Online Social Media and the End of the Employment-at-Will Doctrine

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I. INTRODUCTION

The increasing use of online social media platforms such as Facebook, Twitter, and LinkedIn has resulted in two important workplace trends: first, employees are communicating amongst themselves online and, being coworkers, those communications often involve work; and second, employers are increasingly promulgating social media policies to restrict what employees may say online about their work and the businesses for which they work. The National Labor Relations Act (“NLRA” or “the Act”), however, protects certain employee work-related speech. Due to these recent trends, the National Labor Relations Board (“NLRB”), which enforces the NLRA, has had the opportunity to analyze and address the interplay between work-related online social media activities and the NLRA. As discussed in this Article, there are certain types of employee online conversations that are protected under the NLRA and there are certain types of unlawfully overbroad social media policies, both of which restrict employers from disciplining or firing employees for engaging in certain types of online communications. As a result, employees who initially were “at-will” and could be fired at any time, with or without reason, may now only be fired for a legitimate cause.

The employment-at-will doctrine has a long history in U.S. common law—longer than federal statutory protections of workers’ rights. One of the earliest employment-at-will cases held in 1884 that employers “may dismiss their employees [sic] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.” Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884),

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1. Indeed, employers may find it in their best interests to promote employee use of online social media platforms. See, e.g., Hope Koch et al., Bridging the Work/Social Divide: The Emotional Response to Organizational Social Networking Sites, 21 EUR. J. INFO. SYS. 699 (2012) (finding that social networking sites blur the boundary between work life and social life, creating positive emotions for employees that can have organizational impacts).


3. One of the earliest employment-at-will cases held in 1884 that employers “may dismiss their employees [sic] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.” Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884),
Court of Appeals for the Fourth Circuit has recently provided an example of how powerful the employment-at-will doctrine can be. In *Scott v. Merck & Co.*, Jennifer Scott, a sixteen-year Merck employee, was fired shortly after she reported her supervisor to Merck’s Office of Ethics for conduct that she believed violated Merck’s ethical standards. Merck’s Code of Conduct provided that “[a]ny employee or third party who raises a business practice issue will be protected from retaliation” and that any such issues raised in good faith cannot be the basis for an adverse employment action. Despite this policy, the Fourth Circuit reversed the verdict in favor of Scott, in which the jury found “that Merck breached its employment contract by terminating her in retaliation for raising a good faith business practice issue to Merck’s Office of Ethics.” Applying Maryland law, the Fourth Circuit concluded that any policies, such as the one at issue, can be prevented from becoming an enforceable employment contract provision as long as the employer provides sufficient notice to employees that they cannot rely upon such policies—namely by providing conspicuous notices that employment is at-will. Despite the strength of the employment-at-will doctrine, the growing use of online communications by employees may spell, if not its demise, at least its erosion.

Part II of this Article discusses how employee communications, particularly online, can be protected by the NLRA. Part III analyzes the NLRB’s position with regard to employer online social media policies and surveys the Board’s recommended guidelines as to what are and are not lawful policies. Part IV of this Article examines the interplay between the NLRA and the employment-at-will doctrine, establishing the factors under which the NLRA will trump the at-will doctrine. In Part V, this Article addresses the standards applied to determine whether an employer can legally discharge an employee—in effect, under what circumstances will it be required to show cause to dismiss an employee who was, at least previously, hired at-will. As this Article shows, the employment-at-will doctrine is not more powerful than the NLRA. The intersection of employee online social media activity and NLRA-protected rights could actually spell the end of—or at least severely wound—the employment-at-will doctrine.

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5.  Id. at 332.
6.  Id. at 332 n.2 (internal quotations omitted). The Code of Conduct specifically provided that the “fact that an employee has raised concerns in good faith, or has provided information in an investigation, cannot be a basis for denial of benefits, termination, demotion, suspension, threats, harassment or discrimination.” Id. (internal quotations omitted).
7.  Id. at 333–34.
8.  Id. at 335–37.
II. PROTECTED CONCERTED ACTIVITY

Section 7 of the NLRA guarantees employees the right to “engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”9 Section 7 is enforced by Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7 of the NLRA].”10 The NLRA applies to most businesses that affect interstate commerce and have employees,11 and Section 7, in particular, applies to both union and nonunion at-will employees.12

In order to be protected by Section 7, employees must engage in concerted activity. The NLRA does not define “concerted activity,” so it has been left to the NLRB and the courts to determine, on a case-by-case basis, whether employees have engaged in protected concerted activity.13 Fundamentally, concerted activity arises when employees seek to improve their lot as employees.14 For an employee’s activity to be concerted, the employee must be acting with, or under the authority of, other employees and not acting solely on her own behalf.15 However, individual employees bringing genuine group complaints to the attention of management can be protected.16

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10. Id. § 8(a)(1) (codified at 29 U.S.C. § 158(a)(1)).
11. The NLRA includes a very broad definition of “employer.” See 29 U.S.C. § 152(2). In order to better manage its caseload, the NLRB has self-imposed jurisdictional restrictions: Employers in retail businesses fall under the [NLRB’s] jurisdiction if they have a gross annual volume of business of $500,000 or more . . . . For non-retailers, jurisdiction is based on the amount of goods sold or services provided by the employer out of state (“outflow”) or purchased by the employer from out of state (“inflow”). . . . The Board takes jurisdiction when annual inflow or outflow is at least $50,000. Nat’l Labor Relations Bd., Jurisdictional Standards, http://www.nlrb.gov/rights-we-protect/jurisdictional-standards (last visited May 22, 2013). The NLRB has also specified additional special categories with various jurisdictional threshold amounts. Id. Section 7 expressly applies only to employees, and the NLRA excludes independent contractors and supervisors from the definition of “employee.” 29 U.S.C. § 152(3).
13. See, e.g., Meyers Indus., Inc. (Meyers II), 281 N.L.R.B. 882, 887 (1986), aff’d sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988) (noting that the Board’s definition of concerted activity “was by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis”).
16. Id. (citing Meyers II, 281 N.L.R.B. at 887).
In addition, employee discussions that are an extension of earlier concerted activities can be protected. For example, in *Karl Knauz Motors, Inc.*, sales personnel became concerned that their commissions could be adversely impacted when a BMW dealer’s management decided to serve hot dogs and chips, as opposed to champagne and hors d’oeuvres, at a promotional event for a new BMW model. On the day of the event, salesman Robert Becker posted pictures and critical comments about the event on Facebook. Although no other employees commented on Becker’s Facebook postings, the Administrative Law Judge (“ALJ”) concluded that Becker’s posting constituted concerted activity because it was a “logical outgrowth” from prior face-to-face discussions Becker had had with one other salesman regarding their concerns. Thus, Becker’s Facebook posting would have been protected except for the fact that he was fired for other Facebook postings that did not constitute concerted activity.

Since 2010, the NLRB, through General Counsel memoranda and ALJ and Board decisions, has informally determined or formally ruled on thirty-six different instances when employees were disciplined or fired as a result of social media content. Thirteen of the incidents involved concerted activity, though three incidents were not protected by Section 7. Online social media
activity protected by Section 7 involved: (1) a paramedic posting derogatory
comments about her supervisor and discussing supervisory actions online with
coworkers after being denied union representation during a work-related
dispute; (2) tweeting about the status of ongoing union negotiations;
(3) Facebook discussions about how employees were being treated by the
employer at work in terms of work assignments and compensation;
(4) an employer’s “pre-emptive” firing of an employee due to fear of the
consequences of the employee’s Facebook postings about sexually-derogatory
comments directed at her in the workplace; (5) Facebook postings among
employees regarding another employee’s promotion and mismanagement;
(6) Facebook postings among employees criticizing a supervisor’s attitude
and performance; (7) multiple Facebook postings criticizing management,
which were widely followed by fellow employees; (8) five employees
complaining on Facebook about a coworker’s conduct; (9) employees
criticizing, in a Facebook conversation, the employer’s inaccurate payroll
tax withholding, with one employee “liking” the conversation; and (10)
employees complaining on Facebook about late paychecks.

The recent incidents also provide guidance as to what does not constitute
protected concerted activity under Section 7. In particular, merely griping
about work or a coworker without any evidence of encouraging or recruiting
other workers to take action against perceived shortcomings or improper
conduct by management will not be protected, particularly if no coworkers

124 and accompanying text (discussing loss of protection for obscene, insubordinate, and other opprobrious
conduct).

22. See Advice Memorandum from the NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg,
see generally Christine Neylon O’Brien, The First Facebook Firing Case Under Section
7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted
Communication on Social Media, 45 SUFFOLK U. L. REV. 29 (2011) (discussing this incident and its
relationship with Section 7 concerted activity).

23. See Advice Memorandum from the NLRB Office of the Gen. Counsel to Karen Fernbach, Acting

24. See Memorandum from the NLRB Office of the Gen. Counsel to All Reg’l Dirs., Officers-in-

25. See id. at 18–20.

26. See id. at 20–22.

27. See id. at 23–25.

28. See id. at 26–27.


32. See Jan. 2012 Memorandum from Lafe Solomon, supra note 24, at 6–7 (complaining online about a
reprimand); id. at 12 (expressing personal anger with coworkers and the employer); Advice Memorandum
(2011 WL 6960023) (criticizing a supervisor in a Facebook conversation with a former coworker); Advice
Memorandum from the NLRB Office of the Gen. Counsel to Wayne Gold, Reg’l Dir. of Region 5 (Nov. 14,
2011) (2011 WL 6009620) (complaining online about annoying conduct of a coworker along with what could
be perceived as a threat against that employee); Advice Memorandum from the NLRB Office of the Gen.
Counsel to Wanda Pate Jones, Reg’l Dir. of Region 27 (Nov. 1, 2011) (2011 WL 5822506) (complaining
about customers on Facebook); Advice Memorandum from the NLRB Office of the Gen. Counsel to Cornele
are involved in the conversation. 33 In addition, making any perceived workplace-related threats will not be protected. 34

A pre-social media case, Koch Supplies, Inc. v. NLRB, 35 provides insight into the griping/concerted activities dichotomy. In Koch Supplies, “Musy, a highly competent bilingual secretary, . . . was upset because she did not receive a promotion and thereafter she vigorously protested the company’s promise of vacation benefits to a new employee—benefits which [Musy] stated were contrary to established company policy.” 36 The Eighth Circuit concluded that Musy was fired “because of her own personal persistent griping,” and not because any group action was ever discussed—indeed, Musy’s fellow employees denied any interest in her gripes. Thus, as the decision in Koch Supplies illustrated, in order to be protected, an online posting(s) must first, relate to terms and conditions of employment and second, express concerns other than the employee’s own personal concerns, with evidence of an intention to instigate group action or bring a group concern to management. 38


33. See, e.g., Advice Memorandum from the NLRB Office of the Gen. Counsel to Gail R. Moran, Acting Reg’l Dir. of Region 13 (July 7, 2011) (2011 WL 2960964) (concluding that a bartender’s online complaints to his stepsister about a lack of a raise and criticizing customers were not protected); see also Advice Memorandum from the NLRB Office of the Gen. Counsel to Daniel L. Hubbel, Reg’l Dir. of Region 17, at 2, 5–6 (Oct. 19, 2012), available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d60f5f (concluding that an employee’s vulgar comments posted on Google+ that were directed at a customer were not protected concerted activity, particularly where a coworker’s only responding comment was sarcastic and did not treat it as a discussion of mutual concern) [hereinafter Cox Communications Advice Memo].

34. See Advice Memorandum from the NLRB Office of the Gen. Counsel to Richard L. Ahearn, Reg’l Dir. of Region 19 (Sept. 19, 2011) (2011 WL 4526828, at *1) (concluding that Facebook post by employee that he was “a hair away from setting it off” at work was not protected); Dismissal of Charges Letter from Ronald Hooks, Reg’l Dir., NLRB, No. 26-CA-24000 (June 30, 2011), available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580520e25 (concluding that a Facebook post in which an employee hoped an earthquake would level a workplace building while members of management were inside was not protected).

35. 646 F.2d 1257 (9th Cir. 1981).

36. Id. at 1259.

37. Id. (emphasis omitted).

38. See Sprague, supra note 32, at 998; see also St. Margaret Mercy Healthcare Ctrs., 350 N.L.R.B. 203, 212 (2007), enforced, 519 F.3d 373 (7th Cir. 2008) (holding employee discussions were protected even though there was no evidence that employees were contemplating group action, as it was obvious that the nature of their discussions usually precede group action); Robert J. Rojas, Note, NLRB’s Difficult Journey Down the Information Super Highway: A New Framework for Protecting Social Networking Activities Under the NLRA, 51 WASHBURN L.J. 663, 698 (2012) (arguing that “in the social networking context, a stricter standard is necessary when communications maintain attenuated connections to the employment relationship” due to the fact that in the online context “one’s family, friends, colleagues, and professional contacts may all be privy to the same communication”).
III. SECTION 7 AND SOCIAL MEDIA POLICIES

Beyond disciplining or firing employees as a direct result of their online protected concerted activities, the NLRB also seriously considers whether employer social media policies can inhibit Section 7 rights. Obviously, a social media policy that expressly prohibits Section 7 activity would violate Section 8(a)(1). More problematic, however, is whether a social media policy implicitly inhibits or discourages Section 7 activity.

For example, would a “courtesy” rule tend to chill employees in the exercise of their Section 7 rights? The Karl Knauz Motors dealership maintained a rule stating, “Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.”

Although one of the Board’s members believed that this rule did not chill the exercise of Section 7 rights “because employees and employers alike have a right to expect a civil workplace,” and some commentators derided the notion that the NLRB would question such a rule, a majority of the Board determined the rule was unlawful. Accordingly, where a rule does not expressly prohibit Section 7 activity, it will still be considered unlawful if “(1) employees would reasonably construe the language to prohibit Section 7 activity,” “(2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

The Board generally recognizes that when employees object to their working conditions and seek the support of others in improving them, their

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40. See Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998), enforced, 203 F.3d 52 (D.C. Cir. 1999) (“Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.”).
41. Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012). The dealership had rescinded this and two other rules shortly before its hearing on the matter before the ALJ. See id. at n.3. However, rescission of unlawful provisions will not necessarily relieve an employer of liability—the NLRB requires evidence of affirmative repudiation, which must be “timely, unambiguous, specific in nature to the coercive conduct, and free from other prescribed illegal conduct.” Douglas Div., Scott & Fetzer Co., 228 N.L.R.B. 1016, 1024 (1977) (internal quotations omitted), enforcement denied on other grounds, 570 F.2d 742 (8th Cir. 1978) (quoting multiple authorities). In addition, “there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer’s part after the publication.” Passavant Mem’l Area Hosp., 237 N.L.R.B. 138, 138 (1978). Finally, the repudiation must “give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.” Id. at 138–39.
42. Karl Knauz Motors, 358 N.L.R.B. No. 164 (Member Hayes, dissenting in part).
43. See, e.g., Is It Too Much to Ask for a Little Courtesy from Employees?, RHOADS & SINON EMP’T & LABOR LAW BLOG, http://employmentlawblog.rhoadssinon.com/is-it-too-much-to-as... (last visited May 9, 2013).
44. Karl Knauz Motors, 358 N.L.R.B. No. 164 (majority opinion) (citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004)); see, e.g., GAF Corp., 196 N.L.R.B. 538, 543 (1972) (requiring that there be reasonable ground for an employer’s action—such as firing employees, changing working conditions, or increasing wages—in response to Section 7 activity, as opposed to such actions being justified by other circumstances).
45. Karl Knauz Motors, 358 N.L.R.B. No. 164 (citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 647 (2004)).
language may be considered disrespectful and possibly injurious to the image or reputation of their employer. After all, the employees are complaining about how they are being treated by their employer. Consequently, if an employer’s broad prohibition does not explicitly exclude Section 7 protected communications, the prohibition could reasonably be interpreted by employees to include statements of protest or criticism regarding working conditions. The Board therefore concluded in Karl Knauz Motors that “expressions of disagreement with the [dealership’s] employment practices or terms and conditions of employment risk being deemed ‘disrespectful’ or damaging to the [dealership’s] image or reputation.”

As noted above, even when an employer has not enforced a social media policy in such a way as to punish or inhibit protected concerted activity, the policy can still be considered unlawful. For example, even though it was determined that Karl Knauz Motors did not fire its salesman, Robert Becker, in response to his exercising his Section 7 rights, the ALJ and the Board did conclude that the employer maintained unlawfully overbroad policies that could reasonably chill employees in the exercise of their Section 7 rights. In general, though, the NLRB will not address whether a policy is unlawfully overbroad when it is clear that an employee’s conduct interfered with work and that the interference, rather than the violation of the employer’s policy, was the reason for discipline or termination. However, it is the employer’s

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46. See id.

47. See id.

48. Id.; see also Costco Wholesale Corp., 358 N.L.R.B. No. 106 (2012) (ruling that a policy prohibiting online statements that “damage the Company, defame any individual or damage any person’s reputation” clearly encompasses concerted communications protesting the employer’s treatment of its employees); Quicken Loans, Inc., No. 28-CA-75857, 2013 WL 100863 (N.L.R.B. Div. of Judges Jan. 8, 2013) (holding that a non-disparagement policy that stated employees will not “publicly criticize, ridicule, disparage or defame the Company or its products, services, [or] policies” violated employees’ Section 7 rights); Dish Network Corp., No. 16-CA-62433, 2012 WL 5564372 (N.L.R.B. Div. of Judges Nov. 14, 2012) (finding unlawful a social media policy that banned employees from making “disparaging or defamatory comments” about the employer); EchoStar Techs., L.L.C., No. 27-CA-066726, 2012 WL 4321039 (N.L.R.B. Div. of Judges Sept. 20, 2012) (concluding that a “handbook’s admonition: ‘You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services,’ improperly limits employee Section 7 rights”). The Board has also ruled that a nondisclosure policy that prohibits disclosing employee personnel information to persons outside the organization was unlawfully overbroad because “employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act.” Flex Frac Logistics, L.L.C., 358 N.L.R.B. No. 127 (2012).

49. See Karl Knauz Motors, 358 N.L.R.B. No. 164; supra notes 17–19 and accompanying text.

50. Cont’l Grp., Inc., 357 N.L.R.B. No. 39 (2011). This case stated that discipline imposed pursuant to an unlawfully overbroad rule violates the Act 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 of the Act. Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee’s conduct actually interfered with the employee’s own work or that of other employees or otherwise actually interfered with the employer’s operations, and that the interference, rather than the violation of the rule, was the reason for the discipline.

Id. Compare Flagler Hosp. Advice Memo, supra note 21 (concluding that although the disciplined employee was not engaged in protected concerted activity because she was a supervisor and therefore not covered under Section 7, the employer nevertheless maintained unlawfully overbroad social media policies), with Advice
burden to establish that the employee’s interference was the actual reason for the discipline.51

The NLRB’s Office of the General Counsel has provided some guidance in a 2012 memorandum as to what are and are not acceptable social media policies. Fundamentally, “[r]ules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.”52 Whereas, “rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.”53 In applying this dichotomy, the Office of the General Counsel has found the following social media policy provisions to be unlawfully overbroad:

- Don’t release confidential guest, team member or company information.54 This prohibition “would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves.”55

- [Y]ou must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.56 This prohibition “is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of, the Employer’s labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false.”57 Furthermore, “the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.”58 In addition, given the policy’s explanation that non-public information “specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them

Memorandum from the NLRB Office of the Gen. Counsel to Elbert F. Tellem, Acting Reg’l Dir. for Region 2 (Oct. 13, 2011) (2011 WL 5122642, at *1) [hereinafter Schulte, Roth & Zabel Advice Memo] (declining to address the lawfulness of the employer’s disparagement policy where the employee’s termination was not associated with protected concerted activities).


53. Id. at 4.

54. Id. at 4.

55. Id.; see also DirectTV U.S. DirecTV Holdings, LLC, 359 N.L.R.B. No. 54 (2013) (holding that a similar prohibition was unlawful because it “would reasonably be understood by employees to restrict discussion of their wages and other terms and conditions of employment”).

56. May 2012 Memorandum from Lafe Solomon, supra note 52, at 6.

57. Id. at 6–7.

58. Id. at 7.
from discussing terms and conditions of employment among themselves or with non-employees.”

- When in doubt about whether the information you are considering sharing falls into [a prohibited category], DO NOT POST. This provision is unlawful because “any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act.”

- Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. This provision is unlawful because it “proscribes a broad spectrum of communications that would include protected criticisms of the Employer’s labor policies or treatment of employees.”

- Think carefully about “friending” co-workers. This provision “is unlawfully overbroad because it would discourage communications among co-workers, and thus it necessarily interferes with Section 7 activity. Moreover, there is no limiting language clarifying for employees that it does not restrict Section 7 activity.”

- Don’t comment on any legal matters, including pending litigation or disputes. This provision is overly broad “because it specifically restricts employees from discussing the protected subject of potential claims against the Employer.”

- Adopt a friendly tone when engaging online. Don’t pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. This provision is unlawful because its “overall thrust . . . is to caution employees against online discussions that could become heated or controversial. Discussions

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59. Id.
60. Id. at 6.
61. Id. at 7.
62. Id. at 8.
63. Id.
64. Id.
65. Id. at 8-9.
66. Id. at 10.
67. Id.
68. Id.
about working conditions or unionism have the potential to become . . . heated or controversial . . . .”

- **You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers . . . [rather] than by posting complaints on the Internet.** The Office of the General Counsel found this rule to be unlawful because “by telling employees that they should use internal resources rather than airing their grievances online, . . . this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.”

- **Employees should avoid harming the image and integrity of the company.** This provision is considered “unlawfully overbroad because employees would reasonably construe it to prohibit protected criticism of the Employer’s labor policies or treatment of employees.”

- **Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages[,] hours or work conditions with other employees . . . provided that access to such discussions is . . . not generally accessible to the public.** This provision is considered unlawful “because it precludes employees from discussing and sharing terms and conditions of employment with non-employees.”

- **Unless . . . specifically authorized to do so, [employees] are prohibited from participating in [social media] with company resources and/or on company time.** This prohibition is considered “unlawfully overbroad because employees have the right to engage in Section 7

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69. Id.
70. Id. at 11.
71. Id.
72. Id. at 12.
73. Id. at 13.
74. Id. at 14.
75. Id. (noting that the Board has long recognized that “Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute”) (citing Valley Hosp. Med. Ctr., 351 N.L.R.B. 1250, 1252 (2007), enforced sub nom. Nev. Serv. Emps. Union, Local 1107 v. NLRB, 358 F. App’x 783 (9th Cir. 2009)); see also DirectTV U.S. DirecTV Holdings, LLC, 359 N.L.R.B. No. 54 (2013) (holding unlawful a policy prohibiting employees from posting “company information” on blogs, chat rooms, or public websites).
76. May 2012 Memorandum from Lafe Solomon, supra note 52, at 16.
activities on the Employer’s premises during non-work time and in non-work areas.”

- Unless you receive prior authorization, you . . . [may not communicate with] the media regarding [the Employer] or its business activities . . . [and] [c]ertain blogs, forums and message boards are also considered media. This prohibition is considered unlawfully overbroad because employees “have a protected right to seek help from third parties regarding their working conditions. This would include going to the press [or] blogging.”

In contrast, the NLRB’s Office of the General Counsel found one company’s social media policy to be lawful in its entirety because it provided “sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity.” For example, the policy’s prohibition against inappropriate remarks included examples of “plainly egregious conduct,” such as discriminatory comments, harassment, and threats of violence. Similarly, the employer’s admonition that employees “be respectful” in their online postings was qualified by prohibiting malicious, obscene, threatening, bullying, or intimidating comments. In a separate memorandum, the NLRB’s Office of the General Counsel determined that an employer’s social media policy, which prohibited employees from communicating “about customers, coworkers, supervisors, the Company, or [its] vendors or suppliers in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of any ‘legally recognized protected basis’” was not unlawful because it would not be reasonably understood to restrict Section 7 activity.

Finally, the NLRB will not permit an employer to promulgate what would otherwise be considered unlawful policies with an attempt to qualify any unlawful aspects with a “savings clause,” which is “a general clause or other language asserting that a document should be applied and interpreted in

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77. Id. at 17; see also DirectTV U.S., 359 N.L.R.B. No. 54 (holding that a policy that prohibited employees from contacting the media was unlawful, particularly where it made no attempt to distinguish unprotected from protected communications); Dish Network Corp., No. 16-CA-62433, 2012 WL 5564372 (N.L.R.B. Div. of Judges Nov. 14, 2012) (finding a similar policy provision was unlawful).
78. May 2012 Memorandum from Lafe Solomon, supra note 52, at 17–18.
79. Id. at 18; see also Dish Network Corp., 2012 WL 5564372 (finding a similar policy provision was unlawful).
80. May 2012 Memorandum from Lafe Solomon, supra note 52, at 20.
81. Id.
82. Id. The General Counsel’s office had also determined that even when some policy provisions were considered unlawful, prohibitions against bullying were lawful. See id. at 13.
83. Cox Communications Advice Memo, supra note 32, at 4.
such a manner that it is legal. Thus, such a clause “does not save an otherwise invalid rule under the Act.”

As this Part has demonstrated, the NLRB, particularly through its Office of the General Counsel, has taken an aggressive stand against what it considers to be unlawfully overbroad social media policies. Indeed, even where there has not been protected concerted activity, the NLRB still has addressed unlawful policies. Employees may be less inhibited to talk amongst themselves through online conversations. Certainly, whenever coworkers gather, whether around the water cooler or through an online social media platform, the talk will probably, at some point, turn to work. Consequently, employers must tailor their social media policies to ensure that they do not expressly or implicitly chill employees’ Section 7 rights.

IV. SECTION 7 AND THE EMPLOYMENT-AT-WILL DOCTRINE

Common law doctrines are often at odds with statutory law. That is the case with Section 7, which “provided the first great assault on the concept of at-will,” and is exemplified by NLRB restrictions on employer social media policies. In other words, the employers with unlawful policies in the previous examples would be prohibited from dismissing at-will employees for violating those unlawful policies.

Employment-at-will is “[e]mployment that is usu[ally] undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.” The employee can be fired for any reason unless there is a contract or statute—the NLRA for example—to the contrary. While the employment-at-will doctrine is a policy that favors

85. Id.; accord Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel Div. of Advice, the NLRB Office of the Gen. Counsel to Robert Chester, Reg’l Dir. of Region 6 (June 22, 2011) (2011 WL 5115076, at *3) (“An employer may not prohibit employee activity protected by the Act and then seek to escape the consequences of the prohibition by a general reference to rights protected by law.”); see also Tower Indus. Inc., 349 N.L.R.B. 1077, 1084 (2007) (“An employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law.”).
86. See supra note 49 and accompanying text; see also Flagler Hosp. Advice Memo, supra note 21 (concluding that although the disciplined employee was not engaged in protected concerted activity because she was a supervisor and therefore not covered under Section 7, the employer nevertheless maintained unlawfully overbroad social media policies).
88. BLACK’S LAW DICTIONARY 604 (9th ed. 2009).
employers.\textsuperscript{90} Section 7 of the NLRA focuses on the collective rights of employees.\textsuperscript{91}

The U.S. Supreme Court definitively addressed the scope of Section 7 with regard to the employment-at-will doctrine shortly after the NLRA’s initial passage by Congress in 1935. The NLRA “does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them”\textsuperscript{92}; however, “[f]or the purpose of the Act, it is immaterial that employment is at will and terminable at any time by either party.”\textsuperscript{93}

While it was established early on that Section 7 rights clearly apply to at-will employees, the Board has also found NLRA violations when employers have attempted to limit employees’ abilities to change their working conditions and status. For example, in \textit{HTH Corp.},\textsuperscript{94} the Board determined that the employer violated the NLRA by trying to effectively deprive the union of certification by proposing the following language during contract negotiations: “The employer has and shall maintain at any and all times its sole and exclusive right to unilaterally and arbitrarily change, amend, and modify the certified bargaining unit . . . , and any and all hours, wages, and/or other terms and conditions of employment at will.”\textsuperscript{95}

Because part of the test in ascertaining whether there has been a violation of the NLRA includes an employee’s reasonable perceptions, a common source of Section 7 violations occur in relation to employer-provided handbooks. For example, in \textit{NTA Graphics},\textsuperscript{96} the Board found that employees who refused to sign handbooks at the outset of employment, after they noted their unwillingness to accept the at-will provision contained in the

\textsuperscript{90} 31 AM. JUR. TRIALS § 318 (1984).

\textsuperscript{91} 29 U.S.C. § 151 (2006); see also Bethel, supra note 89, at 601–02 (noting that at common law employers could retaliate freely against employees for virtually any reason, while the NLRA explicitly protects group conduct).

\textsuperscript{92} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

\textsuperscript{93} NLRB v. Waterman S.S. Corp., 309 U.S. 206, 219 (1940); see also NLRB v. Ace Comb Co., 342 F.2d 841, 847 (8th Cir. 1965). The court in \textit{Ace Comb Co.} stated that:

It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer’s policies, including his policies concerning tenure of employment, and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act.

\textit{Id.;} NLRB v. Latex Indus., Inc., 307 F.2d 737, 739 (6th Cir. 1962) (stating that the employer had “the right to hire and discharge employees at will without violating the [NLRA] so long as its action was not based on the concerted activities” of its employees).

\textsuperscript{94} 356 N.L.R.B. No. 182 (2011).

\textsuperscript{95} \textit{Id.;} see also Coastal Elec. Coop., 311 N.L.R.B. 1126, 1133 (1993) (concluding that the employer’s insistence on its management rights proposals, including designating employees at-will, during collective bargaining were intended to thwart negotiations in violation of the NLRA); \textit{In re Pub. Serv. Co. of Okla.}, 334 N.L.R.B. 487, 498, 501 (2001) (concluding that although the employer’s collective bargaining contract proposal that essentially gave it employment-at-will powers over employees was not in and of itself unlawful, the employer’s insistence on a provision to “explicitly obtain the power and right to adjust essentially all aspects of unit employees terms and conditions of employment without let or hindrance from the Union” constituted bad-faith bargaining in violation of the NLRA); S & F Mkt. St. Healthcare L.L.C, 21-CA-39703, 2012 WL 1309214 (N.L.R.B. Div. of Judges Apr. 16, 2012) (finding unlawful an employer’s proposed collective bargaining contract provision “retaining essentially unfettered control over a broad range of mandatory subjects of bargaining”).

handbook during a union meeting, were discharged in violation of the Act. More recently, on February 1, 2012, in American Red Cross Arizona Blood Services Region, the ALJ concluded the employer violated the NLRA by requiring employees to sign the following language in the employee handbook: “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.” The ALJ concluded that “the signing of the acknowledgement form is essentially a waiver in which an employee agrees that his/her at-will status cannot change, thereby relinquishing his/her right to advocate concertedly, whether represented by a union or not, to change his/her at-will status.” Stated another way, “the clause in question premises employment on an employee’s agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective-bargaining agreement, which would amend, modify, or alter the at-will relationship,” which “would reasonably chill employees who were interested in exercising their Section 7 rights.”

Nine months later, on October 31, 2012, the NLRB’s Office of the General Counsel released two Advice Memoranda, Mimi’s Café and Rocha Transportation, both of which focused on the extent to which an employee’s rights under Section 7 are chilled by an employer’s at-will policies. In Mimi’s Café, the Office of the General Counsel examined language in the employee handbook to determine if there was a chilling effect: “The relationship between you and Mimi’s Café is referred to as ‘employment at will’ . . . . No representative of the Company has authority to

97. Id at 802.
99. Id.
100. Id.
101. Id. The employer did distribute an updated statement regarding at-will status that contained language different from that found objectionable by the NLRB’s General Counsel. Id. As noted supra note 41, an employer can repudiate an unlawful clause to escape liability. In this case, however, the ALJ concluded the employer’s dissemination of an updated statement, which replaced the offending statement, did not relieve it of liability—it was not timely in that it was not distributed until one year after the NLRB’s complaint was filed; employees were not adequately informed of the retraction; and it contained no assurances the employees’ Section 7 rights would not be interfered with in the future. Id. Later that same month, the NLRB’s Region 28 filed a complaint against the Hyatt Hotels Corporation, alleging that its handbook contained an unlawfully overbroad acknowledgement: “I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt’s Executive Vice-President/Chief Operating Officer or Hyatt’s President.” Complaint and Notice of Hearing, at 9, Hyatt Hotels Corp., 28-CA-061114 (N.L.R.B. Feb. 29, 2012), available at http://www.employmentlawwatch.com/uploads/file/Hyatt%20Complaint.pdf. Hyatt subsequently settled with the Region in which it agreed to post a notice repudiating its “at-will” acknowledgement, among additional employee handbook policies. Settlement Agreement, at 1, Hyatt Hotels, Corp., 28-CA-061114 (N.L.R.B. May 24, 2012), available at http://www.employmentlawwatch.com/uploads/file/Hyatt%20Settlement.pdf.
enter into any agreement contrary to the foregoing ‘employment at will’ relationship.”

104 Noting that the policy in question did not explicitly restrict Section 7 activity and with no evidence that it was promulgated in response to any union or other protected activity, the General Counsel’s Office applied the Lutheran-Heritage standard.105 This standard provides that “maintenance of the contested handbook provision is only unlawful if employees would reasonably construe it in context to restrict Section 7 activity.”106 The Office of the General Counsel concluded “that the contested handbook provision would not reasonably be interpreted to restrict an employee’s Section 7 right to engage in concerted attempts to change his or her employment at-will status.”107 Unlike the at-will provision in American Red Cross Arizona Blood Services Region,108 the provision in Mimi’s Café does not require employees to agree that their at-will status cannot be changed in any way; it merely highlights that its own representatives are not authorized to change that status.109 Acknowledging that employers rely on at-will policy provisions as a defense against potential legal actions by employees asserting that the employee handbook creates an enforceable employment contract, the General Counsel’s Office concluded that the clear meaning of Mimi’s Café’s at-will provision is to reinforce the unambiguously-stated purpose of its at-will policy—“nothing contained in this handbook creates an express or implied contract of employment.”110

In Rocha Transportation, the language at issue in the employee handbook stated,

Employment with Rocha Transportation is employment at-will. Employment at-will may be terminated with or without cause and with or without notice at any time by the employee or the Company. Nothing in this Handbook or in any document or statement shall limit the right to terminate employment at-will. No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.111

Applying the same analysis as in Mimi’s Café, the NLRB’s Office of the General Counsel also concluded that this provision “does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way.”112 Instead, not only does the provision prohibit Rocha Transportation’s “own representatives from

104. Mimi’s Café Advice Memo, supra note 102, at 1.
105. See supra note 39 and accompanying text.
106. Mimi’s Café Advice Memo, supra note 102, at 3.
107. Id.
108. See supra notes 99–101 and accompanying text.
109. Mimi’s Café Advice Memo, supra note 102, at 3.
110. Id. at 3–4 (internal quotes omitted).
112. Id. at 3.
entering into employment agreements that provide for other than at-will employment,” it “explicitly permits [Rocha’s] president to enter into written employment agreements that modify the employment at-will relationship, and thus encompasses the possibility of a potential modification of the at-will relationship through a collective-bargaining agreement that is ratified by the Company president.”

The NLRB’s Office of the General Counsel concluded both Advice Memoranda by acknowledging that the law related to whether at-will provisions restrict Section 7 rights is unsettled. Accordingly, the General Counsel’s Office advised that “the Regions should submit to the Division of Advice all cases involving employer handbook provisions that restrict the future modification of an employee’s at-will status.”

Thus, Section 7 clearly supersedes common law employment-at-will, placing employees’ protected concerted activities above employers’ interests. Employees’ protected rights extend well beyond striking and picketing; they include activities such as “discussing working conditions among [coworkers] . . . and making common complaints about . . . wages, hours, and other terms and conditions of employment, including complaints to management regarding abusive behavior by supervisors,” and presenting grievances by a group of employees to their employer. The Board has interpreted Section 7 broadly, and courts have found that “employees’ activities are protected by Section 7 if they might reasonably be expected to

113. Id. at 3–4.
114. See Mimi’s Café Advice Memo, supra note 102, at 5; Rocha Transp. Advice Memo, supra note 103, at 5. The law is particularly unsettled because American Red Cross Arizona Blood Services Region settled before the ALJ’s decision could be reviewed by the Board.

115. Mimi’s Café Advice Memo, supra note 102, at 5; Rocha Transp. Advice Memo, supra note 103, at 5. In certain cases involving novel and complex issues, the NLRB Regional Director may be required to submit the case for advice from the NLRB’s Office of the General Counsel before issuing a complaint. 29 C.F.R. § 101.8 (2012).

116. See supra notes 92–93 and accompanying text.

117. Richard Michael Fischl, Self, Other, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act, 89 COLUM. L. REV. 789, 789 n.2 (1989). Professor Fischl stated, “In the absence of protection under §§ 7 and 8(a), the employer would be free to discipline employees for virtually any reason he saw fit under the . . . common-law ‘employment-at-will’ rule . . . . Since strikes, picketing, and other protest activities inevitably threaten the employer interests, § 7 remains the principal source of protection for employees who engage in such conduct.”


119. NLRB v. Sequoyah Mills, Inc., 409 F.2d 606, 608 (10th Cir. 1969) (noting that Section 7 was designed to protect such activity even though union activities are not specifically involved); see also Koch Supplies, Inc. v. NLRB, 646 F.2d 1257, 1259 (8th Cir.1981) (“[C]oncerted activities need not take place in a union setting and it is not necessary that a collective bargaining agreement be in effect. It is sufficient that the employee intends or contemplates, as an end result, group activity which will also benefit some other employees.”).
affect terms or conditions of employment." Ultimately, however, while the collective actions of at-will employees are protected under Section 7, “[i]ndividual activities relating to... aid or protection remain] wholly unprotected under [the] Act, which is consistent with the prevailing nonunion employment-at-will doctrine.” This at-will caveat leaves room for employer retaliation, without violating Section 7, against at-will employees for an employee’s individual action.

Finally, there are limits to what activities will be protected. Concerted activity that is unlawful, violent, or insubordinate is not protected. In addition, employers can promulgate rules for the orderly presentation of grievances, the willful violation of which would justify discharge for cause. Opprobrious conduct that is highly disruptive to the workplace can cause an employee engaged in concerted activity to lose protection. The Board considers four factors to determine whether an employee has crossed the line: “(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.”

V. APPLYING WRIGHT LINE WHEN AT-WILL EMPLOYEES ARE DISCHARGED

If an employee charges an employer with an unfair labor practice—such as wrongful termination under Section 7 for engaging online in protected

120. Office & Prof’l Emps. Int’l Union v. NLRB, 981 F.2d 76, 81 (2d Cir. 1992) (quoting Brown & Root, Inc. v. NLRB, 634 F.2d 816, 818 (5th Cir. 1981)).
121. Charles J. Morris, How the National Labor Relations Act Was Stolen and How It Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board’s Appointment Process, 33 BERKELEY J. EMP. & LAB. L. 1, 36 (2012) (emphasis added). But see Bethel, supra note 89, at 584; Robert A. Gorman & Matthew W. Finkin, The Individual and the Requirement of “Concert” Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 338 (1981) (arguing that “there is not the slightest hint in the history of the NLRA that in attempting to expand the protection that the law would give to group activity to secure benefits or improvements, Congress contemplated a less favored status for individual activity having the same objective”) (emphasis omitted).
122. Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947, 952–53 (6th Cir. 1968); see also Metal Blast, Inc. v. NLRB, 324 F.2d 602, 603 (6th Cir. 1963) (noting that discharging an employee for inciting a wildcat strike in violation of a collective bargaining agreement would not constitute an unfair labor practice).
123. Hagopian & Sons, 395 F.2d at 953.
124. Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979) (concluding that an employee’s discharge was not unlawful where the employee had reacted, without provocation, in an obscene fashion to the answer to his question about overtime pay and in a work setting where such conduct was not normally tolerated); see also Plaza Auto Ctr., Inc. v. NLRB, 664 F.3d 286, 293 (9th Cir. 2011) (concluding that the obscene, degrading, and insubordinate nature of an employee’s comments to his employer in a meeting with management regarding compensation policies weighed against protection for his protests of working conditions, even absent a threat of physical harm by the employee); Detroit Med. Ctr. Advice Memo, supra note 21 (concluding that an employee’s concerted activity lost protection because his Facebook complaints contained racial epithets, which caused significant workplace disruption). But see Gaylord Hosp., No. 34-CA-13008, 2012 WL 3878931 (N.L.R.B. Div. of Judges Sept. 6, 2012) (concluding that an employee did not lose protection based on a verbal confrontation with her supervisor); 3815 9th Ave. Meat & Produce Corp., No. 2-CA-67534, 2012 WL 2992089 (N.L.R.B. Div. of Judges July 20, 2012) (finding the same in a situation in which multiple obscenities were used) [hereinafter Compare Supermarket].
125. An unfair labor practice complaint process is initiated by an employee (individually or through representation) filing a charge with an NLRB Regional Office. See 29 C.F.R. § 101.1–101.43 (2013) (detailing the filing and adjudication process).
concerted activity, which may also include violating an unlawfully overbroad social media policy—the burden shifts to the employer to establish that the employer’s actions were supported by “legitimate and substantial business justifications” that are not in violation of Section 7. In other words, in order to refute the unfair labor charge, the employer will have to establish that the at-will employee was fired for cause.

This is the approach the NLRB follows in establishing whether an employee is the target of an adverse employment action as a result of protected concerted activity. Based on the Board’s holding in *Wright Line*, the General Counsel must prove (1) the existence of the protected concerted activity, (2) the employer’s knowledge or belief that the protected concerted activity occurred, and (3) the protected concerted activity motivated the adverse action. The approach taken by the Board in *Wright Line* has a convoluted history, as *Wright Line* focused on the interplay between pretext and dual motives. When an employee engages in protected activities and the employer’s purported legitimate business reason is shown to be a sham, the reason advanced by the employer is termed pretextual. In contrast, dual-motive cases involve two reasons for the employer’s action—a legitimate business reason and an unlawful motivation based on the employee’s protected activities.

Whether the Board is applying pretext or dual-motive analysis, the General Counsel must first establish that protected activities played a role in the employer’s decision—which would establish a *prima facie* case. “[T]he inquiry then focuses on whether any ‘legitimate business reason’

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129. *Wright Line*, 251 N.L.R.B. at 1083–84. *Wright Line* involved union-related conduct and an alleged violation of Section 8(a)(3), which makes it an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3) (2006). As such, much of the *Wright Line* analysis and application applies to Section 8(a)(3) activities. However, the *Wright Line* procedures apply equally to Section 8(a)(1). “Section 7 is ‘amplified’ by the prohibition of certain unfair labor practices, enumerated in Section 8[,]” Office & Prof'l Emps. Int'l Union v. NLRB, 981 F.2d 76, 81 (2d Cir. 1992).
130. *Wright Line*, 251 N.L.R.B. at 1084. The dual motives framework was borrowed from *Mt. Healthy City School District Board of Education v. Doyle*, in which an untenured teacher claimed he was fired in retaliation for exercising his First and Fourteenth Amendment rights. 429 U.S. 274, 276 (1977). In *Mt. Healthy*, the U.S. Supreme Court established a two-part test to be applied in a dual-motivation context: “Initially, the employee must establish that the protected conduct was a ‘substantial’ or ‘motivating’ factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.” *Wright Line*, 251 N.L.R.B. at 1087 (citing *Mt. Healthy*, 429 U.S. at 287).
asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel’s showing of prohibited motivation.”

Ultimately, though, “the General Counsel does not have to show that the employee’s protected . . . activit[ies] [were] the ‘sole factor’ for the discharge.”

The burden of proof in establishing dual-motive has proven somewhat problematic for the courts. For example, in 1983, the U.S. Supreme Court noted that “[t]he Courts of Appeals were not entirely satisfied with the Board’s approach to dual-motive cases.” Regardless, in NLRB v. Transportation Management Corp., the Court agreed that throughout the proceedings, the NLRB’s General Counsel carries the burden of proving the elements of an unfair labor practice. Eleven years later, the Court reconsidered its conclusion in Transportation Management that the Administrative Procedure Act determines only the burden of going forward, not the burden of persuasion, as being merely cursory to an ancillary issue. Without reversing Transportation Management, the Court clarified that the party with the burden of persuasion must “meet its burden by a preponderance of the evidence, not by clear and convincing evidence.”

But Hospital Cristo Redentor, Inc. v. NLRB, in which a nurse who was involved in union activities was dismissed for alleged incidents of misconduct, demonstrates the challenges courts still face in applying the proper analytical framework in a dual-motive situation. As noted by one commentator, when applying the Wright Line standards, the First Circuit stated that the General Counsel had to merely show, rather than persuade, that union animus was a motivating factor.

While the timing of an employer’s action in relation to known protected activity “can supply reliable and competent evidence of unlawful

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132 Id.
133 Holsum De Puerto Rico, Inc. v. NLRB, 456 F.3d 265, 269 (1st Cir. 2006) (citing NLRB v. Hosp. San Pablo, Inc., 207 F.3d 67, 70 (1st Cir. 2000)).
134 NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 399–400 (1983) (noting, for example, that the Fourth Circuit had refused to enforce the Wright Line decision because it believed it was an error to place the burden on the employer to prove that the adverse employment action would have occurred despite the employee’s protected activities).
136 Id. at 401 (citing Section 10(c) of the NLRA, 29 U.S.C. § 160(c) (2006), which directs that violations may be adjudicated only “upon the preponderance of the testimony” taken by the Board).
138 Id. at 278 (“[T]he holding in that case remained intact . . . . because the NLRB first required the employee to persuade it that antunion sentiment contributed to the employer’s decision. Only then did the NLRB place the burden of persuasion on the employer as to its affirmative defense.”).
139 Id. at 277–78 (citing Steadman v. SEC, 450 U.S. 91, 95 (1981)).
140 488 F.3d 513 (1st Cir. 2007).
141 Id. at 519–20.
motivation,” temporal proximity to the claimed concerted activities and the employer’s adverse action will not automatically result in a finding of an unlawful termination. For example, when an employee was fired for violating his employer’s electronic usage policy after his employer discovered he had used an obscenity for his job title in a LinkedIn profile that named the employer, the employee claimed the real reason he was fired was because he had had conversations with other employees regarding the employer’s overtime policy. The employee noted that the “joke” job title had been online for over a year, yet he was fired within a few months of his overtime policy conversations. The NLRB’s Office of the General Counsel rejected the employee’s assertions, noting that “timing alone does not establish a prima facie case under Wright Line; part of the General Counsel’s burden of proof is to demonstrate employer knowledge of and animus towards the protected activity.” In this case, there was no evidence that the employer was even aware of the overtime discussions activity or had demonstrated animus towards employees discussing their working conditions.

As noted previously, concerted activities protected by Section 7 of the NLRA will supersede the employment-at-will doctrine. Consequently, firing an employee relatively soon after she has engaged in any protected concerted activities raises the suspicion that she was fired because of those concerted activities. This will therefore shift the burden to the employer to demonstrate the employee was fired for some other legitimate, lawful cause—in other words, emasculating the employment-at-will doctrine by leaving the employer with only the option to terminate for cause. The argument is put forth that as more and more employees turn to social media as a means of regular communication and interaction with coworkers—as evidenced by the numerous charges recently received by the NLRB from employees who have been fired due to online social media postings—the more those


144. Schulte, Roth & Zabel Advice Memo, supra note 50, at *1.

145. Id.

146. Id. (citing Caribe Ford, 348 NLRB No. 74 (2006) (finding the General Counsel failed to establish a prima facie case of unlawful discharge under the Wright Line standard because the General Counsel had failed to prove the employer had knowledge of the employee’s protected activities at the time of discharge)).

147. Id. (noting the employer became aware of the employee’s “joke” job title only after the employer decided to view employees’ LinkedIn profiles as part of an effort to create a profile for the employer itself). But see Gaylord Hosp., No. 34-CA-13008, 2012 WL 3878931 (N.L.R.B. Div. of Judges Sept. 6, 2012) (holding that although the timing between a confrontation regarding working conditions and discharge did not alone establish a prima facie case, the employer’s knowledge of and animus towards the employee’s protected activity did).

148. See supra notes 92–93 and accompanying text.

149. See generally Sprague, supra note 32 (reviewing approximately 100 charges filed with the NLRB by employees disciplined or fired based on online social media postings; analyzing 36 online social media decisions by the Board, ALJs, and the NLRB Office of the General Counsel; reporting that 10 of the incidents involved protected concerted activity); see also Rafael Gely & Leonard Bierman, Social Isolation and American Workers: Employee Blogging and Legal Reform, 20 HARV. J.L. & TECH. 287, 297 (2007) (noting
communications may constitute protected concerted activities. At the beginning of their employment, those employees were most likely at-will, but their Facebook, Twitter, or LinkedIn “conversations” with coworkers could easily end that at-will status.

Peter Dechiara’s call for greater employee knowledge of workplace rights is particularly important for protecting Section 7 rights, as, unlike other forms of statutorily proscribed discharge, protecting concerted activity is the exclusive domain of the NLRB. In 1959, the U.S. Supreme Court determined the NLRB has exclusive jurisdiction to determine whether there has been a violation of Section 7. As a result, a discharged employee cannot bring a private unfair labor practice charge against the employer after being fired for engaging online in protected concerted activities.

that “the workplace serves as an important focal point for interpersonal connectivity”). Professors Gely and Bierman contend “that the blogosphere has become a new space where the voices of employees can be heard at a very low cost, unimpeded by the hierarchical barriers present at work.” Id. at 301. Gely and Bierman discussed employee online communications via blogs at a time when only five percent of employees hosted their own blogs and before the explosive growth on online social media platforms such as Facebook, Twitter, and LinkedIn. See id. at 301–02.

150. See Union Members Summary, U.S. DEP’T OF LABOR BUREAU OF LABOR STATISTICS (Jan. 23, 2013, 10:00 AM), http://www.bls.gov/news.release/union2.nr0.htm. In 2012, less than twelve percent of wage and salaried U.S. employees were members of a union—the most likely scenario under which employees will be working under an employment agreement that provides for termination only for cause. See id.

151. See generally Peter Dechiara, The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act, 32 HARV. J. ON LEGIS. 431 (1995) (advocating informing employees of their rights under the NLRA through posted notices).

152. For example, employment discrimination based on race, color, nationality, religion, gender, or disability is not only prohibited by federal law but also by state statutes. In addition, although an employee who believes he is the victim of discrimination must initiate a federal claim with the Equal Employment Opportunity Commission (“EEOC”), if the EEOC declines to pursue the matter, the individual will be free to file his own civil discrimination lawsuit against his employer. See 42 U.S.C. § 2000e-5 (2006); 29 C.F.R. § 1601.21 (2013). However, failure to assert a claim under Section 7 of the NLRA does not preclude the ability to bring an action for wrongful discharge under state common law. See Hogwood v. Town of Oakland, No. 11-2396-STADK, 2012 WL 1414000, at *4 (W.D. Tenn. Apr. 23, 2012) (determining that state law claims of constructive discharge and employment-at-will dispute would be better heard in state court); Marcus Mgmt., Inc., 292 N.L.R.B. 251, 259 (1989).

153. See Turner v. Vancom Transp. of Mo., Inc., 916 F. Supp. 949, 951 (E.D. Mo. 1996). The court found, if a wrongful discharge suit is based on the same allegations as a § 7 or § 8 NLRB charge, the suit is preempted under Garmon. Where there is no “significant distinction” between the allegations in the NLRB charge and the corresponding civil suit, NLRB jurisdiction is primary and the civil suit is properly dismissed.
situation requires consistent application by the NLRB, not in deciding whether the activity in question was protected and concerted—as that issue is fairly well established, though necessitating a case-by-case application\textsuperscript{155}—but in concluding whether a dismissal following such activity was indeed for a legitimate cause and not due to the protected concerted activity.

VI. CONCLUSION

Only the NLRB can protect employees’ Section 7 rights to engage in concerted activities. In the twenty-first century workplace, concerted activities are more likely to take place online through social media platforms rather than around the water cooler. These conversations can continue over a longer period of time (days instead of just a few minutes over a break), involve more people (depending upon how many of the coworkers have “friended” each other), and, most importantly, can be documented.

This Article has argued that as more coworkers communicate through online social media, they are more likely to eventually talk about work—in other words, engage in protected concerted activities. Once they do, their employment-at-will status is effectively moot. If these employees are the subject of any adverse employment action arising relatively soon after their conversations, the employer will then have the burden of establishing that it either did not know of the concerted activity or that it had some other legitimate cause to discharge the employees—which is the antithesis of the employment-at-will doctrine.

\textit{Id.} (citing \textit{Garmon}, 359 U.S. at 245 (quoting DeSantiago v. Laborers Int’l Union, Local 1140, 914 F.2d 125, 129 (8th Cir. 1990))).

\textsuperscript{155} See supra note 13.