the states.[136] The First Amendment right to free speech also includes the right to be free from retaliation by a public official for the exercise of that right.[137]

A government employee does not relinquish all First Amendment rights otherwise enjoyed by other citizens just by reason of his or her employment.[138] However, a government employer may impose certain restraints on the speech of its employees that would be otherwise unconstitutional if

---

[133] Am. Fed'n of State, Cnty., and Mun. Emps., v. L.A. Cnty. Super. Ct., PERB Decision No. 1979-C (Cal. Pub. Rel. Board 2008) (stating that despite employer, Court's policy prohibiting all non-business use, Court did not discipline employees for sending non-union broadcast emails for events like baby showers and birthday parties, so discipline for union broadcast emails was discriminatorily applied; however, the court dismissed complaint because found that employee was lawfully disciplined based on other unprotected activity); MALIN ET AL., *supra* note 31, at 318) (citing St. of Cal., 22 Pub. Emp. Rptr. Cal. (LRP) ¶ 29148 (Cal. Pub. Emp. Rel. Board 1998) (stating that when state agency allowed use of business email for personal use it could not prohibit use for employee organization matters without violating the Dills Act); City of Clearwater, 32 Fla. Pub. Emp. Rptr. (LRP) ¶ 210 (Fla. Pub. Emp. Rel. Comm'n 2006) (finding that the city violated Florida's public employee labor relations statute by allowing personal use of city computers for various charity, volunteer or other activities, but not union activities).

[134] MALIN ET AL., supra note 31, at 318) (citing Univ. of Wis. Hosps., Dec. No. 30203-C (Wis. Emp. Rel. Comm'n Apr. 12, 2004).

[135] U.S. CONST. amend. I.

[136] Gitlow v. N.Y., 268 U.S. 652, 666 (1925); *Bland v. Roberts*, 730 F.3d 368, 373 (4th Cir. 2013).

[137] U.S. CONST. amend. I; *Roberts*, 730 F.3d at 373.

[138] City of San Diego v. Roe, 543 U.S. 77, 80 (2004).

applied to the general public.[139] Along these lines, in relation to employer social media policies, the FBI recently stated that on one hand, "officers cannot be expected to refrain from maintaining a social presence on the Internet," but on the other, in order to protect the integrity of departments and investigations, law enforcement agencies must establish criteria for social media usage that balances the constitutional rights of officers while protecting officer safety and their departments and preventing misuse of information posted by officers.[140]

The United States Supreme Court has recognized the public employee's right to speak on matters of public concern. These matters typically concern government policies that have a high public interest .[141] The Court has recognized this right because public employees are privy to the inner workings of the governmental units in which they serve, which uniquely qualify them to comment on and possibly bring great insight regarding matters of public concern.[142] However, in *Connick v. Myers* and *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, the United States Supreme Court explained that the free speech rights of public employees to speak as private citizens must be balanced against the governmental interest in ensuring and promoting the efficiency of the public services that its employees perform.[143]

The Fourth Circuit court instituted a three-prong test that must be satisfied by the public employee to prove that an adverse employment action violated their First Amendment right to freedom of speech.[144] An employee must establish (1) that he "was speaking as a citizen upon a matter of public concern"[145] rather than "as an employee about a matter of personal interest;"[146] (2)

---

[139] *Id.*; *Roberts*, 730 F.3d at 373.
[140] Robert D. Stuart, *Social Media: Establishing Criteria for Law Enforcement Use*, http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2013/february/social-media-establishing-criteria-for-law-enforcement-use (last visited May 15, 2014).
[141] *Id.*
[142] *See id.*
[143] Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563 (1968); *Roberts*, 730 F.3d at 373.
[144] *Roberts*, 730 F.3d at 373.
[145] *Roberts*, 730 F.3d at 374 (quoting Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006)).

that "the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public;"[147] and (3) that "the employee's speech was a substantial factor in the termination decision."[148] In conducting the second prong of the balancing test, the Fourth Circuit considered the context along with the employee's role and the extent to which the speech impairs workplace efficiency, which evaluates nine different factors.[149] A public employee who has a "confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee."[150]

In the context of social media, courts should consider the extent to which the speech or activity via social media impairs workplace efficiency and business in view of its far reaching potential for widespread dissemination. In some circumstances, despite widespread dissemination, the employee's interest in certain speech or activity will prevail over the government's interest in prohibiting the speech. For example, courts have emphasized that political speech is entitled to the highest level of protection.[151]

B. Is A "Like" Protected Speech Under The First Amendment?

---

[146] *Roberts*, 730 F.3d at 374 (quoting Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006)).
[147] *Roberts*, 730 F.3d at 374 (quoting Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006)).
[148] *Roberts*, 730 F.3d at 374 (quoting Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006)).
[149] *Roberts*, 730 F.3d at 373-74 (quoting McVey v. Stacy, 157 F.3d 271, 276 (4th Cir. 1998)) (stating that the relevant factors include whether a public employee's speech: "(1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the [agency]; (6) undermined the mission of the [agency]; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the [agency]; and (9) abused the authority and public accountability that the employee's role entailed.").
[150] *Roberts*, 730 F.3d at 374 (quoting *McVey*, 157 F.3d at 278).
[151] *See, e.g.*, R.A.V. v. City of Saint. Paul, Minn., 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position."); Mowles v. Comm'n on Governmental. Ethics & Election Practices, 958 A.2d 897, 902 (Me. 2008) ("Core political speech includes 'discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes,' and receives the highest possible protections.").

In *Bland v. Roberts*, the United States Fourth Circuit Court of Appeals examined whether a Facebook "like" constituted protected speech under the First Amendment. The case arose when several employees of the Hampton Sheriff's Office ("the Sheriff's Office") brought a civil rights action alleging that the Sheriff's Office retaliated against them in violation of their First Amendment rights when the sheriff did not reappoint them because they showed support for his opponent.[152] Of the several employees, one alleged that the sheriff violated his First Amendment right to free speech when he refused to reappoint him after he "liked" the sheriff's opponent's Facebook page and wrote a message of encouragement on the Facebook page.[153]

Although the sheriff testified that there were other reasons for not reappointing the employee, the Fourth Circuit found that a reasonable jury could conclude that the employee's lack of political allegiance and the sheriff's knowledge of his support for his opponent was a substantial motivation in the sheriff's decision not to reappoint.[154] The court found relevant that the sheriff gave speeches during shift changes stating that he disapproved of employees showing support for his opponent on Facebook and indicated that those who openly supported his opponent would lose their jobs.[155] The Court also found it significant that the employee had prior positive performance evaluations and no prior disciplinary problems.[156]

The Fourth Circuit also explored, as a factual matter, what it means to "like" a Facebook page. The court aptly explained the concept of "liking," stating, "'[l]iking' on Facebook is a way for Facebook users to share information with each other. The 'like' button, which is represented by a thumbs-up icon, and the word 'like,' appear next to different types of Facebook content. Liking

[152] *Roberts*, 730 F.3d at 372.
[153] *Id.* at 380.
[154] *Id.* at 381-82.
[155] *Id.* at 381.
[156] *Id.* at 382.

something on Facebook 'is an easy way to let someone know that you enjoy it.'"[157] After you click the "like" button on Facebook, a "story" is published in your "Newsfeed" for your Facebook "friends," and anyone with access to the post or webpage you "liked," to see. The Court found it obvious that "liking" a campaign page on Facebook constituted sufficient speech to merit constitutional protection.[158] The Court stated,

> "[C]licking on the 'like' button literally causes to be published the statement that the User "likes" something, which is itself a substantive statement. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."[159]

According to the Fourth Circuit, "liking" a campaign page not only constitutes pure speech, but also symbolic expression; *i.e.*, posting the universally understood "thumbs up" symbol in association with the sheriff's opponent's campaign page showed which candidate the employee supported.[160]

The Court found the second prong of the test—whether the employee's "like" and supportive message on Facebook constituted speech as a private citizen on a matter of public concern—was easily satisfied.[161] Moreover, the employee's interest in expressing support for the candidate he supported outweighed the sheriff's interest in providing effective and efficient services to the public.[162] The court found that the public's interest in the employee's opinions regarding the election may have had particular value to the public in light of his employment with the Sheriff's Office.[163] The Court concluded that the "like" created a genuine factual issue concerning whether

---

[157] *Id.* at 385 (internal citations omitted).
[158] *Id.* at 386.
[159] *Id.*
[160] *Id.* at 386 (citing Spence v. Wash., 418 U.S. 405 (1974) (per curiam) (holding that person engaged in expressive conduct when there was "[a]n intent to convey a particularized message . . ., and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.").
[161] *Id.* at 387-88.
[162] *Id.* at 388.
[163] *Id.*

the employee's Facebook activity was a substantial factor in the employee's discharge, and denied the Sheriff Office's pre-trial motion to dismiss the case.[164]

C. Speaking As A Private Citizen On A Matter Of Public Concern v. Speaking As A Public Employee In Official Capacity.

As mentioned, in *Roberts*, the Court found that the employee was speaking as a private citizen on a matter of public concern.[165] However, if a public employee makes statements pursuant to official duties as a public employee, the employee is not speaking as a private citizen for the purposes of the First Amendment, and the Constitution does not protect such statements from discipline or discharge.[166] Courts have thus upheld disciplinary actions or discharge when employee speech is made in official capacity as a public employee, and when the public interest in such speech is outweighed by the employer's interest in providing efficient and effective services to the public.

In *Graziosi v. City of Greenville*, the United States District Court for the Northern District of Mississippi upheld a police chief's decision to discharge a police officer, Susan Graziosi.[167] Graziosi brought an action against the City and Police Chief alleging she suffered a retaliatory discharge in violation of the First Amendment for making several comments on her own Facebook page and on the Mayor's Facebook page critical of the Police Chief for not sending a representative to the funeral of a police officer who was killed in the line of duty.[168]

The court granted the City and the Police Chief's motion for judgment, but how the court reached this judgment is curious and illustrates the need for a special rule involving widely disseminated Internet activity. On one hand, the *Graziosi* court held, first, that Graziosi spoke primarily pursuant to her official duties as a police officer, not as a citizen on a matter of public concern, in an effort to attack the Police Chief with whom she was frustrated and to air a personal

---

[164] *Id.* 394-95.
[165] *Id.* at 387-88.
[166] Graziosi v. City of Greenville, 2013 WL 6334011 at *3 (N.D. Miss. 2013).
[167] *Id.* at *1-*2.
[168] *Id.*

grievance.[169] At the same time, the court admitted that her posting was not related to any official duty she had as a police officer, yet somehow concluded—without explanation for such a leap—that her statement nevertheless was made as an employee and not as a citizen.[170]

The Northern District Court of Mississippi's analysis, however, seems conflicting in light of United States Supreme Court precedent in *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, discussed above. In *Pickering*, the Court held that the question of whether a school system requires additional public funding is a matter of legitimate public concern.[171] The court held that it is "*essential*" that teachers—as members of the community who are most likely to have informed and definite opinions as to how funds allotted to operation of schools should be spent—are able to speak out freely on such questions without fear of retaliatory dismissal (and thus, a teacher's letter to a local newspaper, critical of the way the board of education had handled past proposals to raise revenue, was not a legitimate basis for the teacher's dismissal).[172]

Graziosi argued that her statements were a legitimate matter of public concern. Indeed, Graziosi's statement, akin to the statements made in *Pickering*, concerned how public dollars werespent to service the public.[173] The issue of whether the City's municipal funds should have been spent to have an officially sanctioned police representative attend a funeral on the City's behalf is plausibly a legitimate concern in the community.[174]

Notwithstanding *Pickering*, the *Graziosi* Court held that *even assuming that Graziosi had spoken as a private citizen*, the Police Chief's interest in promoting efficiency of department's services, including maintaining discipline and good working relationships amongst employees, somehow outweighed

---

169 *Id.* at 813.
170 *Id.* at 813.
171 Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill., 391 U.S. 563, 571 (1968).
172 *Id.* at 570-72.
173 *Id.*
174 *Id.*

her interests as a citizen in commenting on a matter of public concern.[175] Based on officer testimony, the court found that her Facebook comments did, in fact, disrupt the department by supposedly creating a "buzz" in the office and were thus "disrupting" to the chief's leadership.[176] In view of *Pickering*, one would think that on such a question, a court would find that "free and open debate is vital to informed decision-making by the electorate."[177]

The *Graziosi* Court's opinion also seems to conflict with other United States Supreme Court precedent in *Rankin v. McPherson*.[178] In *Rankin*, a data entry employee in the county Constable's office, Ardith McPherson, was fired for saying to a co-worker, after hearing of an attempt to assassinate President, Ronald Regan, "if they go for him again, I hope they get him."[179] The Court ultimately found that McPherson was fired based on the content of her speech and found that her discharge violated her First Amendment right to freedom of expression.[180]

In making such a finding, the Court found that her termination was not based on an assessment that she was unfit to perform her work.[181] Further, the Court found that her position involved no confidential or policymaking role.[182] Based on the content, form, and context of her statement, the Court found that the statement was speech on a matter of public concern.[183] "The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding a matter of heightened public attention: an attempt on the life of the President."[184] The Court further found that the inappropriate

---

175 985 F. Supp. 2d at 814.
176 *Id.* at 814.
177 *Pickering*, 391 U.S. at 571-72.
178 Rankin v. McPherson, 483 U.S. 378 (1987).
179 *Id.* at 381.
180 *Id.* at 390.
181 *Id.* at 389.
182 *Id.* at 390-91.
183 *Id* at 385-87.
184 *Id.* at 386.

or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern.[185]

If the speech in *Rankin*—showing support for the assassination of the President, a politically charged and highly controversial topic—was held to be speech of a private citizen on a matter of public concern protected by the First Amendment, it is puzzling how the *Graziosi* Court distinguished Graziosi's speech. Graziosi's speech, made outside of the workplace via a personal Facebook account regarding expenditures of municipal funds, is arguably a legitimate matter of public concern under *Pickering*.

In view of *Pickering* and *Rankin*, did the *Graziosi* Court get it wrong? Or, did it reach the right outcome for reasons not stated? In *Rankin*, in making its finding, the Court emphasized the fact that McPherson did not make her statements publicly. The Court stated that there was no "danger that McPherson had discredited the office by making her statement in public. McPherson's speech took place in an area to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or heard McPherson's statement."[186] The Court's comments suggest that if McPherson's comments had been made publicly, *Rankin* would have been decided differently. Ergo, if Facebook existed in 1987 and McPherson posted the same comment as a Facebook status, which later went viral and portrayed the county Constable's office in a negative and controversial light, it is unlikely that McPherson would have found refuge in the First Amendment.

Although the *Graziosi* Court did not clearly articulate this point in its opinion, the public nature of Graziosi's speech on Facebook is arguably what distinguishes it from the speech in *Pickering* and *Rankin*. Unlike the comments in *Rankin* which were made to one person and the letter in *Pickering* which was contained to a local newspaper, by making her statement in public on

[185] *Id.* at 387.
[186] *Id.* at 389.

Facebook, Graziosi's posting ran the risk of discrediting the Police Chief and police department. The *Graziosi* facts could provide comic fodder for late night television's Jimmy Kimmel or Saturday Night Live and make the police department and Police Chief a laughing stock across the country. The *Graziosi* opinion illustrates that existing law may need to be updated in view of the breadth of the Internet.

Indeed, the *Graziosi* opinion hints that the forum was what the court was *really* concerned about, even if the court was not willing to overtly single out social media cases. The *Graziosi* court stated, "Facebook claims to enable 'fast, easy, and rich communication.' However, with fast and easy communication comes the inherent risk of 'posting' statements and pictures one would not normally tell or show off to their 'friends' and even, sometimes, to the general public."[187] In a footnote, the court also noted, "Facebook, Twitter, and the like seem to have a 'special' power to bring an issue before the masses, especially when a story goes viral, and is on a sensitive subject such as the funeral of a fellow officer."[188] Perhaps the court was concerned about the repercussions of opening the door to protecting widely disseminated postings on the Internet that could greatly embarrass and undermine the credibility of public officials and municipalities. A new rule for widely disseminated Internet postings seems viable in view of the United States Supreme Court's holding in *Rankin* that distinguishes comments made in a private versus a public forum. Under such a rule, Internet postings would be considered presumptively disruptive to the government's ability to provide efficient and effective services to the public due to their ability to go viral. Internet postings would thus tip the balance in favor of the government even if speech was made by a citizen on a matter of public concern.

D. Due Process Rights and Civil Tenure Laws.

[187] *Graziosi*, No. 4:12-CV-68-MPM-DAS, 2013 WL 6334011 at *1.
[188] *Id.* at n.8.

It bears brief mention that some states provide public sector employees with property rights in continued employment through formal or informal civil service or teacher tenure systems.[189] Under the Due Process Clause of a state's constitution and the Fourteenth Amendment to the United States Constitution, substantive rights of life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures.[190] This principle means that before a public sector employee can be deprived of any significant property interest in his or her job, at minimum, he or she must be given a hearing of some kind before discipline or discharge.[191] Thus, if an employee falls within the scope of a statute that affords due process rights, and those protections are not afforded in the context of discipline or discharge for a social media post, an employee can challenge an adverse employment action on due process grounds to the appropriate administrative body or, if applicable, judicial body.

E. Other Protections.

Absent protection under a public employee labor relations statute, due process, or the First Amendment, at least one court has been reluctant to penalize employees for venting over social media and given an employee solace in good old-fashioned fairness in weighing the proportionality of punishment to the conduct at issue. For example, in *Rubino v. City of New York*, the Supreme Court of New York County, affirmed a hearing officer's findings, and the Appellate Division agreed, that a New York City public school teacher's Facebook posts were not protected speech under the First Amendment, but it found the termination was contra the "spirit" of the First Amendment and

[189] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-39 (1985) ("The Ohio statute plainly creates such an interest. Respondents were 'classified civil service employees,' Ohio Rev. Code Ann. § 124.11 (1984), entitled to retain their positions 'during good behavior and efficient service,' who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office.' § 124.34."); Perry v. Sindermann, 408 U.S. 593 (1972) (finding that an informal tenure system protected property interest in job requiring due process in the form of notice of charges and an opportunity to respond before termination).
[190] *Id.* at 541; U.S. CONST. amend. XIV.
[191] *Id.*

ordered reinstatement pursuant to an applicable standard for reviewing proportionality of penalty in light of the offense.[192]

Rubino began with a tragic incident in 2010 in which a New York City public school student drowned during a class field trip to the beach.[193] The student who drowned was not one of her students, but Christine Rubino, a tenured teacher working for the New York City Department of Education at a public school in Brooklyn, heard about the tragedy.[194] Shortly after hearing the news, Rubino posted the following on her Facebook page: "After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils [sic] spawn!"[195] In further comments, she mentioned that she would not throw one of her students a life jacket.[196] After viewing the posts, a Facebook "friend" of Rubino contacted the school and expressed concern about the posts.[197]

In a due process hearing regarding the posts, Rubino took responsibility, apologized for her comments and explained that she was venting, but regrettably chose the wrong forum.[198] The hearing officer declined to "render a conclusive decision on the [First Amendment] rights of a person making inappropriate comments on Facebook," but determined that, having referred to her students in her postings, Rubino was acting as a teacher, not as a private citizen, and that "while the drowning itself may have been a matter of public concern, the postings were not."[199] The hearing officer ultimately recommended termination, emphasizing that Rubino had engaged in conduct unbecoming a teacher in posting offensive comments in a forum that is not truly private.[200]

---

[192] Rubino v. City of N.Y., 950 N.Y.S.2d 494 (N.Y. Sup. Ct. 2012) *aff'd*, 965 N.Y.S.2d 47, 48 (N.Y. App. Div. 1st Dept. 2013).
[193] *Id.* at*1.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at *2.
[199] *Id.* at *3.
[200] *Id.*

The Supreme Court of New York County affirmed the hearing officer's findings on the grounds that they were neither arbitrary nor capricious under the applicable standard of review.[201] However, the court found that the penalty, termination, was "so disproportionate to the offense as to shock one's sense of fairness."[202] The court noted Rubino's 15-year long and otherwise unblemished employment history as well as the fact that the posts were made outside the school building and after school hours.[203]

Although the court declined to address the hearing officer's determination as to the alleged violation of her First Amendment right to freedom of speech,[204] it found that firing Rubino was inconsistent with the "spirit" of the First Amendment in weighing the proportionality of the punishment to the offense.[205] The court discussed Facebook's quick evolution and common usage in contemporary society, and stated that although Rubino "should have known that her postings could become public more easily than if she had uttered them during a telephone call or over dinner, given the illusion that Facebook postings reach only Facebook friends . . ., her expectation that only her friends . . . would see the postings is not only apparent, but reasonable," and that "[w]hile her reference to a child's death is repulsive, there is no evidence that her postings are part of a pattern of conduct or anything other than an isolated incident of intemperance."[206]

Ultimately, the court found no evidence that Rubino would post inappropriate or offensive comments online and expressed remorse during oral argument.[207] The court further stated that students must learn to take responsibility for their actions, but they should also know that

---

[201] *Id.* at *5-*6.
[202] *Id.* at *8.
[203] *Id.* at *7.
[204] *Id.* at *5 ("Errors of fact or law provide no basis for vacating an award (citing Matter of New York State Correctional Officers & Police Benevolent Assoc., Inc. v. State of New York, 94 N.Y.2d 321 (1999)) as the hearing officer determined that the Facebook postings do not constitute protected speech . . . I do not address the merits of petitioner's first amendment claim.").
[205] *Id.* at *7.
[206] *Id.* at *7.
[207] *Id.*

sometimes there are second chances, and that "ending petitioner's long-term employment on the basis of a single isolated lapse of judgment teaches otherwise."[208] The court then remanded the case for the imposition of a lesser penalty.[209] The court was able to make this determination pursuant to a New York state statute and case law that permits the courts to review measures of discipline imposed by administrative agencies, so cases such as these will vary depending on the law of a particular jurisdiction.[210]

Although unpublished, the *Rubino* case is troubling because the court likens Rubino's social media activity to speech made to a closed audience over the telephone or at dinner. In reality, widespread dissemination is the essence of social media activity. In fact, "how-to" manuals have been created to guide individuals and businesses in making a posting go viral—from one hundred likes, views, and/or shares to one million—overnight.[211] Even if an employee has privacy settings in place, it can hardly be argued that people are unaware that engaging in conduct on social media does not carry with it the potential for widespread dissemination. Lecturer, Robert Quigley, who teaches social media classes at the University of Texas School of Journalism, put it aptly: "Privacy walls do not protect you. You can have every privacy block up, and all it takes is one friend to copy and paste it somewhere, and it's out there."[212] Accordingly, the court's conclusion that Rubino's expectation that her Facebook postings would only reach a closed group of people is misplaced.

The court also mentions that the posts did not affect Rubino's ability to teach, cause injury to her students, or affect the manner in which she teaches and treats her students.[213] Yet, depending on whether her posting was widely circulated, this type of activity could potentially lead to feelings

---

208 *Id.* at *8
209 *Id.*
210 Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester Co., 313 N.E.2d 321, 326 (N.Y. 1974).
211 Brian Carter et al., *Contagious Content: What People Share On Facebook And Why They Share It*, http://oginenergy.com/sites/default/files/Contagious-Content.pdf (last visited Apr. 28, 2014).
212 Austin Local News, *Austin Realtor Fired After Facebook Post*, http://www.kvue.com/story/news/local/2014/05/25/2441844/ (last visited Apr. 29, 2014).
213 *Rubino*, 950 N.Y.S.2d 494 at *7

of embarrassment among her students and frustrate their ability to learn in her class. Despite the arguably humorous tone of Rubino's posting, as stated in a *New York Times* article after the court's opinion came out quoting Brooklyn's Law Department, Rubino's "actions would cause any parent to reasonably object to having a child in her class."[214] It could lead to conflict among students and Rubino as well as parents and the school board, disrupting the school's operations. For these reasons, this type of conduct should not be protected. Courts should not be hesitant to penalize employees for careless activity or speech on social media that is widely disseminated online.

III. Conclusion.

In conclusion, case law and labor board decisions involving social media in the context of public and private adverse employment actions and personnel policies is relatively new. Yet, the principles discussed within those cases have stayed carefully consistent with well-established case law. As discussed, both private and public sector employees whose employment is governed by either Section 7 of the NLRA or state legislation that mirrors the language of Section 7 of the NLRA enjoy substantial protection for engaging in conduct that constitutes concerted activity for mutual aid or protection regardless of whether that activity takes place via online social media and even if the conduct is discourteous to the employer. Likewise, public and private employers alike should avoid a broad and sweeping social media policy that constrains, or would lead an employee to reasonably believe that the policy constrains employees from engaging in concerted activity for mutual aid or protection. Such a policy will likely be found to violate Section 8(a)(1) of the NLRA or a state statute provision comparable to Section 8(a)(1).

As discussed, however, expressing individual gripes via social media that are unrelated to terms and conditions of employment or engaging in truly egregious or opprobrious activity on social

[214] Andy Newman, *Teacher's Facebook Post Didn't Warrant Firing, a Panel Upholds*, http://www.nytimes.com/2013/05/09/nyregion/brooklyn-teacher-who-talked-out-of-school-can-keep-her-job.html?_r=0 (last visited May 7, 2014).

media will not fall under such protection. Public sector employees enjoy additional protections under the First Amendment when they speak as private citizens on matters of public concern on social media. However, public employers are given broader leeway to discipline or discharge employees when their activity or speech undermines the integrity of their status as a public employee and disrupts the ability of their public employer to provide effective and efficient services to the public. To counterbalance such restrictions, public employees may turn to applicable statutory due process protections and civil service or teacher tenure laws for due process violations, or judicial review for fairness of the discipline or penalty imposed.

Under the case law and board decisions discussed herein, certain employee speech and activity will rightfully be protected regardless of the platform it is communicated through. However, the law should recognize the implications of activity in the emerging forum of social media and protect adverse employment decisions by management in the public and private sectors when employees engage in activity or speech on social media that significantly undermines management's business objectives, reputation, business relationships, or its efficient operations. Courts and labor relations boards should not hesitate to bring more balance into the work place and afford management more leeway in disciplining and discharging employees for conduct on social media that undermines legitimate business objectives. Doing so recognizes the perpetual implications of speech or activity widely disseminated on the Internet via social media. Such recognition will encourage sober and responsible conduct as it relates to the workplace—which is exactly what is expected of employees in person.

The specific facts and circumstances leading up to and surrounding an incident, an employee's length of employment and disciplinary history, and other context are always relevant considerations, and future cases will continue to be decided on a case-by-case basis. In the private sector courts and labor boards may want to consider shifting the burden to management to prove

that its business was so undermined. In the public sector, courts and labor boards may want to consider narrowing First Amendment protection when employee speech is widely disseminated across the Internet especially if management can show a disruption to its efficient operations as a public employer as a result of the speech. Removing protection in the conduct of viral Internet speech would apply even if the speech made as a private citizen on a matter of public concern. Such rules would still be consistent with board decisions and overarching labor policy concerns dating back to 1935 when the National Labor Relations Act was first enacted: to promote labor peace by balancing collective employee voice regarding conditions of employment against management's right to conduct and control its business. As social media gives employees a platform to amplify their voice, it simultaneously enlarges the risk of undermining management's right to control its business. Management should thus be given the opportunity to discipline or discharge employees when conduct indeed disrupts business.