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# Can't Escape from the Memory: Social Media and Public Sector Labor Law

William A. Herbert



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# CAN'T ESCAPE FROM THE MEMORY: SOCIAL MEDIA AND PUBLIC SECTOR LABOR LAW

*William A. Herbert\**

*Abstract: The Web 2.0 communicative revolution is impacting many fields of law, including labor and employment law. This article focuses upon the application and impact of statutory and constitutional doctrines on the use of social media in public employment in the United States. As part of that analysis, it will compare and contrast developments under the National Labor Relations Act, state collective bargaining and tenure laws and the First Amendment concerning social media. Through this comparative analysis, the article will highlight the distinctions and similarities of public sector labor law and their implications for the future.*

## I. INTRODUCTION

Like most human endeavors, the study and practice of law are not immune from the allure of societal fads, which can entice many and repel others. The combined power of rapid technological innovations and creative advertising has created a storm of consumer desire for electronic communicative devices, transforming want into need. The use of digital devices and their networks is reshaping our culture and our workplaces, metamorphosing formerly deniable or forgettable verbal exchanges into discoverable and distributable electronic written records. The Web 2.0 communicative revolution is simply the latest platform accelerating the velocity and growth of digital expressions and interchanges.

Governments, businesses, unions, political and cultural figures, and other individuals are finding social networking an effective tool for communicating, promoting, branding, and organizing. In the public sector, social media has

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become an important open government tool for communicative exchanges with the public.<sup>1</sup>

The proliferation and accessibility of interactive electronic communications are substantially enhancing individual and collective discourse, a vital element for social interaction and unified workplace activities.<sup>2</sup> The communicative revolution has expanded the ability to act collectively or individually concerning employment, commercial, personal, and political issues. The successful presidential campaigns of Barack Obama can be attributed, in part, to the masterful use of social media and other technologies.<sup>3</sup> It is too early to judge, however, whether the use of social media will lead us toward a new renaissance in political, social, and labor activism or whether it is destined to become just another passivity-inducing development, leading to a further decline in social capital.<sup>4</sup> Generational, economic, cultural, and geographic factors will determine the ultimate impact social networking will have on collective and associational activities.

Social media platforms are popular fora for interactive dialogues related to work, personal matters, and issues of great social and political import. Like other means of discourse, the content can be thoughtful and profound, banal and profane, or both. Writers can articulate substantive ideas and criticisms concerning policies, practices, and current events that may be protected under public and/or private sector workplace law. At the other end of the spectrum, electronic statements and interactions can be childish, crude, immoral, disloyal or just an outlet for thought dreams to be seen. As will be demonstrated in Parts II(A) and (C), *infra*, employee posts found opprobrious and abusive toward an

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1. Ines Mergel, *Gov 2.0 Revisited: Social Media Strategies in the Public Sector*, P.A. TIMES, Summer 2010, at 7, 10, available at [http://faculty.maxwell.syr.edu/iamergel/files/Gov20\\_Revisited\\_2010.pdf](http://faculty.maxwell.syr.edu/iamergel/files/Gov20_Revisited_2010.pdf).

2. Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1094 (2011) (“[C]ollective action requires a significant level of discourse and information transference among individuals; mere sporadic or impersonal contacts are inadequate.”).

3. Jennifer Aaker & Victoria Chang, *Obama and the power of social media and technology*, EUR. BUS. REV., May-June 2010, at 16-21, available at <http://www.europeanbusinessreview.com/?p=1627>; Richard Parker, *Social and Anti-Social Media*, N.Y. TIMES CAMPAIGN STOPS (Nov. 15, 2012, 9:16 PM), <http://campaignstops.blogs.nytimes.com/2012/11/15/social-and-anti-social-media/>.

4. See ROBERT D. PUTNAM, *BOWLING ALONE* (2000) (describing the general decline in civic engagement in the United States since World War II caused partially by the atomization of the public through television watching, and internet surfing). Despite expectations, social networking has yet to become an effective tool in product marketing and advertising. See Stephen Baker, *Can Social Media Sell Soap?*, N.Y. TIMES, Jan. 6, 2013, at SR1, available at [http://www.nytimes.com/2013/01/06/opinion/sunday/can-social-media-sell-soap.html?ref=opinion&\\_r=0](http://www.nytimes.com/2013/01/06/opinion/sunday/can-social-media-sell-soap.html?ref=opinion&_r=0).

employer or co-workers can lose applicable legal protections in the private and public sectors.<sup>5</sup>

Unlike other products, such as cars and bicycles, the design of social networking does not include built-in mechanical breaks or a clear user manual aimed at minimizing communicative accidents and collisions. Excessive cyberspatial exuberance can lead to the revelation and distribution of confidential, embarrassing, or harmful information for those forgetful or unmindful of their electronic footprints.<sup>6</sup> The proverbial slippery slope into electronic mud is of particular concern when social networking involves certain types of relationships such as supervisor-employee or teacher-student.<sup>7</sup>

Frequently, employers learn of posted off-duty comments and photographs from so-called friends or others with access to an employee's social media page.<sup>8</sup> In one case, a Paterson, New Jersey, first-grade teacher was terminated after her posts describing students as "future criminals" were forwarded to the school district by one of her hundreds of Facebook friends, a former principal.<sup>9</sup> Within

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5. *E.g.*, *Atl. Steel Co.*, 245 N.L.R.B. 814 (1979) (The employee "called the foreman a 'lying son of a bitch' or stated that the foreman had told a 'm--f--lie' (or was a 'm--f--liar') as to whether he had asked the entire crew to work overtime."); *State of New York (Ben Aaman)*, 11 NYPERB ¶ 3084 (1978) (describing conduct, including: threatening supervisors during grievance hearing, abusing another supervisor with foul language, and creating a disturbance during an employer investigation).

6. As Robert Sprague has noted, social media "raises issues such as what is the boundary between public and private-at what point does something that is private become public? Can there be seclusion in cyberspace?" Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 13 (2011) (footnotes omitted). *See also* William A. Herbert, *Workplace Consequences of Electronic Exhibitionism and Voyeurism*, 30 TECH. & SOC'Y MAG. 25 (2011).

7. *See City Sch. Dist. of the City of New York v. McGraham*, 75 A.D.3d 445 (N.Y. App. Div. 2010), *aff'd*, 958 N.E.2d 897 (N.Y. 2011) (Teacher found guilty of serious misconduct for off-duty electronic communications with a poetry student about personal matters including the teacher seeking clarification about the nature of their relationship.); *see also* Charlie Osborne, *When do students and teachers cross the line through social media?*, ZDNET (Oct. 1, 2012, 17:25 GMT), <http://www.zdnet.com/when-do-students-and-teachers-cross-the-line-through-social-media-7000005046/> ("In relation to the Internet, not only is cyberbullying an issue -- especially when conducted on school grounds -- but social media is considered by some as an inappropriate way for teacher and student to communicate."); Charlie Osborne, *Students use mobile tech to make teachers' lives 'intolerable'*, ZD NET (Jan. 2, 2013, 11:37 GMT), <http://www.zdnet.com/students-use-mobile-tech-to-make-teachers-lives-intolerable-7000009277/> (describing a union complaint in Scotland about school officials failing to take action in response to student harassment of teachers through social media).

8. *E.g.*, *Vista Nuevas Head Start*, 129 Lab. Arb. Rep. (BNA) 1519 (2011) (VanDagens, Arb.) (Arbitrator found Head Start program had just cause to discharge a teacher for her profanity-filled abusive remarks about the program's administrator, co-workers, students, and parents on a closed Facebook group page, set up primarily for teachers at the school. The school obtained print-outs of the posts from a group member, who was the estranged husband of one of the other teachers in the group.).

9. *In re O'Brien*, A-2452-11T4, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013) (The posts stated: "I'm not a teacher—I'm a warden for future criminals!" and "They had a scared

a few short days, her posts were the subject of parental outrage and media attention, which led to her termination.<sup>10</sup> In Florida, elementary school teachers were verbally reprimanded after one compared a student to an orangutan in a Facebook post and others responded favorably to the comment.<sup>11</sup> An Ohio middle school math teacher faces possible discharge after her colleague reported to the district that she posted on Facebook a photograph of her students with duct tape over their mouths with the caption: “Finally found a way to get them to be quiet!!!”<sup>12</sup> The alleged humor that might have motivated the conduct of the teacher and her students did not translate well in cyberspace, which is another cautionary tale involving social media in the public sector.<sup>13</sup>

There are other examples of unprofessional or inappropriate electronic communications in the public sector leading quickly to disciplinary action or a demand that the employee resign. The steady stream of high-profiled and precipitous public sector falls and stumbles highlights the potential destructive workplace consequences of electronic footprints: the resignation of C.I.A. Director David H. Petraeus,<sup>14</sup> the resignation of Congressman Christopher Lee,<sup>15</sup> the firing of three congressional staff members,<sup>16</sup> and the termination of an Indiana Deputy Attorney General.<sup>17</sup>

Modernity cannot be blamed for unfiltered or unprofessional behavior; they are as old as humankind. The architectural design of the virtual world, however, encourages impulsiveness, exhibitionism, and undiscerning expression. It also ensures that such behaviors are readily discoverable and searchable, thanks to

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straight program in school—why couldn't [I] bring [first] graders?”). *See also* Mid-Michigan Cmty. Coll., 26 MPER ¶ 4 (2012) (adjunct professor terminated after his college received a letter complaining that he posted on his Facebook page insulting remarks about a student and encouraged others to make similar posts about that student).

10. *In re O'Brien*, 2013 WL 132508, at \*1.

11. Suzanne Choney, *Teacher compares student to 'orangutan' on Facebook, could lose license*, TODAY.COM (July 5, 2012, 3:01 PM), <http://www.today.com/tech/teacher-compares-student-orangutan-facebook-could-lose-license-864638>.

12. David Boroff, *Teacher may lose her job after posting Facebook gag photo of students with duct tape over mouths*, NY DAILY NEWS (Jan. 22, 2013, 12:58 PM), <http://www.nydailynews.com/news/national/teacher-posts-facebook-gag-photo-students-duct-tape-mouths-article-1.1244953>.

13. *Id.*

14. Greg Miller & Sari Horwitz, *David Petraeus resigns as CIA director*, WASH. POST (Nov. 9, 2012), [http://www.washingtonpost.com/world/national-security/david-petraeus-resigns-as-cia-director/2012/11/09/636d204e-2aa8-11e2-bab2-eda299503684\\_story.html](http://www.washingtonpost.com/world/national-security/david-petraeus-resigns-as-cia-director/2012/11/09/636d204e-2aa8-11e2-bab2-eda299503684_story.html).

15. Raymond Hernandez, *New York Congressman Resigns Over E-Mails*, N.Y. TIMES, Feb. 10, 2011, at A19, available at [http://www.nytimes.com/2011/02/10/us/politics/10lee.html?\\_r=0](http://www.nytimes.com/2011/02/10/us/politics/10lee.html?_r=0).

16. Marin Cogan & Jonathan Allen, *Hill Staffers fired in Twitter flap*, POLITICO (Dec. 9, 2011, 2:51 PM), <http://www.politico.com/news/stories/1211/701116.html>.

17. Adam Weinstein, *Indiana Official: "Use Live Ammunition" Against Wisconsin Protesters*, MOTHER JONES (Feb. 23, 2011, 1:01 AM), <http://www.motherjones.com/politics/2011/02/indiana-official-jeff-cox-live-ammunition-against-wisconsin-protesters>.

the multiple repositories of data including tablets, laptops, smart phones, and the cloud.<sup>18</sup> Furthermore, it leads to significant blurring of the once firm line between work and off-duty activities in many occupational settings.<sup>19</sup>

Far behind the cacophonous storm of digital communications, and resulting workplace consequences, is the application of labor law to employee social media use. As the United States Supreme Court has observed: “[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior,”<sup>20</sup> and “it is uncertain how workplace norms, and the law’s treatment of them, will evolve.”<sup>21</sup> With the exception of recently enacted laws in a few states placing restrictions on employer access to social media accounts of employees and applicants,<sup>22</sup> there has not been a focused reexamination of current laws and doctrines aimed at placing checks on irrational behavior associated with the use of, and response to, social media. The subject of civil liberties in the workplace must be revisited as well, at a time when an unsolicited photograph or video of off-duty conduct by a public employee can go viral, placing the unwitting subject in danger of losing her or his job. Along with a reconsideration of labor law

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18. See Ariana C. Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837, 839 (2012) (“Using social networking websites both shares the posts and maintains them, providing employers with a potentially incriminating record that is often unavailable with in-person conversations.”).

19. See Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 EMP. RTS. & EMP. POL’Y J., 901, 902 (2012); William A. Herbert & Amelia K. Tuminaro, *The Impact of Emerging Technologies in the Workplace: Who’s Watching the Man (Who’s Watching Me)?* 25 HOFSTRA LAB. & EMP. L.J. 355, 358 (2008).

20. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010).

21. *Id.*

22. Six states have enacted laws protecting the privacy of employees and/or applicants concerning their social media activities by prohibiting employers from seeking usernames and passwords: California, Illinois, Maryland, Michigan, Utah and New Mexico. CAL. LAB. CODE § 980 prohibits employers from requesting an employee or applicant to disclose a username or password for the purpose of accessing personal media, access personal social media in the presence of the employer or to divulge any personal social media unless a request to an employee is reasonably believe to be related to an investigation into the employee’s misconduct or violation of applicable laws. In Maryland, private sector and governmental employers are prohibited from requesting or requiring an employee or applicant to disclose a username, password, or other means to accessing a personal account or service through an electronic communications device. See MD. CODE, LAB. AND EMP’T, §§ 3-712(a)(4)(i)(2), 3-712(b)(1). Effective January 1, 2013, the Illinois Right to Privacy in the Workplace Act, 820 ILL. COMP. STAT. ANN. 55 § 10 (West 2013), makes it unlawful for an employer to request or require an employee or prospective employee to provide a password or other related account information in order to gain access to the employee’s or prospective employee’s account or profile on a social networking page. See Ariana R. Levinson, *Social Media, Privacy and the Employment Relationship: The American Experience*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2265609](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2265609). Similar legislation has been introduced in other states. See Nat’l Conf. of State Legislatures, *Employer Access to Social Media Usernames and Passwords*, available at <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx>.

doctrines as applied to electronic communications, there needs to be a societal rededication to training and education to encourage mature and sober conduct in cyberspace.

A primary factor in determining the scope of legal protections for collective or individual electronic communications is whether the employee works for a private employer or government agency.<sup>23</sup> The private and public sectors are subject to distinct sources of labor law, doctrines, and history.<sup>24</sup> There are two related legal questions that arise in both sectors concerning social networking: whether the content of posts is legally protected from adverse personnel action; and whether the employer can lawfully impose and maintain a policy restricting social media activities by its employees.

In general, resolution of the first question requires an examination of various factors including whether: the content was work-related, personal, or touched upon a broad social or political issue; it was directed at other employees, other specific individuals, or the virtual world at-large; it was so egregious to lose legal protections; it had an adverse impact upon the workplace; it was created and distributed during work time or off-duty; it was made pursuant to work duties; and/or it was distributed with a personal device or the employer's equipment.<sup>25</sup>

The second issue, the lawfulness of an employer's policy, requires an analysis into whether the policy restricts or chills protected employee speech and association under applicable law, and whether the subject is mandatorily negotiable with the union that represents the employees subject to the policy. The question of negotiability is more likely to arise in the public sector where the density of union representation far exceeds representation in the private sector.<sup>26</sup>

A related third legal issue concerns whether an employee has enforceable privacy protections against employer access to a social media page or the right to be free from employer surveillance. Recent state laws concerning that issue

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23. See William A. Herbert, *Public Sector Labor Law and History: The Politics of Ancient History*, 28 HOFSTRA LAB. & EMP. L.J. 335, 345 (2011).

24. *Id.* at 338, 345, 359-61.

25. These factual issues are generally not relevant to whether the content of an electronic communication is protected under the anti-retaliation provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a) (2006), and the plethora of other federal and state laws prohibiting retaliation for reporting or seeking to report violations of law. The Supreme Court has cited to anti-retaliation laws as one rationale for narrowly construing the scope of employment protections for public employees under the First Amendment. See William A. Herbert, *The Chill of a Wintry Light? Borough of Duryea v. Guarinieri and the Right to Petition in Public Employment*, 43 U. TOL. L. REV. 583, 623-25 (2012) [hereinafter Herbert, *The Chill of a Wintry Light?*].

26. U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., *Economic News Release* (Jan. 23, 2013, 10:00 AM), <http://www.bls.gov/news.release/union2.nr0.htm>.

have substantially increased privacy protections concerning social networking.<sup>27</sup> The new laws, however, do not limit an employer from accessing social media content from a page with low or no privacy settings or receiving it from individuals with lawful access to the page.<sup>28</sup>

The scope of protected liberties and responsibilities as defined by judicial, legislative, and administrative actions can profoundly influence the shaping of labor strategies in both sectors.<sup>29</sup> The law creates positive and negative incentives for employers, unions, and employees with respect to electronic speech and activities.<sup>30</sup> Arguably, developments in the area of technology and workplace law should encourage collective employee action in the private and public sectors, along with a broadened application of social unionism in cyberspace.<sup>31</sup> The more posts reflect only individualistic workplace concerns, the less likely they will be legally protected. In contrast, workplace-related content linked with broader policy and social questions has the greatest likelihood of being protected. These objective legal incentives in the current era are eclipsed by predominant cultural and societal forces that encourage self-centeredness in cyberspace.

This article examines social media and public sector labor law based on a cross-sectoral analysis of legal doctrines and precedent.<sup>32</sup> The comparison will

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27. *Supra* note 22.

28. *Supra* note 22.

29. See WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991) (demonstrating how decisions by federal and state courts enjoining labor activities and striking down protective labor legislation shaped the principles, tactics and strategies of the American labor movement at the turn of the 20th century).

30. See *City of Ontario, Cal.*, 130 S. Ct. at 2629-30 (“As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications.”).

31. Social unionism denotes an anti-economistic strategy and tactics connecting workplace conditions with wider policy and social issues. See Stephanie Ross, *Varieties of Social Unionism: Towards a Framework of Comparison*, 11 JUST LAB.: A CAN. J. OF WORK & SOC’Y 16 (Autumn 2007), [http://www.justlabour.yorku.ca/volume11/pdfs/02\\_Ross\\_Press.pdf](http://www.justlabour.yorku.ca/volume11/pdfs/02_Ross_Press.pdf) (“Social unionism, generally understood to involve both engagement with social justice struggles beyond the workplace and methods of union activity beyond the collective bargaining process, is claimed to increase the labour movement’s organizing capacity, bargaining power, and social and political weight.”). Other scholars distinguish between “social unionism” and “social movement unionism,” a distinction without any real difference concerning the scope of protected social media activities under the law. See JOHN W. BUDD, EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE 150 (2006) (“In contrast, social *movement* unionism embraces labor unions as part of a broader social movement of community, social, and political activist groups that relies on active grassroots participation and mobilization.”) (emphasis in original).

32. In their separate studies, Daniel J. Walkowitz, Paul Johnston, and Craig Reinerman have each demonstrated the value of comparative analyses of the private and public sectors. See DANIEL J. WALKOWITZ, WORKING WITH CLASS: SOCIAL WORKERS AND THE POLITICS OF MIDDLE-CLASS



demonstrate that many public employees have broader protections for social networking than their private sector counterparts because of statutory and constitutional protections applicable only to the government workplace. These protections are reflective of the century-old consensus in the United States that a *de jure* regulatory structure for government employment is necessary to check the powers of the state and partisan politics.

American private sector labor relations is primarily regulated by the provisions of the National Labor Relations Act (NLRA),<sup>33</sup> originally enacted in 1935 and substantially modified in 1947.<sup>34</sup> Although the private sector union density rate in the United States is currently 6.6%,<sup>35</sup> the NLRA's central importance in regulating American private sector workplace has been reinforced as the result of the National Labor Relations Board (NLRB) applying well-established statutory doctrines and concepts to social media. For example, in *Hispanics United of Buffalo, Inc. (Hispanics United)*,<sup>36</sup> the NLRB ruled that an employer violated the NLRA when it terminated five at-will employees based upon their social media posts, which were found to be protected concerted activity for mutual aid and protection regarding their terms and conditions of employment.<sup>37</sup>

In unionized workplaces, collective bargaining agreements commonly contain just cause provisions, permitting challenges to disciplinary action through grievance arbitration procedures.<sup>38</sup> In light of the ever-expanding growth of social media, arbitrators are beginning to hear employee misconduct

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IDENTITY (1999) (examining the history of social work in the public and private sectors in the United States with a particular emphasis on the transformation of social worker self-identification as employees and the impact of that self-identification on the strategies and tactics of their respective unions); PAUL JOHNSTON, SUCCESS WHILE OTHERS FAIL: SOCIAL MOVEMENT UNIONISM AND THE PUBLIC WORKPLACE (1994) (comparing the successful fight by northern California public sector nurses for comparative worth utilizing social unionism tactics with the unsuccessful strike by private sector nurses in the same California county who applied a traditional business unionism approach); CRAIG REINARMAN, AMERICAN STATES OF MIND: POLITICAL BELIEFS AND BEHAVIOR AMONG PRIVATE AND PUBLIC SECTOR WORKERS (1987) (analyzing the respective political viewpoints and activities of private and public sector employees during the Reagan presidency).

33. 29 U.S.C. §§ 151-69 (2012). Private sector labor relations in the airline and railroad industries are controlled by the Railway Labor Act, 45 U.S.C. §§151-88 (2012). Private sector employment that is not subject to the NLRA or the Railway Labor Act may be subject to a state collective bargaining law, such as New York's State Employment Relations Act, N.Y. LABOR LAW §§ 700-18.

34. Nat'l Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (amended 1947) (current version at 29 U.S.C. §§ 151-69).

35. U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., *supra* note 26.

36. 359 N.L.R.B. No. 37, 2012-13 NLRB Dec. (CCH) ¶ 15656 (Dec. 14, 2012).

37. *Id.*

38. Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 92 n.14, 153 n.339, 154-55 (2008).

cases involving the content of posts on social networking pages.<sup>39</sup> Therefore, disciplinary “arbitrators need to become familiar with all kinds of social networking platforms, learn how to deal with this kind of evidence, and understand the applicable statutory and case law” including the NLRA.<sup>40</sup>

Labor relations in the public sector are regulated by a patchwork of rights and remedies from multiple legal sources. According to the latest national statistics, 7.3 million public sector employees are members of a union in the United States, constituting a union density rate of 35.9%.<sup>41</sup> Many state and local jurisdictions have collective bargaining laws that grant statutory civil liberties to public employees including the rights to engage in union activities and other forms of concerted workplace-related speech and activities.<sup>42</sup> Those laws limit the authority of public employers to take adverse actions that interfere with or discriminate against employees for exercising statutory rights of concerted speech and association.<sup>43</sup> In addition, such laws restrict the power of employers to unilaterally impose or maintain policies that chill the exercise of statutory rights.<sup>44</sup>

Public employees are generally not subject to the at-will employment rule, which is a major distinction between the public and private sectors.<sup>45</sup> Most government workers have protections from civil service merit and fitness rules, statutory tenure, and disciplinary protections.<sup>46</sup> In jurisdictions with collective

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39. See *U.S. Steel Corp*, 130 Lab. Arb. (BNA) 461 (2011) (Bethel, Arb.) (Employer lacked just cause to discharge employee on the basis of three off-duty Facebook messages sent to his mother-in-law during a contested divorce and child custody fight.); *Baker Hughes, Inc.* 128 Lab. Arb. (BNA) 37 (2010) (Baroni, Arb.) (Employer had just cause to discharge employee for his off-duty post referencing the plant manager as “German, green card terminator” and stating “I could have sworn that Hitler committed suicide.” The national origin slur violated the employer’s anti-harassment policy and the employee failure to show remorse or apologize for the content of his post.)

40. Robert L. Arrington, Aaron Duffy & Elizabeth Rita, *When Worlds Collide: An Arbitrator’s Guide to Social Networking Issues in Labor and Employment Cases*, 66 DISP. RESOL. J., no. 4, (Nov. 2011-Jan. 2012), at 2. See also *Vista Nuevas Head Start*, 129 Lab. Arb (BNA) 1519 (2011) (VanDagens, Arb.) (An employee’s post regarding a supervisor arriving late to work, read in the context of other employees’ posts on a group Facebook page, was not protected concerted activity but a mere gripe.)

41. U.S. DEP’T OF LAB., BUREAU OF LAB. STAT., *supra* note 26.

42. See R. Theodore Clark, Jr., *Public Sector Collective Bargaining at the Crossroads*, 44 URB. LAW. 185, 187 (Winter 2012) (According to Clark’s survey, twenty-eight states and the District of Columbia currently have comprehensive collective bargaining laws for their public sector employees and eleven other states grant similar rights to specifically defined job classifications.)

43. *Id.*

44. *Id.*

45. See Herbert, *The Chill of a Wintry Light?*, *supra* note 25, at 592-94, 597-99 (describing the development of statutory tenure and disciplinary protections for public employees in the federal sector and in Pennsylvania).

46. *Id.*

bargaining laws, protections against arbitrary disciplinary action can be enhanced through negotiated just cause provisions.<sup>47</sup> Another major distinction between the public and private sectors is that government employment is regulated by constitutional protections concerning speech, association, and privacy.<sup>48</sup> Despite the panoply of public sector legal issues connected with social media, most of the legal commentary and media attention involving social networking and the workplace has ignored the public sector.<sup>49</sup>

The article begins in Parts II(A) and (B) with legal developments concerning the scope of legally protected social networking activities by private employees under the NLRA. Although the NLRA exempts states and political subdivisions from the definition of “employer,”<sup>50</sup> thereby rendering the federal statute’s protections inapplicable to government employment, NLRB precedent provides a useful framework for examining analogous issues in the public sector. Furthermore, NLRB precedent is considered by state collective bargaining agencies in examining analogous legal issues. In Part I(C), the article compares work-related protections under public sector collective bargaining and other laws in Michigan, Florida, and New York, with legal developments under the NLRA concerning protected concerted activities.

In Part III, the legal limitations on the scope of employer social networking policies in the private and public sectors are compared. Constitutional issues relating to public sector employee social networking under the First and Fourth Amendments is explored in Part IV. It will demonstrate that the First Amendment provides the greatest protections for social networking about public policy issues, while providing no protections for posts made pursuant to an employee’s official responsibilities. It will also show that the applicable scrutiny of an employer’s social media policy under the First Amendment is weaker than the degree of scrutiny applied to policies under the NLRA and state collective bargaining laws.

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47. *Id.* at 626.

48. See Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Implications*, 47 U. LOUISVILLE L. REV. 679 (2009).

49. See Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES, Nov. 9, 2010, at B1, available at [http://www.nytimes.com/2010/11/09/business/09facebook.html?\\_r=0](http://www.nytimes.com/2010/11/09/business/09facebook.html?_r=0).

50. “The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.” 29 U.S.C. § 152(2) (2012). Whether a particular entity or body is a political subdivision exempt from the NLRA requires resolution of whether it is “(1) created directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” NLRB v. Natural Gas Util. Dist. of Hawkins Cnty., 402 U.S. 600, 604-05 (1971).

## II. SOCIAL NETWORKING AS A STATUTORILY PROTECTED LABOR ACTIVITY

In four decisions in 2012 and 2013, *Hispanics United*,<sup>51</sup> *Costco Wholesale Corp (Costco)*,<sup>52</sup> *Karl Knauz Motors, Inc. (Karl Knauz)*<sup>53</sup> and *Design Technology Group, LLC (Bettie Page Clothing)*,<sup>54</sup> the NLRB Board has begun to explore the extent to which the NLRA limits the right of the employers to discipline employees for the content of their social media comments, and regulates the scope of employer policies related to social media. Developing private sector precedent under the NLRA can also constitute persuasive authority with respect to social media in the public sector.

The application of the NLRA to social networking has been the subject of substantial legal commentary and press coverage over the past three years. The genesis of this interest has its origin in the December 2009 termination of an emergency medical technician employed by a New Haven medical services company based upon critical Facebook posts she made about her supervisor, which generated supportive posts by co-workers.<sup>55</sup> Following the discharge, an unfair labor practice charge was filed with NLRB Region 34 resulting in an investigation into whether the company's adverse action against the medical technician and its written policies, violated Section 8(a)(1) and (3) of the NLRA.<sup>56</sup> During the investigation, the NLRB General Counsel's Division of

51. 359 N.L.R.B. No. 37, 2012-13 NLRB Dec. (CCH) ¶ 15656 (Dec. 14, 2012).

52. 358 N.L.R.B. No. 106, 2012-13 NLRB Dec. (CCH) ¶ 15602 (Sept. 7, 2012).

53. 358 N.L.R.B. No. 164, 2012-13 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012).

54. 359 N.L.R.B. No. 96, 195 L.R.R.M. (BNA) 1309 (Apr. 19, 2013).

55. See Advice Memorandum from the NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg, Reg'l Dir. of Region 34, Am. Med. Response of Conn., Inc., Case No. 34-CA-12576 (Oct. 5, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055b9c4>.

56. *Id.*; 29 U.S.C. §§ 158(a)(1) and (3) (2012) state:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \*

(3) 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: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have

Advice<sup>57</sup> issued a memorandum advising the NLRB Regional Director to issue a complaint against the medical services company alleging that it violated Section 8(a)(1) and (3) of the NLRA when it terminated the technician for her Facebook posts and for maintaining overly broad policies concerning internet postings and employee conduct that might reasonably chill the exercise of rights guaranteed by Section 7 of the NLRA.<sup>58</sup>

Section 7 of the NLRA states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).<sup>59</sup>

Following the advisory memorandum, NLRB Region 34 issued a complaint against the New Haven company alleging that the technician's discharge and the

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voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

57. The NLRB Division of Advice is delegated the responsibility to prepare advisory memoranda for NLRB Regional Directors concerning novel or complicated legal issues that arise in pending unfair labor practice charges. See NAT'L LABOR RELATIONS BD., *Organization and Functions*, section 202.1.2, <http://www.nlr.gov/sites/default/files/documents/254/organdfunctions.pdf>. Although the particular NLRB Region is required to follow an advice memorandum, the memorandum is not binding upon the NLRB or its Administrative Law Judges.

58. 29 U.S.C. § 157 (2012). In December 2009, the NLRB General Counsel's Division of Advice recommended dismissal of an unfair labor charge against another employer, which alleged that its social media policy violated the NLRA because it prohibited "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." In that case, the advice memorandum concluded that the rule, read in the context of the whole policy, would not reasonably be construed by an employee to prohibit activities protected by Section 7 of the NLRA because the policy prohibited a list of other clearly unprotected activities including explicit sexual references and references to illegal drugs and the policy's preamble stated that it was not aimed as restricting "the flow of useful and appropriate information." See Advice Memorandum from the NLRB Office of the Gen. Counsel to Martin O. Osthus, Reg'l Dir. of Region 18, Sears Holdings (Roebucks), Case No. 18-CA-19081, at 2-3, 5 (Dec. 4, 2009, available at <http://www.employerlawreport.com/uploads/file/Advice%20memorandum.pdf>).

59. 29 U.S.C. § 157 (2012) (emphasis added).

company's written policies violate Sections 8(a)(1) and (3) of the NLRA.<sup>60</sup> Among the policies alleged to violate the NLRA was the following internet use policy in the employee handbook:

Blogging and Internet Posting Policy

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-worker and/or competitors.<sup>61</sup>

The NLRB announcement concerning the issuance and substance of the complaint against the New Haven company, and the subsequent settlement of the complaint, generated wide publicity.<sup>62</sup> While most media reports focused attention on the complaint's allegations concerning the discharge, portraying it as a test case over protections for social media postings, the NLRB Acting General Counsel Lafe Solomon described the case as the mere application of well-settled precedent concerning protected employee communications about workplace terms and conditions:

This is fairly straightforward case under the National Labor Relations Act – whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that.<sup>63</sup>

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60. See Complaint and Notice of Hearing, Am. Med. Response of Conn., Inc., Case No. 34-CA-12576 (N.L.R.B. Oct. 27, 2010) available at <http://documents.jdsupra.com/daf37177-f935-4fe0-be1f-82c65d0f2ac3.pdf>; see also, 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) (examining closely the factual and legal issues raised by the complaint in *American Medical Response of Connecticut*).

61. See Complaint and Notice of Hearing, Am. Med. Response of Conn., Inc., Case No. 34-CA-12576, at ¶ 7 (N.L.R.B. Oct. 27, 2010).

62. See Press Release, NLRB, Complaint alleges Connecticut company illegally fired employee over Facebook comments (Nov. 2, 2010), available at <http://www.employerlawreport.com/uploads/file/NLRB%20Press%20Release.pdf>; Greenhouse, *supra* note 49; Melanie Trotman, *Facebook Firing Case Is Settled*, WALL ST. J. (Feb. 8, 2011), <http://online.wsj.com/article/SB20001424052748704422204576130631738779412.html>; Steven Greenhouse, *Even if It Enrages Your Boss, Social Net Speech is Protected*, N.Y. TIMES, Jan. 22, 2013, at A1, available at [http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?\\_r=0](http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?_r=0).

63. Greenhouse, *supra* note 49. See also Bruce E. Boyden, *Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law*, 65 ARK L. REV. 39, 40 (2012) ("The meme that

The heightened attention given to the NLRB's actions in the New Haven case is explainable by the trendiness of social networking and the general ignorance about the scope of the associational workplace rights and protections guaranteed by the NLRA. NLRB Albany Resident Officer Barnett L. Horowitz has aptly observed that the press coverage following the NLRB's press release demonstrated that "there seemed to be a collective disbelief" that Section 7 of the NLRA applied to unrepresented employees.<sup>64</sup>

The enactment of the NLRA has been described by one historian "as a momentous libertarian victory," that is "perhaps the single most important civil liberties statute ever passed by Congress, [which] extended, in theory at least, the guarantees of the First Amendment to American workers who had grown accustomed to enjoying their civil liberties on the sufferance of their employers."<sup>65</sup> Nevertheless, if questioned or polled, few Americans would know or recall that the statutory declaration of national public policy favoring broad private sector worker associational rights remains in effect today:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*<sup>66</sup>

Ignorance concerning the "full freedom of association" protected under the NLRA is attributable to a variety of causes, including government policies

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everything on the Internet is startlingly different has become so engrained that it is actually fairly common for people to miss instances where the fact that a transaction or communication occurs on the Internet, or using computers, is of no significance at all. In the legal world, there are numerous examples where the standard rules developed over the course of the twentieth century work just fine when applied to the Internet.").

64. Barnett L. Horowitz, *The National Labor Relations Act Adapts to Social Media: The First Chapter*, 36 NYSBA LAB. & EMP. LAW J., no. 3, Fall/Winter 2011, at 9.

65. JEROLD S. AUERBACH, LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE & THE NEW DEAL 53, 211-12 (1966).

66. 29 U.S.C. § 151 (2012) (emphasis added). As James Gross has stated the "Wagner Act constituted a fundamental change in public policy, particularly in regard to the role of government regulation of labor relations" and the "rights and protections remain legislatively intact today, and the government still retains the power to prosecute violations through unfair labor practice proceedings." See JAMES A GROSS, A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE 62-63 (2010). The scope of freedoms guaranteed by the NLRA is not absolute. Its scope of protections is dependent on the relative importance and value those freedoms are given in the context of historical and technological developments. See Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283 (Winter 2006) (demonstrating the adverse impact the trauma of 9/11 had on employees' right to association).

favoring deindustrialization, deregulation, and globalization over the past few decades, which partially explains why 93% of the private sector workforce is presently unrepresented.<sup>67</sup> It is also traceable to a general cultural shift in favor of individualism premised upon two amoral precepts: selfishness is a virtue and greed is good. The lack of knowledge regarding NLRA protections also results from insufficient education and training regarding protected collective workplace rights, and labor history in general.<sup>68</sup>

Contrary to the current prevalent misunderstanding, Section 7 of the NLRA protects unorganized employees who engage in activities for mutual aid and protection with or without involvement by a union.<sup>69</sup> These protections have existed since well before the advent of social networking.<sup>70</sup> The liberties granted by Section 7 of the NLRA also cover collective activities external to the employer-employee relationship, if aimed at improving workplace conditions such as petitioning administrative, legislative, and judicial forums.<sup>71</sup> As will be demonstrated in Parts II(C) and IV, *infra*, collective activities by government employees receive similar protections in jurisdictions with collective bargaining laws, and their activities might also be subject to constitutional protections under the First Amendment.

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67. There are multiple additional reasons for the steady decline in union density including the growth of the decentralized service economy and failed union strategies and tactics. Gary N. Chaison responded to 2012 statistics showing a continued decline in union density by stating: "It's a time for unions to stop being clever about excuses for why membership is declining, and it's time to figure out how to devise appeals to the workers out there." Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 24, 2013, at B1, available at <http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?ref=stevengreenhouse>. See also JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970'S AND THE LAST DAYS OF THE WORKING CLASS* (2010) (examining the historical, political and cultural forces leading to the decline of private sector unionization during the 1970's).

68. See Bill Fletcher & Jane McAlevey, *Lessons from Wisconsin*, OPINIONNATION (Jun. 26, 2012), <http://www.thenation.com/blog/168435/opinionnation-labors-bad-recall> (arguing that the unions have a responsibility to develop and maintain effective worker education programs). The lack of union leadership support for labor education is not a recent phenomenon. See Al Nash & May Nash, *Labor Unions and Labor Education*, UNIV. LAB. EDUC. ASS'N, MONOGRAPH SERIES NO. 1, 5 (June 1970) ("Labor educators generally agree that labor education activities have failed to become institutionalized in the labor movement or to affect a significant cross-section of labor leaders. A few larger unions sponsor educational activities and cooperate with universities in the field, but the majority of unions in American do not sponsor or support labor education.").

69. See Rita Gail Smith & Richard A. Parr II, *Protection of Individual Action As 'Concerted Activity' under the National Labor Relations Act* 68 CORNELL L. REV. 369, 371 (1983) ("Section 7 protects employees engaged in concerted activity in a wide variety of circumstances. It protects, for instance, nonunionized employees engaged in such activity and, in some instances, protects unionized employees acting outside established grievance procedures. Section 7 even protects concerted conduct by employees who contemplate neither union activity nor collective bargaining.") (footnotes omitted).

70. *Id.*; see also *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

71. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978).



While the NLRB complaint against the New Haven company was settled prior to an adjudicatory ruling,<sup>72</sup> social media cases under the NLRA have proliferated with respect to two primary issues: the legality of adverse actions taken against employees for their posts and the lawfulness of employer social media policies. There have been a series of social media decisions issued by the NLRB and its Administrative Law Judges (ALJs) examining those issues, as well as one ALJ decision examining whether a union's conduct with respect to social media violated its obligations under the NLRA.<sup>73</sup> In describing the NLRB's actions in this area, NLRB Chairman Mark Gaston Pearce has emphasized that "All we're doing is applying traditional rules to a new technology."<sup>74</sup>

The NLRB General Counsel's Division of Advice has issued numerous advisory memoranda concerning social media cases, and NLRB Acting General Counsel Solomon has issued three reports summarizing those memoranda, which constitute persuasive authority in future social media cases.<sup>75</sup> The NLRB General Counsel plays a central role in developing NLRA case law through the grant of prosecutorial responsibility to accept, investigate, resolve, or dismiss unfair labor practice charges and, following an investigation, to issue and prosecute complaints alleging unfair labor practices against employers and unions.<sup>76</sup>

The importance of the legal developments regarding social media under the NLRA is reflected in a 2011 study by the U.S. Chamber of Commerce analyzing

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72. Under the settlement, "the company agreed to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions." A separate agreement between the discharged EMT worker and the company resolved the termination resulting from her Facebook postings. See Press Release, NLRB, Settlement reached in case involving discharge for Facebook comments (Feb. 8, 2011), available at <http://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments>.

73. See Amalgamated Transit Union, Local Union No. 1433, AFL-CIO, Case No. 28-CB-78377 (N.L.R.B. Div. of Judges Nov. 28, 2012).

74. Steven Greenhouse, *supra* note 62.

75. See Memorandum from the NLRB Office of Gen. Counsel (OM 11-74), Report of the Acting Gen. Counsel Concerning Social Media Cases (Aug. 18, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743>; Memorandum from the NLRB Office of Gen. Counsel (OM 12-31), Report of the Acting General Counsel Concerning Social Media Cases (Jan. 24, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>; Memorandum from the NLRB Office of Gen. Counsel (OM 12-59), Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>.

76. See NLRB Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board (Apr. 1, 1955), available at [http://www.nlr.gov/sites/default/files/documents/254/delegationofauthogc\\_0.pdf](http://www.nlr.gov/sites/default/files/documents/254/delegationofauthogc_0.pdf).

the status of NLRB social media cases.<sup>77</sup> The proactive administrative approach adopted by the NLRB Acting General Counsel concerning social media over the past few years has not been free from criticism.<sup>78</sup>

Private sector labor law in this area remains unsettled because the NLRB Board's social media decisions have not been judicially reviewed and exceptions to other NLRB ALJ decisions have not yet been decided. Moreover, there is a possibility that the NLRB Board decisions in *Hispanics United*,<sup>79</sup> *Costco*,<sup>80</sup> *Karl Knauz*,<sup>81</sup> and *Bettie Page Clothing*<sup>82</sup> might be judicially nullified as the result of litigated claims that President Obama's 2012 recess appointments to the NLRB Board were unconstitutional.<sup>83</sup> The final results of the pending litigation regarding those appointments might result in the social media decisions being reversed, and reconsidered by a differently constituted NLRB Board.

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77. See Michael J. Eastman, Exec. Dir. Labor Law Policy, U.S. Chamber of Commerce, A Survey of Social Media Issues Before the NLRB 1 (Aug. 5, 2011) (report prepared for the U.S. Chamber of Commerce Labor, Immigration & Emp. Benefits Div.), available at <http://www.uschamber.com/sites/default/files/reports/NLRB%20Social%20Media%20Survey.pdf>. (“The Board has only just begun to address these many important issues, and it is, of course, hard to speculate as to how the Board will rule as these cases develop and whether those decisions will withstand scrutiny. It is hoped that this survey can assist employers and counsel identify issues with which they should be aware as they grapple with the application of labor law to employee use of social media.”).

78. See *Another NLRB Power Grab: The board moves toward regulating social media and banning legal arbitration*, WALL ST. J. REV. & OUTLOOK (Jan. 7, 2013, 5:53 PM), [http://online.wsj.com/article/SB10001424127887324461604578189443097965414.html?mod=googlnews\\_wsjs#](http://online.wsj.com/article/SB10001424127887324461604578189443097965414.html?mod=googlnews_wsjs#).

79. 359 N.L.R.B. No. 37, 2012-13 NLRB Dec. (CCH) ¶ 15656 (Dec. 14, 2012).

80. 358 N.L.R.B. 106, 2012-13 NLRB Dec. (CCH) ¶ 15602 (Sept. 7, 2012).

81. 358 N.L.R.B. No. 164, 2012-13 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012).

82. 359 N.L.R.B. No. 96, 195 L.R.R.M. (BNA) 1309 (Apr. 19, 2013).

83. See *Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir. 2013), cert. granted, No. 12-1281, 2013 WL 1774240 (Jun. 24, 2013); *NLRB v. New Vista Nursing & Rehab.*, Nos. 11-3440, 12-1027 & 12-1936, 2013 U.S. App. LEXIS 9860, at \*116-17 (3d. Cir. May 16, 2013) (The U.S. Courts of Appeals for the D.C. and Third Circuits vacated NLRB Board decisions on the grounds it lacked a quorum because President Obama's appointments of certain Board members violated Art. II §2, cl. 2 of the United States Constitution. Art. II §2, cl. 2 states: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”). See also Melanie Trottman, *Chamber Urges Businesses to Appeal Labor Rulings*, WALL ST. J. (Jan. 31, 2013, 7:26 PM), <http://online.wsj.com/article/SB1000142412788732392610457827623323334320.html>; Steven Greenhouse, *More Than 300 Labor Board Decisions Could Be Nullified*, N.Y. TIMES, Jan. 26, 2013, at A10, available at <http://www.nytimes.com/2013/01/26/us/labor-relations-board-rulings-could-be-undone.html?ref=nationallaborrelationsboard>.

With those caveats, we begin with an analysis of the developing NLRB case law on the issue of whether social networking constitutes protected concerted activity under the NLRA. The article then explores the comparative scope of protections under public sector collective bargaining and tenure laws in Michigan, Florida, and New York. While Michigan and Florida have collective bargaining provisions similar to Section 7 of the NLRA, their respective administrative case law is not fully consistent with NLRB precedent. In New York, the public sector collective bargaining law omits protections for concerted activity unrelated to forming, joining, and participating in a union. Therefore, NLRB precedent defining the scope of concerted activity for mutual aid and protection has less relevance in New York's public sector.

*A. Standards for Protected Concerted Activity under Section 7 of the NLRA*

The regulatory impact of the NLRA on social networking is directly related to the scope of private sector employee activities it protects. By definition, the full right of association guaranteed by the NLRA is inseparable from the statutorily protected civil liberty of free speech regarding private sector terms and conditions of employment.

Whether the NLRA protects employee social media conduct is resolved in each case within the context of an unfair labor practice case, in which it is alleged that an employer violated §§8(a)(1) and/or (3) of the NLRA<sup>84</sup> by taking an adverse action against an employee because of her or his social media activity. The respective burdens of proof in such cases are analyzed within the framework set forth in *Wright Line*.<sup>85</sup> Under that test, the NLRB General Counsel has the initial burden of proving that protected concerted activity was a substantial or motivating factor in the adverse action taken against an employee.<sup>86</sup> Following that initial showing, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.<sup>87</sup>

A central issue in many NLRB social networking cases is whether the postings that formed the basis for an adverse action constituted protected "concerted activities" for "mutual aid and protection" under Section 7 of the

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84. *Supra* note 56.

85. 251 N.L.R.B. 1083 (1980), *enforced* NLRB v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see also* NLRB v. *Transp. Mgmt.*, 462 U.S. 393 (1983) (upholding the burdens of proof articulated in *Wright Line* as reasonable under the NLRA).

86. *Wright Line*, 251 N.L.R.B. at 1089 ("First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision.").

87. *Id.* ("Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.").

NLRA.<sup>88</sup> Thus far, the social networking involved in NLRB decisions have not related to the more commonly known statutory “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing.”<sup>89</sup>

Like other subjects under the NLRA, the application of the legal standards for what constitutes protected “concerted activities” for “mutual aid and protection” under Section 7 of the NLRA is subject to a continuing debate.<sup>90</sup> This is due, in part, to the fact that the statutory phrase “concerted activities” is undefined, and requires a determination regarding “which particular actions of an individual must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity.”<sup>91</sup> In *NLRB v. City Disposal Systems, Inc.*,<sup>92</sup> the United States Supreme Court noted that it is “not self-evident from the language [of the NLRA]...the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity.”<sup>93</sup> The uncertainty concerning protections for individual acts led two scholars to acknowledge that “when an individual employee protests alone, without any consultation with and authorization by fellow employees, his legal rights under section 7 may be drastically curtailed, even when he purports to voice the concerns of others but especially when he is speaking only for himself in lodging a protest regarding working conditions affecting him alone.”<sup>94</sup>

The *sine qua non* of protected “concerted activities” for “mutual aid or protection” is when an employee speaks with co-workers about their need for unionizing.<sup>95</sup> In such situations, there is little question that the comment is protected because “the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”<sup>96</sup> In the unionized context, an individual employee’s reasonable assertion of a contract right based on the terms of a collective bargaining agreement will also be protected because it is an extension of the concerted activity that led to the agreement, and the grievance can impact the rights of all employees covered by

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88. 29 U.S.C. § 157 (2012).

89. *Id.*

90. 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, 290 (1981).

91. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 826 (1984).

92. *Id.*

93. *Id.* at 830-31.

94. Gorman & Finkin, *supra* note 90.

95. *Root-Carlin, Inc.*, 92 N.L.R.B. 1313 (1951).

96. *Id.* at 1314.

the agreement.<sup>97</sup> At the other extreme, personal gripes by employees unrelated to group action with co-workers or not aimed at inducing collective action, will be found to be unprotected.<sup>98</sup> Narcissistic social media postings about work are least likely to be found protected.<sup>99</sup>

In 1975, the NLRB adopted a broader view when it found that a single employee's health and safety complaint to a state agency was protected activity, although the employee had never discussed the safety issue with his co-workers, and had not sought their support or requested their assistance in any manner.<sup>100</sup> Despite the lack of such evidence, the NLRB reasoned that the written complaint was protected because the importance of occupational safety was shared by the entire work force, and subject to state legislation.<sup>101</sup> It concluded that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."<sup>102</sup>

The NLRB soundly rejected this analytical standard nine years later in *Meyers Industries, Inc. (Meyers I)*,<sup>103</sup> when it adopted what it described as an "objective" standard of concerted activity" to be applied to the particular facts in each case:

Although the definition of concerted activity we set forth below is an attempt at a comprehensive one, we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law. In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse

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97. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enforced* NLRB v. *Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967); AUERBACH, *supra* note 65.

98. *See* *Capitol Ornamental Concrete Specialties, Inc.*, 248 N.L.R.B. 851 (1980); *Media Gen. Operations, Inc.*, 346 N.L.R.B. 369 (2006).

99. *See* Lauren K. Neal, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715, 1752 (2012) ("At the same time, social media lends itself to griping. As anyone with a Facebook page knows, many Facebook users employ their page as a platform to air personal complaints—both work-related and otherwise.").

100. *Alleluia Cushion Co, Inc.*, 221 N.L.R.B. 999 (1975).

101. *Id.* at 1000-01.

102. *Id.* at 1000.

103. 268 N.L.R.B. 493 (1984) (*Meyers I*), *remanded sub nom.* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *supplemented* 281 N.L.R.B. 882 (1986) (*Meyers II*), *aff'd sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.<sup>104</sup>

The D.C. Circuit reversed the adoption of the new standard in *Meyers I* on the grounds the NLRB “erred when it decided that its new definition of ‘concerted activities’ was *mandated* by the NLRA” and that the decision “stands on a faulty legal premise and without adequate rationale.”<sup>105</sup> Upon remand, the NLRB in *Meyers II*<sup>106</sup> reaffirmed and clarified the standard for concerted activity. In its supplemental decision, the NLRB emphasized that the standard for concerted activity did not preclude protections for individual conduct.<sup>107</sup> Instead, the standard distinguishes “between an employee’s activities engaged in ‘with or on the authority of other employees’ (concerted) and an employee’s activities engaged in ‘solely by and on behalf of the employee himself’ (not concerted).”<sup>108</sup> In addition, the agency reiterated that the “definition of concerted activity in *Meyers I* encompasses 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.”<sup>109</sup> When the “evidence demonstrates group activities, whether ‘specifically authorized’ in a formal agency sense, or otherwise,” it will be found to be concerted conduct.<sup>110</sup>

Although intemperate remarks and impulsive behavior during the course of labor relations will, at times, be protected under the NLRA,<sup>111</sup> opprobrious and egregious conduct or comments by individuals while engaged in concerted activities can result in the loss of statutory protections.<sup>112</sup> In determining whether an employee’s behavior has crossed that line, the NLRB considers four factors first articulated in *Atlantic Steel Co.*:<sup>113</sup> (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s

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104. *Id.* at 496-97.

105. *Prill*, 755 F.2d at 942 (emphasis in original).

106. 281 N.L.R.B. 882 (1986).

107. *Id.*

108. *Id.* at 885.

109. *Id.* at 888; *see* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (stating that to meet the definition of protected concerted activity “it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees”).

110. *Meyers II*, 281 N.L.R.B. 882, 886 (1986). *See also* Owens-Corning Fiberglass Corp v. NLRB, 407 F.2d 1357, 1365 (4th Cir 1969) (stating that a single employee’s activities to gain support from fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity).

111. *See* NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965).

112. *Atl. Steel Co.*, 245 N.L.R.B. 814 (1979); *Verizon Wireless*, 349 N.L.R.B. 640 (2007); *Honda of Am. Mfg.*, 334 N.L.R.B. 746 (2001).

113. *Atl. Steel Co.*, 245 N.L.R.B. at 816.

outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.<sup>114</sup>

Before we examine the NLRB decisions involving employee use of social networking, it is worth examining a case that sheds light on the application of the standards of *Meyers I*, *Meyers II*, and *Atlantic Steel Co.* to the electronic workplace. In *Timekeeping Systems, Inc.*,<sup>115</sup> an e-mail from an employee to his co-workers, with the salutation "Greetings Fellow Traveler," critical of the employer's e-mail announcement of proposed changes in a vacation policy, was found to be a protected concerted activity.<sup>116</sup> The employer's announcement to the entire workforce encouraged employees to comment about the changes, and the employee's e-mail encouraged his co-workers to support his opposition to the modification, after some of them had circulated comments supportive of the change.<sup>117</sup> The employee's e-mail was found to be concerted activity because it implicitly sought to encourage group action to maintain the current vacation policy.<sup>118</sup> While the employer found the e-mail to be disrespectful and discourteous, and the ALJ found that the e-mail utilized "some flippant, and rather grating language,"<sup>119</sup> the NLRB found that the wording was not opprobrious and egregious thereby warranting exclusion from NLRA legal protections.<sup>120</sup>

The protected e-mail in *Timekeeping Systems, Inc.* was directed to co-workers and the employer, and its length and detail strongly suggested that the employee spent a fair amount of time composing it.<sup>121</sup> By contrast, electronic communications through social media are not always equivalent to internal workplace e-mail exchanges or traditional water cooler discussions. For one thing, access to social networking pages and tweets are frequently not limited to co-workers. An employee's social media wall may include responsive posts from friends with no relationship with the workplace. In addition, the speed of the communicative exchanges through social media can blur personal issues with other matters and encourage the posting of workplace gripes filled with unfiltered thoughts and phrases.<sup>122</sup> As the case law develops, NLRA standards

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114. *Id.*

115. 323 N.L.R.B. 244, 249 (1997).

116. *Id.*

117. *Id.* at 246.

118. *Id.* at 247.

119. *Id.* at 246.

120. *Id.* at 249.

121. *See Timekeeping Systems, Inc.*, 323 N.L.R.B. at 246.

122. *See Amalgamated Transit Union, Local Union No. 1433, AFL-CIO, Case No. 28-CB-78377* (N.L.R.B. Div. of Judges Nov. 28, 2012) (social networking page is not the virtual equivalent of a picket line); Advice Memorandum from the NLRB Office of the Gen. Counsel to Daniel L. Hubbel, Reg'l Dir. of Region 17, Wal-Mart, No. 17-CA-25030, at 3 (July 19, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e73d> (directing dismissal of

will probably start to take into consideration the unique design of social media and the consequences of that design.<sup>123</sup>

*B. Social Networking as a Protected Concerted Activity under the NLRA*

The first NLRB Board decision to determine whether the content of social networking postings was protected under Section 7 of the NLRA was *Karl Knauz*.<sup>124</sup> In that case, the NLRB affirmed an ALJ's conclusion that a car salesman was not unlawfully discharged for his Facebook postings based upon the ALJ's credibility finding that the decision to discharge was based solely upon the content of a particular post regarding a car accident at another dealership owned by the employer.<sup>125</sup> The at-issue post did not involve a discussion with co-workers and had no connection to their terms and conditions of employment.<sup>126</sup> Therefore, the salesman's termination was found lawful under the NLRA because it was not based upon concerted activity for mutual aid and protection.<sup>127</sup>

The decision in *Karl Knauz* reflects a core evidentiary question that will arise in many social networking cases. Due to the communicative exuberance

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a charge premised upon Facebook postings that expressed an employee's workplace gripe and contained no language suggesting he sought to initiate or induce co-workers to engage in group action); Advice Memorandum from the NLRB Office of the Gen. Counsel to Chip Harrell, Reg'l Dir. of Region 11, Wal-Mart, No. 11-CA-067171, at 4-5 (May 30, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a3922d> (directing dismissal of a charge alleging retaliation for an employee posting concerning government population control policy, which was just "running off at the mouth").

123. See Neal, *supra* note 99, at 1751-53.

124. Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 2012-13 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012).

125. *Id.*

126. *Id.* at n.1.

127. *Id.* NLRB General Counsel's Division of Advice memoranda provide other examples of social networking activities unprotected under the NLRA. See Advice Memorandum from the NLRB Office of Gen. Counsel to J. Michael Lightner, Reg'l Dir. of Region 22, MONOC, Nos. 22-CA-29008, 22-CA-29083, 22-CA-29084 & 22-CA-29234, at 1 (May 5, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803f7e3b> (directing dismissal of an unfair labor charge because the challenged disciplinary action resulted from posts about employees not providing proper care to the employer's patients, which was unprotected); Advice Memorandum from the NLRB Office of Gen. Counsel to Jonathan B. Kreisberg, Reg'l Dir. of Region 34, Martin House, No. 34-CA-12950 (July 19, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e73e> (directing dismissal of an unfair labor charge challenging a termination because the posts were not with a co-worker and the content was limited to insensitive comments concerning the employer's mentally disabled clients); Advice Memorandum from the NLRB Office of Gen. Counsel to Rik Lineback, Reg'l Dir. of Region 25, Rural Metro, No. 25-CA-31802, at 2-4 (June 29, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055fad2> (directing dismissal of an unfair labor charge because the employee's complaints about her and her husband's working conditions on a United States Senator's website was not concerted because it did not seek to induce collective action).



associated with social media, a determination concerning whether an adverse action was unlawful under the NLRA will frequently depend upon a credibility finding about which post(s) were the substantial motivating factor in the employer's decision.<sup>128</sup> By relying upon the ALJ's credibility determination in *Karl Knauz*, the NLRB avoided examining the ALJ's alternative conclusion that the salesman's other posts about a workplace issue were protected concerted activities.<sup>129</sup> Those posts were made following comments by sales staff about how the lousy food being offered at a scheduled sales event would adversely impact the size of their commissions.<sup>130</sup> At the event, the salesman took photographs of his co-workers holding hot dogs, chips, and water.<sup>131</sup> Later he posted the photographs, along with sarcastic remarks about the quality of the food, on his Facebook page.<sup>132</sup> The ALJ concluded that the postings concerning the sales event were protected concerted activities because they were an outgrowth of conversations with co-workers related to the impact on their compensation from sales resulting from the inadequacies of the food.<sup>133</sup> Finally, the ALJ found that the sarcasm and mocking tone of the posts did not deprive them of protection.<sup>134</sup>

In *Hispanics United*,<sup>135</sup> the NLRB held that off-duty workplace-related social media posts by five unrepresented employees of a non-profit social services agency constituted protected concerted activities for mutual aid and protection, and affirmed an ALJ's finding that the employer violated §8(a)(1) of the NLRA when it terminated the five employees based upon the content of their posts. While Board Member Hayes dissented, he agreed with the majority that the standards articulated in *Meyers I* and *Meyers II* were applicable to determining whether social networking posts were protected concerted activity, and that the intent of employees to engage in collective action can be inferred from the posts; intent need not be explicit.<sup>136</sup>

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128. *Karl Knauz*, 358 N.L.R.B. No. 164 (Sept. 28, 2012).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*; see *Mike Yurosek & Son, Inc.*, 306 N.L.R.B. 1037, 1038 (1992) (finding that employees' refusal to work overtime was protected because it was a "logical outgrowth" of prior collective disputes reduction in schedule).

134. See *Pontiac Osteopathic Hosp.*, 284 N.L.R.B. 442, 452 (1987) (finding employee use of a fake newsletter containing satire and irony about workplace conditions to be protected). See also *New River Industries, Inc.*, 299 N.L.R.B. 773 (1990) (finding that sarcastic remarks about employer offering ice cream to celebrate new partnership did not exceed level of protections).

135. *Hispanics United of Buffalo, Inc.* 359 N.L.R.B. No. 37, 2012-13 NLRB Dec. (CCH) ¶ 15656 (Dec. 14, 2012).

136. *Id.* at \*4-5, n.7.

The facts regarding the at-issue social networking activities in *Hispanics United* are simple and concise. Shortly after a new domestic violence advocate Lydia Cruz-Moore was hired, she began complaining to another agency employee, Marianna Cole-Rivera, about the job performance of other employees assigned to assist domestic violence victims, particularly those in the housing department.<sup>137</sup> Cruz-Moore also criticized housing department employees directly concerning their work habits.<sup>138</sup> After Cruz-Moore threatened to inform the agency's executive director about her criticisms concerning the job performance of others, Cole-Rivera made the following off-duty post on her Facebook page, using her personal computer:

Lydia Cruz, a coworker feels that we don't help our clients  
enough . . . I about had it! My fellow coworkers how do u feel?<sup>139</sup>

Four co-workers, using their own personal computers, responded with off-duty posts objecting to Cruz-Moore's criticisms, defending the quality of their work, and expressing frustrations about workplace conditions including their case load.<sup>140</sup> In addition, a member of the agency's board of directors and the executive director's secretary each made responsive posts.<sup>141</sup> Cruz-Moore also made a post stating "...stop with ur [sic.] lies about me."<sup>142</sup> Cruz-Moore immediately complained to the executive director about the Facebook posts, and provided print-outs of the posts.<sup>143</sup> Cole-Rivera and the four co-workers were terminated on the basis that the content of their posts violated the employer's policy against bullying and harassment.<sup>144</sup>

In affirming the ALJ in *Hispanics United*, the majority concluded that there was "no question" the posts were protected concerted activities for mutual aid and protection under *Meyers I* and *Meyers II*.<sup>145</sup> They found Cole-Rivera's initial post was a solicitation implicitly aimed at inducing collective action to defend against Cruz-Moore's criticism about their job performance, and the solicitation was motivated by Cruz-Moore's threat to Cole-Rivera to make a complaint to the executive director.<sup>146</sup> The social networking exchange was found to be the first step by the employees to take group action to defend themselves against allegations that they could reasonably believe Cruz-Moore

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137. *Id.* at \*10.

138. *Id.*

139. *Id.* at \*2.

140. *Id.* at \*10-11.

141. *Hispanics United*, 359 N.L.R.B. No. 37, at \*10-11.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

intended to present to the employer.<sup>147</sup> The majority rejected Member Hayes' dissenting view that the employees' exchange was an unprotected electronic "group griping" session because the other employees did not know of Cruz-Moore's threat to inform the executive director.<sup>148</sup>

The majority in *Hispanics United* denied the employer's defense premised upon its anti-bullying policy, finding that the at-issue posts cannot reasonably be construed as constituting bullying or harassment, and that the employer could not rely solely upon Cruz-Moore's subjective reaction to the posts.<sup>149</sup> In rejecting the defense, the NLRB did not rely upon the analysis in *Atlantic Steel Co.* because the employer contended that the postings were unprotected from the outset and *Atlantic Steel Co.* "typically applies when determining whether activity that is initially protected has been rendered unprotected by subsequent misconduct."<sup>150</sup>

The facts in *Hispanic United* did not require the NLRB to revisit the question of whether employees have an inherent statutory right under Section 7 of the NLRA to use employer computer equipment to solicit other employees through social media during non-work time.<sup>151</sup> The at-issue posts were made off-duty and on personal computer equipment.<sup>152</sup> The case also did not require the NLRB to decide under what circumstances an employer gaining access to employee social media posts constitutes unlawful surveillance or creates the impression of unlawful surveillance under the NLRA.<sup>153</sup> The rapid growth of social networking renders it likely that the NLRB will face those provocative legal issues in future cases.

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147. *Hispanics United*, 359 N.L.R.B. No. 37, at \*10-11; but see Advice Memorandum from the NLRB Office of Gen. Counsel to Gail R. Moran, Reg'l Dir. of Region 13, JT's Porch Saloon & Eatery, Ltd., No. 13-CA-46689 (July 19, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055b9c6> (directing dismissal of an unfair labor charge because the posting exchange between the bartender and his step-sister regarding employer's tipping policy was not discussed with other employees, none of his co-workers responded to the posts, and there had not been any effort to initiate group action concerning the tipping policy).

148. *Hispanics United*, 359 N.L.R.B. No. 37; but see Advice Memorandum, Wal-Mart, No. 17-CA-25030, *supra* note 127 (directing dismissal of a charge because the evidence established that employee's social networking exchange with other employees concerning a particular Wal-Mart assistant manager was not a concerted activity because it was only his frustrated "expression of an individual gripe" rather than an effort to initiate group action).

149. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at \*12.

150. *Id.*

151. *Guard Publ'g Co.* 351 N.L.R.B. 1110 (2007), *enforced in part and remanded*, *Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), *on remand* 357 N.L.R.B. No. 27 (2011). See also William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMP. RTS. & EMP. POL'Y J. 49, 83-96 (2008).

152. *Hispanics United*, 359 N.L.R.B. No. 37, at \*1.

153. See *Frontier Tel. of Rochester, Inc.*, 344 N.L.R.B. 1270 (2005), *enforced* *Frontier Tel. of Rochester, Inc. v. NLRB*, 181 F. App'x 85 (2d Cir. 2006).

In *Bettie Page Clothing*,<sup>154</sup> the NLRB held that Facebook posts by employees of a Haight Ashbury clothing store were protected concerted activity for three reasons. First, the posts were a continuation of their complaints to the employer concerning working late in an unsafe area. In addition, the posts were protected because they “were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management’s refusal to address the employees’ concerns.”<sup>155</sup> Furthermore, the posts discussed consulting a book on California workplace rights, published by the Center for Labor Research and Education at the University of California, Berkeley, to determine whether their rights had been violated.<sup>156</sup> In remedying the violation, however, the NLRB denied the request of the charging party for an order requiring the employer to purchase copies of the book and to distribute them to libraries and schools along with copies of the NLRB decision.<sup>157</sup>

Due to the fact-specific analyses mandated by *Meyers I*, *Meyers II*, and *Atlantic Steel Co.*, interpretative differences will inevitably arise in future cases among NLRB Board members concerning the protected nature of social networking posts.<sup>158</sup> There is little question that the particular composition of an NLRB Board can impact the analysis, values, and results in certain decisions, particularly those with hot button subjects.<sup>159</sup> As one commentator has stated, “[t]he presidential appointed and highly political NLRB is well known to overrule its own decisions when its composition shifts due to a change in Presidential administration.”<sup>160</sup>

Currently pending before the NLRB are exceptions and cross-exceptions from an ALJ decision in *Triple Play Sports Bar & Grille (Triple Play)*,<sup>161</sup> which found that a sports bar violated §8(a)(1) of the NLRA when it terminated employees based upon the content of their posts on the social networking page of

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154. *Bettie Page Clothing*, 359 N.L.R.B. No. 96, 195 L.R.R.M. (BNA) 1309 (Apr. 19, 2013).

155. *Id.* at \*1.

156. See DAVID A. ROSENFELD, MILES E. LOCKER, & NINA G. FENDEL, CALIFORNIA WORKERS’ RIGHTS: A MANUAL OF JOB RIGHTS, PROTECTIONS AND REMEDIES (4th ed. 2010). The connection between the book and the NLRB decision was discussed by Kerianne Steele, Esq. from Weinberg, Roger and Rosenfield during a panel discussion at the 2013 ABA National Symposium on Technology in Labor and Employment Law.

157. *Bettie Page Clothing*, 359 N.L.R.B. No. 96, at \*3.

158. *Atl. Steel Co.*, 245 N.L.R.B. 814 (1979); *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *supplemented* 281 N.L.R.B. 882 (1986), *aff’d sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

159. Mitchell H. Rubenstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, n.92 (2006).

160. *Id.*

161. *Three D, LLC*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).

a former employee. Final resolution of this case may bring greater clarity with respect to the treatment of social networking under the NLRA.

The ALJ in *Triple Play* concluded that the employees' posts were protected concerted activity because they grew out of prior employee discussions relating to complaints about their individual tax liabilities resulting from the employer's treatment of their earnings, the content of the posts discussed what they intended to raise at an upcoming meeting called with the employer, and they discussed possible administrative remedies to explore.<sup>162</sup> In reaching her decision, the ALJ did not find it significant that bar customers had access to the Facebook page, which was maintained by a former employee who participated in the exchange.<sup>163</sup> The ALJ also found the content of the posts remained protected under the standards set forth in *Atlantic Steel Co.* noting that the comments did not take place at work, the subject of the posts related to their wages, and the content did not contain offensive language sufficient to remove them from protections under the NLRA.<sup>164</sup>

The definition and application of the concepts "protected concerted activities" and "mutual aid and protection" are at the heart of NLRB precedent concerning social networking by employees. Whether NLRB precedent and analyses will be followed under public sector collective bargaining statutes, however, will depend on how each public sector collective bargaining law was drafted and how it has been interpreted.

The next subsection examines precedent under collective bargaining and tenure statutes with respect to the scope of protections for social networking in three states: Michigan, Florida and New York.

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162. *Id.*

163. *Id.*; but see Advice Memorandum from NLRB Office of Gen. Counsel to Daniel Hubbel, Reg'l Dir. of Region 17, Cox Comm'n, No. 17-CA-087612 (Oct. 19, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580d6f53f> (directing dismissal of an unfair labor charge alleging that an employer unlawfully terminated an employee because the employee's Google+ posting was addressed at a customer and it contained vulgar words of language about the customer, which did not constitute protected concerted activity).

164. *Three D, LLC*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012). Legal problems might arise under the NLRA if a union or employer fails to carefully monitor and maintain its own social networking page against inappropriate posts. See *Amalgamated Transit Union, Local Union No. 1433, AFL-CIO*, Case No. 28-CB-78377 (N.L.R.B. Div. of Judges Nov. 28, 2012). In that case, an ALJ dismissed a portion of an unfair labor practice complaint against a union for allegedly violating § 8(b)(1)(A) of the NLRA based upon posts made by rank and file members, who were not union representatives, on the union's social networking page threatening other employees with less favorable representation and physical harm based upon their failure to participate in an on-going strike. The ALJ rejected the NLRB Acting General Counsel's contention that the union had an affirmative legal obligation to disavow the threatening comments because the mere posting did not make the union the speaker or publisher. The ruling, if affirmed by the NLRB Board, might have legal relevance for employers who maintain social media pages.

*C. Protections for Social Networking Activities under Public Sector Laws*

Social networking by government employees can be protected under collective bargaining laws, tenure statutes, and negotiated just cause provisions. Even when public sector collective bargaining is prohibited or merely permissive in a particular jurisdiction, public employees frequently have statutory due process protections or contractual rights limiting an employer's authority to discipline.

Procedural protections against discipline in public employment are particularly important at a time when an off-duty post can go viral and lead to workplace repercussions. The existence of statutory and contractual protections against discipline is not a license for misconduct, incompetence, immaturity, or unprofessionalism. Rather, they constitute checks against arbitrary, unreasonable, or retaliatory governmental action. Such checks are essential in the government setting because, to paraphrase Madison, public officials and employees are not all angels.<sup>165</sup>

Although there have been judicial decisions resolving public employee electronic communicative misconduct cases, few decisions have been issued in Michigan, Florida, and New York concerning social networking as a protected activity under their respective public sector collective bargaining laws. Each state, however, has a body of administrative and judicial precedent delineating the contours of statutory liberties in their jurisdiction. Public sector collective bargaining laws and precedent can grant greater or narrower privileges and liberties than the NLRA. When those distinctions exist, federal precedent becomes far less relevant for determining the scope of protections for social networking in the public sector.

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165. See THE FEDERALIST NO. 51 (James Madison): "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." As Diane Ravitch has explained concerning job security protections in the public sector:

"Tenure is not a guarantee of lifetime employment but a protection against being terminated without due process. It does not protect teachers from being laid off in a recession, nor does it protect them from being fired for incompetence. Why does due process matter? Teachers have been fired for all sorts of dubious and non-meritorious reasons: for being of the wrong race or religion, for being gay or belonging to some other disfavored group, for not contributing to the right politician, for not paying a bribe to someone or their job, for speaking out on an issue outside the classroom, for disagreeing with the principal, or simply to make room for a school board member's sister, nephew, or brother-in-law."

DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 176 (2010).

### 1. Michigan

Like the NLRA, the Michigan Public Employment Relations Act (MPERA)<sup>166</sup> grants many public employees within the state a right to participate in union activities, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.<sup>167</sup> MPERA was drafted based on the provisions of the NLRA, and NLRB precedent is considered when applying MPERA.<sup>168</sup> The similarities with the NLRA are reflected in the wording of Section 423.209 of MPERA, which states:

It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, *to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection*, or to negotiate or bargain collectively with their public employers through representatives of their own choice.<sup>169</sup>

Under MPERA, it is an unfair labor practice for a Michigan public employer ‘to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in [Section 423.209].’<sup>170</sup>

To prove that an unfair labor practice has taken place in a mixed motive case, it must be demonstrated that protected concerted activity under MPERA was a motivating or substantial factor in the employer’s decision.<sup>171</sup> If that is shown, the burden shifts to the employer to demonstrate that it would have taken the same action in the absence of the protected activity.<sup>172</sup> The shifting burden approach under MPERA is clearly modeled upon NLRB precedent.<sup>173</sup>

The decision by the Michigan Employment Relations Commission (MERC) in *City of Detroit (Police Department)*<sup>174</sup> suggests how that agency might treat social networking as a protected activity under MPERA. In that case, MERC concluded that the employer violated MPERA when it ordered a police officer to discontinue operating an off-duty website that he, his fellow officers, and the

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166. MICH. COMP. LAWS §§ 423.201-423.217 (2012).

167. MICH. COMP. LAWS § 423.209(1)(a) (2012).

168. *MERC v. Reeths-Puffer Sch. Dist.*, 215 N.W.2d 672, 674-675 (1974).

169. MICH. COMP. LAWS § 423.209(1)(a) (2012) (emphasis added).

170. MICH. COMP. LAWS § 423.210 (2012).

171. *Mich. Educ. Support Pers. Ass’n v. Ewart Pub. Sch.*, 336 N.W.2d 235 (Mich. Ct. App. 1983).

172. *Id.*

173. *See Wright Line*, 251 N.L.R.B. No. 150 (1980), *enforced* *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

174. 19 MPER ¶ 15 (2006), *aff’d*, *City of Detroit v. Detroit Police Officers Ass’n*, 2007 WL 4248562 (Mich. Ct. App. 2007).

public used to discuss police department affairs, and when it suspended him for refusing to do so.<sup>175</sup>

The police officer had created and maintained the website with his own funds for three purposes: to establish a web-based forum for police officers to express their views concerning departmental working conditions; to publish information for a wider audience about the City of Detroit's municipal leadership; and to provide comic relief through publication of his own satirical fiction.<sup>176</sup> While the website was not sanctioned or funded by his union, MERC found that it constituted a lawful concerted activity for mutual aid and protection because it was used, in part, to address work-related issues including wages, promotions, and discipline, and it provided a forum for officers to post comments.<sup>177</sup> Although the website was used for other purposes with no direct connection to workplace conditions, MERC found that that content did not supersede MPERA protections unless the employer demonstrated that it had an adverse impact on the employer's legitimate interests.<sup>178</sup> With respect to the latter issue, MERC found that racist, sexist, and otherwise offensive statements posted on the website did not impact the employer's interests because they were made off-duty and there was no evidence that they affected the performance of other officers.<sup>179</sup>

In *City of Detroit (Police Department)*,<sup>180</sup> MERC applied an arguably broader approach to protected concerted activity than that applied under the NLRA. MERC's analysis did not refer to the NLRA test under *Meyers I* and *Meyers II* for protected concerted activity and MERC did not expressly find that the website was aimed at initiating, inducing, or preparing for collective action about workplace conditions.<sup>181</sup> In addition, unlike the NLRB decision in *Karl Knauz*,<sup>182</sup> MERC rejected the employer's claim that its actions were lawful because it was motivated by the unprotected portions of the posts under Michigan's collective bargaining law. As discussed in Part II(B), *supra*, the NLRB dismissed the charge in *Karl Knauz* because the employer demonstrated

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175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*; *Cf. Ingham Cnty. v. Capitol City Lodge No. 141*, 739 N.W.2d 95, 101 (Mich. Ct. App. 2007) *appeal denied*, 739 N.W.2d 95 (2007). ("According to the United States Court of Appeals for the Third Circuit, to qualify as a protected activity, 'it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.'") (quoting *Mushroom Transportation Co., Inc v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964)).

182. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 2012-13 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012).



that the discharge was motivated by an unprotected post unrelated to workplace terms and conditions, rather than the employee social media comments about the sales event. The distinct approaches by MERC and the NLRB might reflect the constitutional civil liberties applicable only to public employees as well as the breadth of the city's order to shut down the website, which implicates First Amendment protections against prior restraint. MERC's analysis might have importance in future MPERA social networking cases because that medium's culture frequently results in postings with content combining workplace issues with non-work topics, and between co-workers and individuals unconnected with the workplace.

An overly broad reading of *City of Detroit (Police Department)* must be tempered with consideration of two MERC decisions from 2012. In *City of Detroit (Water & Sewage Dept)*,<sup>183</sup> *Meyers I* and *Meyers II* were expressly cited in support of dismissing an unfair labor practice charge because the employee's workplace complaint during a supervisory meeting to discuss the employee's work performance was not a concerted activity even though the meeting was attended by a union representative.<sup>184</sup> NLRB standards were applied again in *Genesee Township Police Department*<sup>185</sup> to conclude that an e-mail sent by a laid-off employee to his union president and fellow laid-off employees urging them to join him in fighting against the layoffs was protected concerted activity for mutual aid and protection.<sup>186</sup>

In general, employee comments made in the course of protected concerted activity that are rude, insulting, or offensive will retain their protections under MPERA unless the conduct is "so flagrant or extreme as to seriously impair the maintenance of discipline or render that individual unfit for future service."<sup>187</sup> Similarly, employee misconduct "in the course of concerted activity, including insubordination, is not beyond an employer's right to discipline."<sup>188</sup> To determine whether employee conduct has gone beyond the pale and, therefore, lost statutory protections, MERC will examine the full context of the behavior including time, place, and audience.<sup>189</sup>

The first MERC decision involving social media was *Mid-Michigan Community College*.<sup>190</sup> In that case, the agency dismissed an unfair labor practice charge alleging that an at-will adjunct professor was discharged in

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183. 17 MPER ¶ 79 (2004).

184. *Id.*

185. 26 MPER ¶ 3 (2012).

186. *Id.*

187. *Id.*

188. AFSCME, Mich. Council, Local 574-A v. City of Troy, 462 N.W.2d 847 (Mich. Ct. App. 1990) (quoting with approval portions of the MERC hearing officer's decision).

189. *See id.*

190. 26 MPER ¶ 4 (2012).

retaliation for meeting with union representatives about an organizing drive and by sending emails to the adjunct faculty and the college president announcing the campaign's commencement.<sup>191</sup> While the professor's union organizing efforts were clearly protected under MPERA, the college was found to have not violated MPERA because its decision to discharge was motivated by the professor's inappropriate and unprofessional Facebook posts concerning a student.<sup>192</sup>

The scope of statutory protections under MPERA for employee's use of employer equipment to distribute e-mail in the workplace is likely to be relevant in future social networking cases. In *City of Saginaw*,<sup>193</sup> MERC affirmed an ALJ's decision finding an employer violated MPERA when it disciplined a police officer for sending a group e-mail through the employer's computer system criticizing the employer for engaging in bad faith bargaining, and making a negative reference to the city manager's relationship with a public administrator's organization.<sup>194</sup> The e-mail was found to be protected concerted activity because it discussed the employer's conduct during negotiations, and the reference to the city manager was in the context of the discussion concerning negotiations.<sup>195</sup> Finally, MERC found the discipline to be discriminatory under MPERA because other employees were permitted to send non-work related emails through the system, and the union used the system to send e-mails to its members.<sup>196</sup>

Well before the development of Web 2.0, the Michigan Supreme Court recognized that the state's civil service law provides general protections for employees to engage in lawful off-duty activities:

[The Civil Service Commission's] power does not extend, however, to the blanket prohibition of off-duty activities, political or otherwise, as a matter of policy simply because such activities may conceivably interfere with satisfactory job performance. What an employee does during his off-duty hours is not of proper concern to the Civil Service Commission unless and until it is shown to adversely affect job performance. Even then the commission's authority is not to curtail the off-hours activity, it is to deal with the adequacy of job performance. Certainly, it is within contemplation that off-duty political involvement may adversely affect a classified employee's performance at work. If

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191. *Id.*

192. *Id.*; see also *Rodriguez v. Wal-Mart Stores*, No. 3:11-CV-2129-B, 2013 WL 102674, at \*6 (N.D. Tex. 2013) (supervisor's criticism of subordinates in social media posts constituted a legitimate nondiscriminatory reason for her termination because it violated the employer's policy).

193. 23 MPER ¶ 106 (2010).

194. *Id.*

195. *Id.*

196. *Id.*

and when it does, the commission is empowered to deal with such circumstances on a case-by-case basis.<sup>197</sup>

Tenure protections for lawful off-duty activities can extend far afield from political and civic engagement. In 2007, a Michigan teacher was terminated after photographs were posted on a website showing her engaged in oral sex with a male mannequin during an off-duty 2005 party.<sup>198</sup> The photographs were taken during the party without the teacher's knowledge and posted on the website without her consent.<sup>199</sup> As would be expected, news within the school spread rapidly resulting in some industrious students abandoning their studies for peeks at the photographs.<sup>200</sup> Although the photographs were removed from the website at the teacher's insistence, the school district terminated her for engaging in lewd behavior that undermined her moral authority and professional responsibility.<sup>201</sup> Upon review, the State Tenure Commission reversed the discharge on the grounds the event took place at a private party two years earlier with no students present, the conduct was not illegal, it did not have any nexus to school activities, and it was not related to her pedagogical responsibilities.<sup>202</sup> Despite the negative publicity caused by the posting of the photographs, the State Tenure Commission concluded that it was insufficient to demonstrate just and reasonable cause under Michigan's teacher tenure law.<sup>203</sup>

In 2011, the Michigan legislature lessened the standard for terminating a tenured teacher from just and reasonable cause to "a reason that is not arbitrary and capricious."<sup>204</sup> This modification may well affect future Michigan teacher disciplinary cases involving employer reactions to social networking activities

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197. Council No. 11, Am. Fed'n of State, Cnty. and Mun. Emp. (AFSCME), AFL-CIO v. Mich. Civil Serv. Comm'n, 292 N.W.2d 442, 451 (Mich. 1980) (holding that a state Civil Service Commission prohibition against political activities by civil service employees violated Michigan's statute granting state classified civil service employees the right to engage in off-duty political action).

198. Land v. L'Anse Creuse Pub. Sch. Bd. of Educ., No. 288612, 2010 WL 2135356 (Mich. Ct. App. 2010), *appeal denied*, 789 N.W.2d 458 (Mich. 2010).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* In contrast, the discharge of an Ohio high school mathematics teacher was upheld by an arbitrator under contractual just cause and progressive discipline provisions after the teacher's estranged wife posted obscene nude photographs of him on websites and on a popular social media page. The arbitrator upheld the termination because high school students were able to access the photographs thereby undermining the teacher's role model status and his credibility. The arbitrator criticized the teacher for failing to secure the photographs, from failing to take appropriate legal action in response to his estranged wife's threats, and in failing to warn his principal of the potential release of the photographs. Warren Cnty. Bd. of Educ., 124 Lab. Arb. Rep. (BNA) 532 (2007) (Skulina, Arb.).

204. 2011 Mich. Pub. Acts 100.

that are not protected concerted activity under that state's collective bargaining law.

## 2. Florida

Unlike Michigan and New York, the Florida state constitution includes an explicit right of public employees to bargain collectively:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.<sup>205</sup>

Under the state constitutional provision, Florida public employees have a right to collectively bargain like private sector employees, but without the right to strike.<sup>206</sup> Florida precedent recognizes that due to the inherent differences between public and private sector collective bargaining, it is impractical to adopt, in whole, analogous private sector precedent.<sup>207</sup>

Florida's public sector collective bargaining statute, like Michigan's law, is modeled after the NLRA. Section 447.301 of the Florida Public Employees Relations Act (FPERA) states:

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.<sup>208</sup>

The Florida Public Employees Relations Commission (FPERC) has concluded that the state legislature intended for FPERA to grant public employees "a very broad scope of protection' for any concerted activity relating to employees' employment relationship"<sup>209</sup> This construction is premised, in part, on FPERA's free speech clause, which states:

Notwithstanding the provisions of subsections (1) and (2), the parties' rights of free speech shall not be infringed, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair

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205. FLA. CONST., Art. 1, § 6.

206. Dade Cnty. Classroom Teachers Ass'n, Inc. v. Ryan, 225 So. 2d 903 (Fla. 1969); Dade Cnty. Classroom Teachers Ass'n, Inc. v. Legislature, 269 So. 2d 684 (Fla. 1972).

207. See United Teachers of Dade FEA/United AFT, Local 1974, AFL-CIO v. Dade Cnty. Sch. Bd., 500 So. 2d 508, 512 (Fla. 1986).

208. FLA. STAT. § 447.301(3) (2003) (emphasis added).

209. City of N. Port, 15 FPER ¶ 20179 (1989) (quoting City of Venice, 4 FPER ¶ 4059, at 130 (1978)).

employment practice or of any violation of this part, if such expression contains no promise of benefits or threat of reprisal or force.”<sup>210</sup>

This statutory free speech clause might form the legal basis for public employees in Florida to have greater protections for social networking than employees in other states.

To demonstrate that an employer violated FPERA through an adverse personnel action, a preponderance of evidence must be presented proving that the conduct was protected and it was a substantial and motivating factor in the employer’s decision.<sup>211</sup> If the employer was motivated by an impermissible reason under FPERA, the burden shifts to the employer to demonstrate that it would have taken the same adverse action anyway.<sup>212</sup> Like Michigan, Florida’s shifting burden standard is analogous to the standard applied under the NLRA.<sup>213</sup>

In order for conduct to be protected under FPERA, it must be concerted in nature.<sup>214</sup> The applicable test for determining that issue is whether it was for “the well-being of fellow employees.”<sup>215</sup> Unlike NLRB precedent, in order for a contract grievance to be protected under FPERA, it has to seek more than personal benefits for the grievant or it must have been “prepared in collaboration with or on behalf of employees other than himself.”<sup>216</sup> In Florida, personal complaints about work or a supervisor do not constitute protected concerted activity.<sup>217</sup> As a result, “criticism for ‘criticism’s sake’” is treated as mere griping and not an effort to obtain a remedy over wages, hours, and other terms and conditions.<sup>218</sup> Therefore, content of an employee’s social networking posts limited to venting about workplace issues will not be found protected under FPERA.

In one case, FPERC concluded that a police union president engaged in protected concerted activity when his two articles were posted on the union’s website discussing contract issues, which contained disparaging, belittling, and

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210. FLA. STAT. § 447.501(3) (2003).

211. *Pasco Cnty. Sch. Bd. v. Fla. Pub. Emp. Relations Comm’n*, 353 So. 2d 108, 117 (Fla. Dist. Ct. App. 1977).

212. *Id.*

213. *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced* *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

214. *City of Cape Coral*, 39 FPER ¶ 185 (2012) (quoting *City of Venice*, 4 FPER ¶ 4059 (1978)).

215. *Id.*

216. *City of Mount Dora*, 8 FPER ¶ 13260 (1982).

217. *Id.*

218. *City of Palm Beach Gardens*, 17 FPER ¶ 22052 (1991), *aff’d*, *Palm Beach Cnty. Firefighters v. City of Palm Beach Gardens*, 590 So. 2d 50 (Fla. Dist. Ct. App. 1991).

insubordinate statements about the sheriff's chief deputy.<sup>219</sup> The agency's decision was based upon prior precedent concluding that Florida's state collective bargaining law mandated a "very high degree of protection for speech uttered in the context of public sector labor-management relations."<sup>220</sup>

When a Florida public employee engages in speech or an activity that is libelous, coercive, physically threatening, or "creates a real threat of immediate disruption in the workplace," it will be found to be unprotected.<sup>221</sup> Similarly, "[i]nsubordinate behavior, including a verbal act, that creates a real threat of disruption in the workplace is not protected even if the employee acts in concert with others."<sup>222</sup> As a result, Florida public employees, like their private sector counterparts under NLRA, need to apply self-restraint in the manner in which they engage in concerted activities in cyberspace to avoid losing protections under FPERA.

Finally, the scope of protected activities between public employees during working hours is constrained by a particular provision in FPERA.<sup>223</sup> It is unlawful for a union or its members to engage in solicitation during working hours or to distribute literature during working hours in areas where work is performed except during an employee's lunch hour or in areas not specifically devoted to performance of official duties.<sup>224</sup> Based upon those restrictions, FPERC dismissed a charge alleging that an employer engaged in an unfair labor practice when it disciplined a union official for sending an e-mail from his personal account while on vacation to sheriff's employees at their work e-mail addresses.<sup>225</sup> The e-mail urged the employees to vote against a pending labor agreement negotiated by an incumbent union and encouraged them to join his competing union.<sup>226</sup>

### 3. New York

The scope of statutory protections for employee activities under New York's Public Employees' Fair Employment Act,<sup>227</sup> commonly referred to as the Taylor

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219. David Gee, Sheriff of Hillsborough Cnty., Fla., 35 FPER ¶ 191, 2009 WL 8157366 (2009), *aff'd*, Sheriff of Hillsborough Cnty. v. Dickey, 32 So. 3d 631 (Fla. Dist. Ct. App. 2010) (per curiam).

220. Dist. Bd. of Tr. of Palm Beach Junior Coll., 11 FPER ¶ 16101, at 327 (1985), *aff'd*, Dist. Bd. of Tr. of Palm Beach Junior Coll. v. United Faculty of Palm Beach Junior Coll., 489 So. 2d 749 (Fla. Dist. Ct. App. 1986).

221. *Palm Beach Junior Coll.* 11 FPER ¶ 16101; Miami Ass'n of Fire Fighters, 11 FPER ¶ 16007 (1984).

222. Palm Beach Gardens, 17 FPER ¶ 22052.

223. FLA. STAT. § 447.509(1)(a).

224. *Id.*

225. Sheriff of Alachula Cnty., 36 FPER ¶ 16 (2010).

226. *Id.*

227. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 2002).

Law, is more limited than protections under the NLRA, MPERA, and FPERA.<sup>228</sup> Unlike those statutes, the Taylor Law does not protect public employees who engage in concerted activities for mutual aid and protection unrelated to forming, joining or participating in a union.

Section 202 of the Taylor 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.<sup>229</sup>

Under Section 203 of the Taylor Law, New York public employees are guaranteed the right to be represented by a union in collective bargaining with their public employers over terms and conditions of employment, and in the administration of grievances under a negotiated agreement.<sup>230</sup> All public employees and their unions covered by the Taylor Law are prohibited from engaging in strikes or condoning strikes.<sup>231</sup>

An employer engages in an improper practice in violation of Sections of 209-a.1(a) and (c) of the Taylor Law<sup>232</sup> when its conduct is unlawfully motivated by a protected activity under that law. To prove such a violation, it must be demonstrated by a preponderance of evidence that: the charging party engaged in a protected activity under the Taylor Law; such activity was known to the person or persons taking the employment action; and the employment action would not have been taken “but for” the protected activity.<sup>233</sup> If a prima facie case of improper motivation is demonstrated, the employer must demonstrate that it was motivated by a legitimate nondiscriminatory reason, which is subject to

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228. *See* Cnty. of Tioga, 44 NYPERB ¶ 3016 (2011); Love Canal Area Revitalization Agency (Bannister), 28 NYPERB ¶ 3040 (1995).

229. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 2002).

230. *Id.*

231. *Id.*; N.Y. CIV. SERV. LAW § 210(1) states: “No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.”

232. *Id.*; N.Y. CIV. SERV. LAW § 209-a.1 states in relevant part that: “It shall be an improper practice for public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights; and (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization.”

233. United Fed’n of Teachers, Local 2, AFT, AFL-CIO and Bd. of Educ. of the City Sch. Dist. of the City of New York (Jenkins), 41 NYPERB ¶ 3007 (2008), *confirmed sub nom.* Jenkins v. State of New York Pub. Emp. Relations Bd., 41 NYPERB ¶ 7007 (Sup. Ct. N.Y. Cnty. 2008), *aff’d*, 67 A.D.3d 567 (N.Y. App. Div. 2009).

rebuttal.<sup>234</sup> Notably, the shifting burdens under the Taylor Law are distinct from those applied in similar cases under the NLRA, MPERA, and FPERA.<sup>235</sup>

The lack of mutual aid and protection language in Section 202 of the Taylor Law is substantive, and substantially limits the relevance of NLRB case law concerning whether social media posts by unrepresented employees is a protected concerted activity.<sup>236</sup> In fact, the Taylor Law expressly mandates that “fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.”<sup>237</sup>

In *Rosen v. New York Public Employment Relations Board*,<sup>238</sup> the New York Court of Appeals sustained an administrative determination by the New York State Public Employment Relations Board (NYPERB)<sup>239</sup> that a community college teacher who presented grievances on behalf of herself and a group of other employees to the associate dean did not engage in a protected activity under the Taylor Law because there was no evidence that the teachers were in a union, were seeking to form a union, or were being represented by one.<sup>240</sup> The *Rosen* holding demonstrates that, in contrast to the standard set forth in *Meyers I* and *Meyers II*,<sup>241</sup> a New York public employee “bringing truly group complaints to the attention of management” is unprotected unless the complaint is related to forming, joining or participating in a union.

In determining the limited breadth of protections under Section 202 of the Taylor Law, the Court of Appeals compared that Taylor Law provision with the wording of Section 7 of the NLRA:

Conspicuously absent from the formulation of a public employee’s right to organize in section 202 is the additional right guaranteed in the NLRA “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” We conclude from the otherwise parallel terminology in each provision that the Legislature, by omitting from section 202 of the Taylor Law the additional reference to “concerted activity”, intended to afford a public employee only the right to form, join or participate in an employee organization. Because the Legislature has by its definition restricted the reach of section 202, it must not have intended for section 202 to

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234. *Id.*

235. *See* Wright Line, 251 N.L.R.B. 1083 (1980), *enforced* NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

236. N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 2002).

237. N.Y. CIV. SERV. LAW §§ 209-a.6.

238. 526 N.E.2d 25 (N.Y. 1988).

239. Dutchess Cmty. Coll., 17 NYPERB ¶ 3093 (1984).

240. *Rosen*, 526 N.E.2d at 29.

241. *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 888 (1986).



protect precisely the same broad range of employee activity as is protected under section 7 of the NLRA.<sup>242</sup>

The same statutory distinction between the Taylor Law and the NLRA was relied upon in *New York City Transit Authority v. New York Public Employment Relations Board*<sup>243</sup> in overturning a NYPERB decision that found New York public employees had an implicit statutory right under Section 202 of the Taylor Law to union representation during a disciplinary interview. In reaching its decision, the court cited the fact that a private sector right to representation during a disciplinary interrogation under the NLRA was upheld by the U.S. Supreme Court in *NLRB v. J. Weingarten, Inc.*<sup>244</sup> based upon that statute's protection for engaging in concerted activities for mutual aid or protection.<sup>245</sup>

In the absence of mutual aid and protection language in the Taylor Law, New York public employee social networking activities must be related to forming, joining, or participating in a union in order to be protected.<sup>246</sup> New York's public sector union density rate was 73% in New York in 2011-12,<sup>247</sup> but that statistic does not reveal the percentage of union members who participate in union activities, including union-sponsored cyberspace initiatives. It is reasonable to speculate, however, that the vast majority of union members engage in social networking primarily for personal purposes unrelated to any activity that would fall under the protections of Section 202 of the Taylor Law.

NYPERB examines "the totality of all relevant circumstances, with a focus upon the purpose and effect of that activity,"<sup>248</sup> in deciding whether a particular activity is protected. In *County of Tioga*,<sup>249</sup> it described the types of employee activities protected by the Taylor Law:

Employee statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity for purposes of the [Taylor Law]. The wide scope of protected concerted activities under the [Taylor Law] includes statements and activities by a unit employee as part of an employee organizational activity, relates to an employee organization

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242. *Rosen*, 526 N.E.2d at 28-29.

243. 864 N.E.2d 56 (N.Y. 2007).

244. 420 U.S. 251 (1975).

245. *N.Y.C. Transit Auth.*, 864 N.E.2d at 57-58.

246. *Cnty. of Tioga*, 44 NYPERB ¶ 3016 (2011).

247. RUTH MILKMAN & LAURA BRASLOW, JOSEPH S. MURRAY INST. FOR WORKER EDUC. AND LABOR STUDIES AND THE CTR. FOR URBAN RESEARCH, *THE STATE OF THE UNIONS 2012: A PROFILE OF ORGANIZED LABOR IN NEW YORK CITY, NEW YORK STATE, AND THE UNITED STATES* 3 (2012), available at [http://www.ruthmilkman.info/rm/Policy\\_Reports\\_files/Union\\_Density2012\\_re7.pdf](http://www.ruthmilkman.info/rm/Policy_Reports_files/Union_Density2012_re7.pdf).

248. *See Vill. of Scotia*, 29 NYPERB ¶ 3071, 3169 (1996), *confirmed sub nom. Vill. of Scotia v. N.Y. State Pub. Emp. Relations Bd.*, 241 A.D.2d 29 (N.Y. App. Div. 1998).

249. 44 NYPERB ¶ 3016 (2011).

policy, involves employee organizational representation or stems from a dispute emanating from a collectively negotiated agreement.<sup>250</sup>

Under that standard, electronic comments on a union-run social media page will generally be found to be protected under the Taylor Law. Similarly, e-mail encouraging members to engage in protected activities or that discusses a pending grievance is generally protected. While purely partisan political activity by non-policymaking public employees is subject to First Amendment protections,<sup>251</sup> it is not protected under the Taylor Law.<sup>252</sup>

Otherwise protected conduct can be found to be unprotected under the Taylor Law if objective evidence demonstrates, under the totality of the circumstances, that it was overzealous, confrontational, and actually disruptive.<sup>253</sup> To prove that defense, an employer must introduce “objective evidence of disruption emanating from the conduct. It cannot rely upon a mere prediction of disruption or a workplace disruption caused by its own overreaction to the at-issue conduct.”<sup>254</sup> As will be demonstrated in Part III, the requirement that actual disruption take place in order to lose statutory protections is a more rigorous standard than the one applied under the First Amendment.

Inaccurate employee statements are protected under the Taylor Law regardless of whether employer representatives are disturbed, unless it is proven that the inaccuracies were deliberate and intended to falsify, or were maliciously aimed at injuring the employer. Grievances and contract claims are protected under the Taylor Law unless an employer demonstrates that they are undeniably frivolous.<sup>255</sup> A union, however, “has no protected right to use for its benefit information about students obtained by a teacher in the course of his official activities.”<sup>256</sup> Therefore, the posting of student information on a union social media page may constitute an unprotected activity under the Taylor Law.

In *State of New York (Division of Parole)*,<sup>257</sup> NYPARB rejected an employer’s claim that a shop steward’s off-duty e-mail, which encouraged unit members to report to work on a holiday to test a contractual argument, was unprotected. NYPARB concluded that the e-mail could not be reasonably

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250. *Id.*

251. *Infra* Part IV(A).

252. *See* City of Saratoga Springs, 18 NYPARB ¶ 3009 (1985).

253. Kings Park Cent. Sch. Dist., 24 NYPARB ¶ 3026 (1991); Erie Cnty. Water Auth., 24 NYPARB ¶ 3046 (1991); Greenburgh No. 11 Union Free Sch. Dist., 30 NYPARB ¶ 3052 (1997), *confirmed sub nom.* Greenburgh No. 11 Union Free Sch. Dist. v. Kinsella, 253 A.D.2d 46 (N.Y. App. Div. 1999), *leave to appeal denied*, 716 N.E.2d 697 (N.Y. 1999).

254. Cnty. of Tioga, 44 NYPARB ¶ 3016 (2011).

255. N.Y.C. Transit Auth., 37 NYPARB ¶ 3013 (2004).

256. Deer Park Union Free Sch. Dist., 11 NYPARB ¶ 3043, 3065 (1978).

257. 41 NYPARB ¶ 3033 (2008).

construed as seeking to disrupt, confront, or to instigate an unprotected protest.<sup>258</sup> In contrast, NYPERB found in *State of New York (Public Employees Federation)*<sup>259</sup> that an employer did not violate the Taylor Law when it blocked a union activist's access to its e-mail system, because it was motivated by the activist's insubordination for refusing to stop sending controversial blast e-mails to union members relating to budgetary and collective bargaining issues.<sup>260</sup>

Public employees in New York have other possible statutory protections for social networking activities. New York Labor Law § 201-d prohibits, in general, workplace discrimination and retaliation against employees who engage in off-duty political or recreational activities.<sup>261</sup> Neither Michigan nor Florida has a similar statute. Presumably, off-duty social networking using a personal device would satisfy the definition of a recreational activity under New York Labor Law § 201-d(1)(b).<sup>262</sup> While courts have not yet decided the applicability of the statute to social networking, the law explicitly excludes protections for any activity that takes place on the employer's premises or with the use of employer equipment and property.<sup>263</sup> It also excludes conduct that creates a conflict of interest or constitutes a violation of applicable public sector ethical rules and limitations.<sup>264</sup>

Many public employees in New York are entitled to statutory due process protections against discipline or are subject to negotiated disciplinary arbitration provisions.<sup>265</sup> There have been three New York court decisions that reviewed disciplinary actions taken against public employees based upon their on-line behavior. All three decisions were issued in the context of judicial review of

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258. *Id.*

259. 33 NYPERB ¶ 3046 (2000), *confirmed sub nom. In re Benson v. Cuevas*, 293 A.D.2d 927 (N.Y. App. Div. 2002).

260. *Id.*

261. *See In re Richardson v. City of Saratoga Springs*, 246 A.D.2d 900 (N.Y. App. Div. 1998); *Melendez v. N.Y.C. Hous. Auth.*, 280 A.D.2d 388 (N.Y. App. Div. 2001); *Wehlage v. Quinlan*, 55 A.D.3d 1344 (N.Y. App.Div. 2008) (concerning protections for political activities).

262. N.Y. LABOR LAW § 201(d)(1)(b) (McKinney 2009) states: "Recreational activities' shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material." *Cf. State v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150 (N.Y. App. Div.1995) (holding that a dating relationship does not satisfy the definition of a recreational activity under the statute).

263. N.Y. LABOR LAW § 201(d)(2)(a).

264. *Id.* at d(3)(a)-(d).

265. *E.g.*, N.Y. CIV. SERV. LAW § 75 (McKinney 2011); N.Y. EDUC. LAW § 3020-a (McKinney 2009); N.Y. TOWN LAW §§ 154-155 (McKinney 2004). *See also In re Auburn Police Local 195, Council 82, AFSCME, AFL-CIO v. Helsby*, 62 A.D.2d 12 (N.Y. App.Div. 1978), *aff'd*, 389 N.E.2d 1106 (N.Y. 1979) (disciplinary arbitration procedures to replace Civ. Ser. Law § 75 is a mandatory subject of negotiations under the Taylor Law); *Town of Wallkill v. Civil Serv. Emp. Ass'n, Inc.*, 979 N.E.2d 1147 (N.Y. 2012) (police disciplinary procedures to replace Town Law §§ 154 and 155 is a prohibited subject of negotiations under the Taylor Law).

statutorily mandated disciplinary procedures. Absent from the decisions are facts explaining the allure of the electronic medium for unfiltered thoughts, feelings, and conduct.

In *City School District of the City of New York v. McGraham*,<sup>266</sup> New York courts at every level grappled with the appropriateness of the arbitral disciplinary penalty imposed on a tenured high school teacher found guilty of serious misconduct for the content of her electronic communications with and about a 15-year old student.<sup>267</sup> During the arbitration, the evidence established that the teacher provided the student with her personal e-mail address, and frequently communicated electronically with him after school about cultural and personal issues.<sup>268</sup> Although she never acted upon her feelings, the communicative exchanges and her anonymous blog entries demonstrated feelings that went well beyond those appropriate for a teacher-student relationship.<sup>269</sup>

Despite the seriousness of her misconduct, the arbitrator imposed a ninety-day suspension without pay and directed that the teacher be assigned to another school.<sup>270</sup> In deciding that the discharge was inappropriate, the arbitrator considered the teacher's remorse when confronted with the allegations, her cessation of communications with the student, the abandonment of her personal blog, and the fact she obtained professional therapy to heal the emotional issues that led to her misconduct.<sup>271</sup> Efforts by the school district to have the arbitral penalty vacated, as violative of public policy, were unsuccessful. The unanimous New York Court of Appeals concluded that, regardless of the facts in a particular case, the broad public policy favoring protection of children did not constitute an absolute mandate requiring vacatur of an arbitral penalty short of discharge.<sup>272</sup>

In a second teacher misconduct case, an intermediate appellate court affirmed the judicial vacatur of the discharge of a New York City tenured teacher for making inappropriate off-duty Facebook posts after the drowning death of a school district student.<sup>273</sup> In one post, the teacher stated: "After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I

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266. 958 N.E.2d 897 (N.Y. 2011).

267. *Id.*

268. *Id.* at 898.

269. *Id.*

270. *Id.*

271. *Id.*

272. *City Sch. Dist. of City of New York v. McGraham*, 958 N.E.2d 897, 898-99 (N.Y. 2011).

273. *In re Rubino v. City of New York*, 950 N.Y.S.2d 494 (N.Y. Sup. Ct. 2012), *aff'd*, 965 N.Y.S.2d 47 (N.Y. App. Div. May 7, 2013). See also Andy Newman, *Teacher's Facebook Post Didn't Warrant Firing, A Panel Upholds*, NY Times, May 9, 2013, at A27, available at [http://www.nytimes.com/2013/05/09/nyregion/brooklyn-teacher-who-talked-out-of-school-can-keep-her-job.html?ref=nyregion&\\_r=1&](http://www.nytimes.com/2013/05/09/nyregion/brooklyn-teacher-who-talked-out-of-school-can-keep-her-job.html?ref=nyregion&_r=1&).

HATE THEIR GUTS! They are the devils [sic] spawn!"<sup>274</sup> She also answered a responsive post from a Facebook friend by indicating that she would not throw a life jacket to a drowning student.<sup>275</sup> The termination imposed by the arbitrator was set aside based upon the teacher's unblemished 15-year career, the posts were made off-duty following a difficult day at school, they were deleted three days after they were posted, students and parents were not on-line friends of the teacher, and the comments did not impact her ability to teach and did not harm her students.<sup>276</sup>

In the third case, New York courts sustained the discharge of a Fire Department emergency medical services supervisor and lieutenant, who posted on his Facebook page a photograph of a computer screen containing the name, address, and confidential medical information of a female 911 caller, which was accessible to hundreds of his Facebook friends. At the time of the posting, the lieutenant knew that the disclosure of patient information violated departmental rules and was a breach of trust.<sup>277</sup>

To discourage employee misconduct and ensure that the benefits of social media outweigh the potential harm, many departments and agencies are developing social media policies that distinguish between official and personal.<sup>278</sup> Private sector employers are also imposing social media policies to avoid commercial harm, the disclosure of confidential information, and the creation of a discriminatorily hostile work environment, and for other business reasons.<sup>279</sup> The content of workplace policies can also limit the scope of privacy

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274. *Id.*

275. *Id.*

276. *Id.*

277. *In re Palleschi v. Cassano*, 102 A.D.3d 603 (N.Y. 2013).

278. See Karen Matthews, *School Social Media Policies: Should Teachers And Students Be Facebook Friends?* HUFF. POST (Apr. 18, 2012, 5:28 PM), [http://www.huffingtonpost.com/2012/04/18/should-teachers-and-stude\\_0\\_n\\_1435728.html](http://www.huffingtonpost.com/2012/04/18/should-teachers-and-stude_0_n_1435728.html) (reporting that at least forty school districts have implemented social media policies); N.Y.C. Dept. of Educ., NYC Department of Education Social Media Guidelines (Spring 2012), available at <http://schools.nyc.gov/NR/rdonlyres/BCF47CED-604B-4FDD-B752-DC2D81504478/0/DOESocialMediaGuidelines20120430.pdf> [hereinafter *Social Media Guidelines*]; INT'L ASS'N OF CHIEFS OF POLICE, DEVELOPING A CYBERVETTING STRATEGY FOR LAW ENFORCEMENT: SPECIAL REPORT 4-21 (Dec. 2010), <http://www.iacpsocialmedia.org/Portals/1/documents/CybervettingReport.pdf>. Maxwell School of Citizenship and International Affairs Professor Ines Mergel has posted a large sampling of social media policies issued by federal departments and agencies, which are available at <http://inesmergel.wordpress.com/research/social-media-policies/>.

279. See Richard A. Paul & Lisa Hird Chung, *Brave New Cyberworld: The Employer's Guide to the Interactive Internet*, 24 LAB. LAWYER 109, 120 (2008); see also Stephanie Chen, *Workplace rants on social media are headache for companies*, CNN LIVING (May 12, 2010, 12:48 PM), <http://www.cnn.com/2010/LIVING/05/12/social.media.work.rants/index.html>; see also Ralph Paglia, *Social Media Employee Policy Examples from Over 100 Organizations*, SOCIALMEDIATODAY (Jul. 3, 2010), <http://socialmediatoday.com/ralphpaglia/141903/social-media-employee-policy-examples-over-100-companies-and-organizations>.

protections employees may have with respect to the content of their social media pages under applicable law.<sup>280</sup>

Constructing the proper balance in a social networking policy can be as difficult as drafting a general internet use policy.<sup>281</sup> Both forms of policies can alienate productive employees, and might adversely impact recruitment of younger employees raised in the culture of social networking. The right to implement and apply such workplace policies, however, is subject to legal restrictions under the NLRA and analogous laws in Michigan, Florida, and New York, particularly when it places limitations upon an employee's off-duty conduct. We shall now turn to those statutory restrictions, beginning with the NLRA.

### III. THE LAWFULNESS OF EMPLOYER SOCIAL MEDIA POLICIES

#### A. *Policies that Chill Protected Concerted Activities under the NLRA*

Although media attention regarding the NLRB case from New Haven focused on the lawfulness of terminating an employee based upon Facebook postings, an issue of wider significance in that case was the allegation that the company's written workplace rules were overbroad and tended to chill the liberty of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" under Section 7 of the NLRA.<sup>282</sup> Whether maintenance of a particular workplace policy violates Section 8(a)(1) of the NLRA will depend upon the specific content of each particular policy and rule.

The lawfulness of employer policies under Section 8(a)(1) of the NLRA was the subject of the first two 2012 NLRB Board decisions relating to social media. In *Costco*,<sup>283</sup> it held that certain workplace policies maintained by Costco violated Section 8(a)(1) of the NLRA because its employees would reasonably construe those policies as prohibiting or restricting activities protected by Section 7 of the NLRA.<sup>284</sup> Among the policies found to violate Section 8(a)(1) of the NLRA was a provision of the employee handbook entitled "Electronic Communications and Technology Policy," which stated in part:

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280. Herbert, *supra* note 154, at 59-62.

281. Herbert, *supra* note 154, at 63.

282. See Phillip L. Gordon, Labor Mgmt. Relations Practice Grp., *Case to Watch: NLRB Challenges Employer's Termination of Employee Based on Violation of Social Media Policy*, LABORRELATIONSCOUNSEL.COM (Nov. 4, 2010), <http://www.laborrelationscounsel.com/labor-management-relations/case-to-watch-nlr-b-challenges-employers-termination-of-employee-based-on-violation-of-social-media-p/>.

283. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012-13 NLRB Dec. (CCH) ¶ 15602 (Sept. 7, 2012).

284. *Id.*

Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.<sup>285</sup>

In *Costco*, the NLRB concluded the policy's broad prohibition against communications that "damage the Company, defame any individual or damage any person's reputation" implicitly includes employee statements and activities protesting workplace conditions.<sup>286</sup> In reaching that conclusion, the agency noted that "there is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule."<sup>287</sup> In finding the work rule violated Section 8(a)(1) of the NLRA, the NLRB reversed a contrary conclusion by an ALJ who found that employees would not reasonably interpret the rule as restricting or inhibiting Section 7 activities; rather, the ALJ concluded that employees would reasonably infer that it was a workplace civility rule.<sup>288</sup>

Prior to *Costco*, there was established NLRB precedent concerning whether maintenance of particular work rules violate Section 8(a)(1) of the NLRA.<sup>289</sup> Under that case law, if an employer maintains an explicit rule restricting employees from engaging in activities protected under Section 7 of the NLRA, the rule is unlawful.<sup>290</sup> Therefore, an employer's rule expressly prohibiting employees from discussing terms and conditions of employment with each other through social media would be unlawful. Even if a workplace rule is not explicit, it still can be found to violate Section 8(a)(1) of the NLRA, "upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response

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285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *See* Lafayette Park Hotel, 326 N.L.R.B. 824 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999); Flamingo Hilton-Laughlin, 330 N.L.R.B. 287 (1999); Ark Las Vegas Rest. Corp., 335 N.L.R.B. 1284 (2001); Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004); Albertsons, Inc., 351 N.L.R.B. 254 (2007); Crown Plaza Hotel, 352 N.L.R.B. 382 (2008); NLS Group, 352 N.L.R.B. 744 (2008); Roomstores of Phoenix, LLC, 357 N.L.R.B. No. 143, 192 L.R.R.M. (BNA) 1485 (Dec. 20, 2011).

290. *See Lutheran Heritage Village-Livonia*, 343 N.L.R.B. at 646.

to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”<sup>291</sup>

The primary issue in NLRB decisions concerning the lawfulness of an employer policy under Section 8(a)(1) is whether it contains a work rule that would be reasonably construed by the employees as restricting them from engaging in protected activities under Section 7 of the NLRA. In determining whether a particular rule would chill protected activities, the rule will be read in context of the policy and without a strained construction of its language.<sup>292</sup> Broad ambiguous restrictions may be found to violate the NLRA unless the rule contains clarifying language about its inapplicability to the rights and liberties protected by Section 7 of the NLRA or sets forth a list of examples of unprotected conduct that would lead a reasonable employee to conclude that the rule does not restrict NLRA protected activity.<sup>293</sup>

Applying those standards, the NLRB in *Costco* affirmed the ALJ’s dismissal of a separate allegation in the complaint that the “appropriate business decorum” provision in the following section of the same electronic communication policy did not violate Section 8(a)(1) of the NLRA because employees would not reasonably conclude that it restricted their rights to engage in concerted activities:

Costco recognizes the benefits associated with electronic communications for business use. All employees are responsible for communicating with appropriate business decorum whether by means of e-mail, the Internet, hard-copy, in conversation or using other technology or electronic means. Misuse or excessive personal use of Costco technology or electronic communications is a violation of Company policy for which you may be disciplined, up to and including termination of employment. Your use of Costco technology and electronic communication systems represents your agreement with the following policies.<sup>294</sup>

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291. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. at 646-47; *Lafayette Park Hotel*, 326 N.L.R.B. at 825 (“The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement.”) (citations omitted). *See also* *Flex Frac Logistics, LLC*, 358 N.L.R.B. No. 127, 2012-13 NLRB Dec. ¶ 15615, at \*2 (Sept. 11, 2012) (“Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning – are construed against the employer. This principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights whether or not that is the intent of the employer . . .”).

292. *Lafayette Park Hotel*, 326 N.L.R.B. at 825; *Albertsons, Inc.*, 351 N.L.R.B. at 259.

293. *See supra* note 283.

294. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012-13 NLRB Dec. (CCH) ¶ 15602 (Sept. 7, 2012) (emphasis added).



In *Karl Knauz*,<sup>295</sup> the NLRB affirmed an ALJ's conclusion that maintenance of the following workplace rule violated Section 8(a)(1) of the NLRA:

(b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.<sup>296</sup>

The NLRB majority concluded that the prohibition against “disrespectful” conduct and “language which injures the image or reputation” of the employer can be reasonably interpreted to encompass activities protected by Section 7 of the NLRA.<sup>297</sup> It found that statements objecting to working conditions or seeking support for improvement in those conditions might run afoul of the employer's rule.<sup>298</sup> As part of its analysis concerning the chilling effect of the rule, the Board majority echoed the reasoning in *Costco* by highlighting that “there is nothing in the rule, or anywhere else in the employee handbook, that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule's broad reach.”<sup>299</sup> In dissent, member Hayes criticized the majority's construction of the at-issue rule, alleging that the majority read the words and phrases in isolation and departed from prior Board precedent.<sup>300</sup>

The interpretative differences in *Karl Knauz* between the majority and member Hayes are bound to be replicated in future NLRB decisions for a number of reasons: the wide variations in workplace policies among employers; the reasonableness standard applied in these cases when interpreting employer policies; and the distinct analytical approaches applied by different NLRB Board members. The pending litigation concerning the recess appointments of NLRB Board members who participated in *Costco* and *Karl Knauz* could result in the cases being reexamined by a differently constituted NLRB Board.

In addition to the two NLRB Board decisions there have been ALJ decisions and NLRB General Counsel advice memoranda addressing the legality of particular social media policies maintained by private employers. Prior to the decisions in *Costco* and *Karl Knauz*, three ALJ decisions addressed whether particular social media policies violated Section 8(a)(1) of the NLRA because employees would reasonably construe the policy to prohibit protected speech and

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295. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 2012-13 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012).

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

activities under the Section 7 of the NLRA. Although some of the ALJs' conclusions are now in question following the decisions in *Costco* and *Karl Knauz*, they illustrate the legal issues that arise concerning social media and internet policies under the NLRA.

In one case, the ALJ dismissed a complaint's allegation that an employer's internet policy stating that an employee may be subject to discipline for "engaging in inappropriate discussions about the company, management and/or co-workers" violated Section 8(a)(1) of NLRA.<sup>301</sup> Relying upon the NLRB's decision in *Tradesmen International*,<sup>302</sup> the ALJ found that the rule was lawful because it sought to restrict speech similar to restrictions on speech having a potentially detrimental impact on the employer, which the Board has found to be permissible.<sup>303</sup> The construction of the rule by the ALJ was based, in part, on its context within the full policy:

This conclusion is supported by the context of the allegedly unlawful segment of the policy. The policy begins by stating that Respondent "supports the free exchange of information" among its employees, and states that only when electronic communications "extend to confidential and proprietary information" or "inappropriate discussions" would they potentially be subject to disciplinary action. Immediately following that statement is a requirement that employees clearly identify opinions they share regarding Respondent as their own, as opposed to those of Respondent. The policy closes by stating that it will have no effect to the extent it conflicts with state or federal law. Under the case law discussed above, I find that in this context the prohibition on "inappropriate discussions about the company, management and/or co-workers" would not be reasonably construed as restricting Section 7 activity.<sup>304</sup>

In *G4S Secure Solutions (USA), Inc.*,<sup>305</sup> an ALJ concluded that a social media policy maintained by a security services employer prohibiting commenting on "work-related legal matters" without permission violated Section 8(a)(1) of the NLRA.<sup>306</sup> The ALJ reasoned that the rule failed to define the phrase "legal matters," and would be reasonably interpreted by employees as

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301. Three D LLC, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).

302. *Tradesmen Int'l*, 338 N.L.R.B. 460 (2002); see also *Ark Las Vegas Rest. Corp.*, 335 N.L.R.B. 1284, n.2 (2001) (finding that employer rules prohibiting on-duty or off-duty employee conduct, which discredits or damages employer or co-workers are not unlawful under the NLRA).

303. Three D LLC, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges, Jan. 3, 2012).

304. *Id.*

305. No. 28-CA-23380, 2012 WL 1065721 (N.L.R.B. Div. of Judges, Mar. 29, 2012), available at <http://www.nlr.gov/case/28-CA-023380>.

306. *Id.*

prohibiting them from discussing lawsuits and administrative complaints about workplace conditions through social media.<sup>307</sup>

The ALJ dismissed, however, the claim that another social media rule restricting the posting of photographs, images, and videos of employees in uniform did not violate Section 8(a)(1) of the NLRA because the employer had legitimate business reasons tied with patient privacy concerns in providing and avoiding the adverse business consequences caused by broad distribution of images of uniformed employees engaged in unprofessional conduct.<sup>308</sup> In reaching her finding, the ALJ relied, in part, on *Flagstaff Medical Center*,<sup>309</sup> in which an NLRB Board majority upheld an employer's work rule prohibiting the use of cameras during work time to record images of patients or hospital equipment and property. In *Flagstaff Medical Center*, NLRB Chairman Pearce dissented, stating that he would find a violation based upon the employer's maintenance of the ban because it would tend to restrain employees from engaging the concreted activity of documenting unsafe working conditions through photographic images.<sup>310</sup>

In a third case, *General Motors, LLC*,<sup>311</sup> an ALJ rejected an employer's argument that its policy did not run afoul of Section 8(a)(1) because it included an explicit disclaimer that it will be enforced consistent with applicable laws including the NLRA. With respect to the specifics of the policy, the ALJ concluded that maintenance of the following elements of the policy violated Section 8(a)(1) of the NLRA: an explicit prohibition against employees discussing the performance and compensation of co-workers on public social networking sites; the requirement that posts be "completely accurate" and "not misleading"; the obligation of employees to consult with the company regarding whether particular information is covered by the policy; and the prohibition against posting photographs and personal information of others without their consent.<sup>312</sup> The ALJ found, however, that the policy's suggestions that employees "treat everyone with respect," and "to think carefully about friending co-workers" were lawful because they were advisory in nature, rather than a rule that could be the basis for discipline.<sup>313</sup>

Following *Costco* and *Karl Knauz*, there have been two ALJ decisions concerning the lawfulness of employer social media policies under the NLRA.

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307. *Id.*

308. *Id.*

309. 357 N.L.R.B. No. 65, 2010-11 NLRB Dec. ¶ 15472 (Aug. 26, 2011).

310. *Id.*

311. No. 07-CA-53570, 2012 WL 1951391 (N.L.R.B. Div. of Judges, May 30, 2012).

312. *Id.*

313. *Id.*

In *Echostar Technologies, LLC*,<sup>314</sup> the ALJ concluded that maintenance of the following social media rule in the employee handbook violated the NLRA:

(i) You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services; and

(ii) Unless you are specifically authorized to do so, you may not: Participate in these activities with EchoStar resources and/or on Company time . . . .<sup>315</sup>

Citing *Costco*, the ALJ concluded that prohibition against “disparaging” improperly intruded upon rights guaranteed by Section 7 of the NLRA even when the term is read in the context of other phrases such as “[r]emember to use good judgment.”<sup>316</sup> The employer’s reliance upon the following introductory handbook disclaimer and offer of assistance was rejected because it would not lessen the chill in a reasonable employee caused by the offending social media rule:

Should you have questions about the Handbook, please contact the Human Resources Department.

Should a conflict arise between an EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction.<sup>317</sup>

In another decision, an ALJ relied upon *Costco* and *Karl Knauz* to find that a social media policy prohibiting employees from making “disparaging or defamatory comments” about the employer and its employees and prohibited negative electronic discussions during “Company time” violated Section 8(a)(1) of the NLRA.<sup>318</sup>

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314. No. 27-CA-066726, 2012 WL 4321039 (N.L.R.B. Div. of Judges, Sept. 20, 2012).

315. *Id.*

316. *Id.*

317. *Id.*

318. Dish Network Corp., Nos. 16-CA-62433, 16-CA-66142 & 16-CA-68261, 2012 WL 5564372 (N.L.R.B. Div. of Judges, Nov. 14, 2012). In an advisory memorandum, issued following *Costco* and *Karl Knauz*, the Division of Advice found that an employer’s social media policy was not overbroad because it included sufficient examples of prohibited activities so that an employee would not reasonably believe that it prohibits protected activities under the NLRA. Attached to his third memorandum concerning employer social media policies, the Acting General Counsel attached the final version of Wal-Mart’s revised social media policy, which was found to be lawful. See Memorandum from the NLRB Office of Gen. Counsel (OM 12-59), Report of the Acting General Counsel Concerning Social Media Cases, 22-24 (May 30, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>.

In *Walmart*,<sup>319</sup> the NLRB General Counsel's Division of Advice found an employer's social media policy prohibiting "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" to be lawful because it provided examples of egregious and unlawful conduct covered under the rule so that a reasonable employee, reading the rule in context, would understand that it does not prohibit the liberties protected by Section 7 of the NLRA. Similarly, the policy's mandate that social networking posts be respectful, fair, and courteous was deemed lawful because an employee would not reasonably construe the rule as prohibiting protected activities based upon the examples of plainly egregious conduct set forth in the rule including: "malicious, obscene, threatening or intimidating" posts; "offensive posts meant to intentionally harm someone's reputation" and posts that may create a discriminatorily hostile work environment.<sup>320</sup>

#### *B. Employer Policies under State Collective Bargaining Laws*

The case law in Michigan, Florida, and New York concerning the lawfulness of employer social networking policies is less developed than under the NLRA. Michigan and New York have no decisions on point but each state has precedent suggesting the analytical approach it might take regarding the maintenance and application of policies restricting social networking. In Florida, FPERC has issued one decision, *Orange County Board of County Commissioners*,<sup>321</sup> concerning restrictions on posting of images through social media that reached a different conclusion than the NLRB ALJ's decision in *G4S Secure Solutions (USA), Inc.*<sup>322</sup>

##### 1. Michigan

In *City of Bay City*,<sup>323</sup> MERC held that a public employer's maintenance of the following work rule in a municipal resolution restricting employee communications with elected officials constituted an unfair labor practice under Section 10(1)(a) of MPERA:

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319. Advice Memorandum, *Walmart*, No. 11-CA-067171, *supra* note 122.

320. *Id.* In an advisory memorandum issued following *Costco and Karl Knauz Motors, Inc.*, the Division of Advice found that an employer's social media policy was not overbroad because it included sufficient examples of prohibited activities so that an employee would not reasonably believe that it prohibits protected activities under the NLRA. See Advice Memorandum, *Cox Comm'n*, *supra* note 163.

321. Orange Cnty. Bd. of Cnty. Comm'r, 38 FPER ¶ 131 (2011).

322. No. 28-CA-23380, 2012 WL 1065721 (N.L.R.B. Div. of Judges, Mar. 29, 2012), available at <http://www.nlr.gov/case/28-CA-023380>.

323. 20 MPER ¶ 96 (2007).

[I]t shall hereafter be the policy of the City to grant to those individuals employed by the City of Bay City the right and privilege to freely communicate with their elected representatives and to address the City Commission in a public forum according to the rules of said forum *to the same degree as those who are not employed by the City of Bay City so long as the communication deals with issues entirely outside of labor relations or employment related matters.* There remain clearly established restraints on employee-commissioner communication and/or interaction related to employment and labor relations issues.<sup>324</sup>

In finding the resolution unlawful, MERC applied the NLRB standard for analogous work rules in the private sector: city employees would reasonably construe the resolution as prohibiting protected concerted activity.<sup>325</sup> It concluded, therefore, that the overbroad policy violated MPERA because it would have a chilling effect on protected activities by city employees.<sup>326</sup> The holding and analysis in *City of Bay City* suggests that MERC would follow NLRB precedent concerning the maintenance of a rule or policy restricting employee social media activities.<sup>327</sup>

The application of a work rule restricting employee social networking in future cases might be examined under the test formulated by a Michigan intermediate appellate court in *Ingham Co. v. Capitol City Lodge No. 141*.<sup>328</sup> In that case, the court set forth a three-part test based upon NLRB precedent for determining whether a public employer violated MERC when it applied a work rule to discipline an employee for engaging in conduct ordinarily protected under MERA.<sup>329</sup> Under the three-part test, the following factors are considered: whether the employer's action adversely affected the employee's statutory right to engage in protected concerted activity; whether the employer satisfied its burden of demonstrating a legitimate and substantial business justification for instituting and applying the rule; and whether the diminution of employee rights because of the rule's application outweighed the employer's interests protected by the rule.<sup>330</sup>

Applying that test, the court in *Ingham Co. v. Capitol City Lodge No. 141* overturned a MERC determination<sup>331</sup> that the employer violated Sections 10(1)(a) and (c) of MPERA by disciplining a union president for violating a

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324. *Id.* (emphasis added).

325. *Id.* (citing *Cintas Corp.*, 344 N.L.R.B. 943 (2005), *enforced* *Cintas Corp v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007); *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004); *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enforced* 203 F.3d 52 (D.C. Cir. 1999).

326. *City of Bay City*, 20 MPER ¶ 96 (2007).

327. *See id.*

328. 739 N.W.2d 95 (Mich. Ct. App. 2007), *appeal denied*, 742 N.W.2d 116 (Mich. 2007).

329. *Id.* at 100-01.

330. *Id.*

331. 18 MPER ¶ 44 (2005).

work rule prohibiting the external dissemination of confidential information by faxing to union counsel an internal sheriff's department memorandum setting forth a new policy requiring detectives to wear pagers while on and off-duty.<sup>332</sup> The court concluded that the union president's dissemination of the policy without prior approval did not constitute protected concerted activity because she received the memorandum in her capacity as a detective.<sup>333</sup> In the alternative, the court found that the sheriff's department had a legitimate and substantial security justification for the rule that outweighed the union president's statutory right to engage in protected activity.<sup>334</sup>

## 2. Florida

In *Orange County Board of County Commissioners*,<sup>335</sup> FPERC held that portions of a county fire department's social media policy violated Section of 447.501(1)(a) of FPERA because it was overbroad and chilled the firefighters' right to engage in concerted activity for mutual aid and protection.<sup>336</sup> The departmental policy was imposed after receipt of citizen complaints about on-duty firefighters taking pictures at accidents using personal cameras and then posting the photographs on social media pages.<sup>337</sup> FPERC found that prohibiting the firefighters from using personal devices to access the internet constituted interference with their statutory rights to engage in off-duty electronic protected concerted activities.<sup>338</sup> It also found the policy's rule mandating that a firefighter "shall not criticize or ridicule or debase the reputation of the Department, its officers or other employees through speech, writing or other expression" violated the free speech clause in 447.501(3) of FPERA.<sup>339</sup> The agency also found the prohibition against posts that "[t]ends to interfere with the maintenance of proper discipline" and or that "[d]amages or impairs the reputation and/or efficiency of the Department or its employees" interferes with protected concerted activities.<sup>340</sup>

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332. *Ingham Co.*, 739 N.W.2d at 105-06.

333. *Id.*

334. *Id.*

335. 38 FPER ¶ 131 (2011).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*; see also Fla. Bd. of Educ., 29 FPER ¶ 89 (2003) (adopting hearing officer's findings of fact and conclusions of law that state university's ban on solicitation and distribution at all times and in all work areas, including use of university's e-mail system, was overbroad and violative of Section 447.501(1)(a) of FPERA); *City of Clearwater*, 32 FPER ¶ 210 (2006) (finding that fire department policy which strictly prohibited all union messages and activities while employees were on duty and on employer property was unlawful because, with three rotating twenty-four hour

However, FPERC concluded that the policy's restriction on employee use of department property and resources to engage in social networking did not facially or intentionally interfere, restrain, or coerce employees in exercising their rights under Section 447.301 of FPERA.<sup>341</sup> Interestingly, with the exception of its analysis concerning the employer equipment use policy, the decision was based only upon the provisions of Florida statutory and case law.<sup>342</sup>

### 3. New York

Although NYPERB has not ruled on the lawfulness of an employer social networking policy under the Taylor Law, its precedent provides guidance for future cases. An employer can violate the Taylor Law by applying a rule that interferes with the fundamental statutory liberties granted to public employees to form, join, or participate in a union of their choosing.<sup>343</sup> Case law under the Taylor Law suggests that a broad policy restriction on employee off-duty social networking relating to forming, joining, or participating in a union would violate Section 209-a.1(a) of the Taylor Law.<sup>344</sup> However, the mandatory duty to bargain terms and conditions of employment under the Taylor Law might constitute the biggest impediment to a public employer unilaterally implementing restrictions on employee social media activities.<sup>345</sup>

Relatively few NYPERB decisions have examined whether the maintenance or application of an employer rule constitutes unlawful interference with the fundamental statutory rights granted under the Taylor Law. In *Village of Depew*,<sup>346</sup> NYPERB held that an employer violated Section 209-a.1(a) of the Taylor Law when it prohibited union officers and members from conducting a union fundraiser in support of a member facing disciplinary charges. In reaching its decision, NYPERB stated:

It is beyond any dispute that employees have the protected right to participate freely in the legitimate affairs of their chosen bargaining agent without suffering job-related consequences for such participation. The right is not so absolute, however, as to permit for no examination of the nature of the union activity, the manner in which it is carried out or the employer's legitimate interests in regulating the activity. As with

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shifts, the policy denied employees the opportunity to engage in off-duty discussions about union matters in work or non-work areas).

341. Orange Cnty. Bd. of Cnty. Comm'r, 38 FPER ¶ 131 (2011).

342. *See id.*

343. State of New York (Office of Emp. Relations), 10 NYPERB ¶ 3108 (1977) (90-day rule denying access to a challenging union for purpose of soliciting employee support violated § 209-a.1(a) of the Taylor Law).

344. *See Vill. of Depew*, 25 NYPERB ¶ 3009 (1992).

345. *See id.*

346. *Id.*



many of the issues which arise under the [Taylor Law], we believe that the correct approach to the disposition of this question necessitates a balance of employee, union and employer rights and interests, subject, of course, to the provisions of the [Taylor Law].<sup>347</sup>

Relying on private sector precedent, NYPERB has also held that a rule prohibiting employees from wearing a union pin while off-duty violated Section 209-a.1(a) of the Taylor Law because there was no special circumstances demonstrating that the employer's interests outweighed the employee's right to participate in the union under Section 202 of the Taylor Law by displaying the labor insignia, which is a form of union participation.<sup>348</sup> A rule that interferes with the free exercise of employees to change union representatives by denying workplace access to a competing union seeking to solicit employee support can violate the Taylor Law.<sup>349</sup> However, the Taylor Law does not restrict an employer from prohibiting employees from leafleting the public on its property about the status of negotiations.<sup>350</sup> Finally, before an employer imposes limitations on off-duty employee activities, including political activities, it is generally obligated to engage in good faith negotiations with the union representing its employees pursuant to Section 209-a.1(d) of the Taylor Law.<sup>351</sup>

Social media developments under the NLRA and state statutory law concerning protected activities and the breadth of employer social media policies provide a useful framework for exploring analogous constitutional issues applicable only to the public sector, to which we now turn.

#### IV. CONSTITUTIONAL PROTECTIONS FOR PUBLIC SECTOR SOCIAL MEDIA ACTIVITIES

Unlike in private sector employment, social networking by government employees is subject to protections under the First and Fourth Amendments to the United States Constitution.<sup>352</sup> The constitutional protections constitute a floor of liberties that are supplemented in jurisdictions like Michigan, Florida,

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347. *Id.*

348. State of New York (Div. of State Police), 37 NYPERB ¶ 3020 (2004), *confirmed sub nom.* State of New York (Div. of State Police) v. Police Benevolent Ass'n of New York State Troopers, Inc., 807 N.Y.S.2d 700 (N.Y. App. Div. 2006).

349. State of New York (Office of Emp. Relations), 10 NYPERB ¶ 3108 (1977).

350. New Paltz Cent. Sch. Dist., 17 NYPERB ¶ 3108 (1984); Chateaugay Cent. Sch. Dist. 19 NYPERB ¶ 3076 (1986).

351. *In re* N.Y.C. Transit Auth. v. N.Y. Pub. Emp. Relations Bd., 972 N.E.2d 83 (N.Y. 2012) (upholding NYPERB decision finding that unilateral implementation of more stringent off-duty dual employment standards was a mandatory subject of negotiations). *See also* Local 589, Int'l Ass'n of Firefighters, 16 NYPERB ¶ 3030 (1983); Ulster Cnty. Sheriff, 27 NYPERB ¶ 3028 (1994); City of Cohoes, 24 NYPERB ¶ 3015 (1991).

352. *See infra* at IV. A.

and New York through legislative measures granting collective bargaining and tenure rights. As we have seen, the Florida constitution also guarantees public sector collective bargaining rights. For public employees in other jurisdictions without collective bargaining and/or other protections, the First and Fourth Amendments are the central, if not sole, legal bulwark against adverse workplace actions resulting from social networking.

As will be seen, *infra*, the First Amendment restricts workplace retaliation based upon the content of a public employee's social media posts that touch upon issues of public concern. It also limits the scope of employer policies that might chill constitutionally protected speech. In addition, the Fourth Amendment provides some privacy protections when a public employee has a reasonable expectation of privacy regarding her or his social media activities.

#### A. *The First Amendment's Application to Public Employee Social Networking*

Contemporary First Amendment jurisprudence in the field of government employment emerged from the shoals of a dark period in American public sector labor history.<sup>353</sup> For roughly three decades, public employment was conditioned on loyalty oaths, associational restrictions, and prohibitions against what was broadly labeled subversive thoughts and activities. During this period, public sector unionism began its steady growth with some unions advancing a social union perspective in conjunction with bread and butter issues.<sup>354</sup> The existence of tenure protections were generally a product of the legislative process, rather than negotiated agreements, because public sector collective bargaining remained largely anathema under the law. Public employees were subject to investigations, terminations, and resignations based upon perceived or actual viewpoints, actions, and associations unrelated to their fitness and competence to perform their job duties.<sup>355</sup> One child of a victim from that period, Seventh Circuit Court of Appeals Judge Richard A. Posner, has observed:

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353. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 341-52 (2004).

354. See MARK H. MAIER, *CITY UNIONS: MANAGING DISCONTENT IN NEW YORK CITY* 57-58 (1987); WALKOWITZ, *supra* note 32, at 189-96 (describing the activities of social services employees represented by United Public Workers of America (UPWA) on behalf of social services recipients).

355. See GEOFFREY R. STONE, *supra* note 353. MARJORIE HEINS, *PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM, AND THE ANTI-COMMUNIST PURGE* (2013); DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 339-45, 431-45 (1978); MARJORIE MURPHY, *BLACKBOARD UNIONS: THE AFT & THE NEA 1900-1980* 175-95 (1990); CLARENCE TAYLOR, *REDS AT THE BLACKBOARD: COMMUNISM, CIVIL RIGHTS AND THE NEW YORK CITY TEACHERS UNION* 130-77, 203-33 (2011); ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM & THE UNIVERSITIES* 287-92 (1986). Militant public sector labor unions like UPWA were subjected to multiple attacks from employers and legislative bodies during this period. For example, the New York City Board of Education passed the Timone Resolution in 1950 to

I believe I have a closer personal acquaintance with civil-liberties abuses than you. My mother was forced out of her job as a public school teacher, and later hauled before the House Un-American Activities Committee, because of her communist sympathies. I consider her political views to have been idiotic, but I am quite sure that she was completely harmless.<sup>356</sup>

The dark cloud over public employee speech and associational rights began to lift as the result of successful legal challenges under the First Amendment to broad statutory restrictions.<sup>357</sup> For example, in *Shelton v. Tucker*,<sup>358</sup> an Arkansas teacher with twenty-five years of experience persuaded the United States Supreme Court to strike down a state law mandating, as a condition of continued employment, the filing of an affidavit listing “the names and addresses of all incorporated and/or unincorporated associations and organizations that [he] within the past five years has been a member of, or to which organization or association [he] is presently paying, or within the past five has paid regular dues or to which the same is making or within the past five years has made regular contributions.”<sup>359</sup> The Arkansas law was declared unconstitutional because the comprehensive scope of its infringement on teacher associational freedom went “far beyond what might be justified in the exercise of the State’s legitimate inquiry into the fitness and competency of teachers.”<sup>360</sup>

In *Keyishian v. Board of Regents*,<sup>361</sup> the Court held that two state laws, which disqualified teachers from employment for making “treasonable or

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prohibit Board members, administrators and supervisors from engaging in any form of negotiations or interactions with the New York City Teachers Union, a UPWA affiliate, concerning teacher grievances, personal or professional problems. HEINS, *supra*, at 95-97; TAYLOR, *supra*, at 163-65, 176-77.

356. Geoffrey Stone & Richard Posner Debate, *What’s Wrong with the Patriot Act?*, LEGAL AFFAIRS: THE MAGAZINE AT THE INTERSECTION OF LAW AND LIFE (Oct 5, 2005, 01:51 PM), [http://legallaaffairs.org/webexclusive/debateclub\\_patact1005.msp](http://legallaaffairs.org/webexclusive/debateclub_patact1005.msp). Another child of that era, who is now an historian, utilized a state freedom of information law to obtain access to unredacted transcripts of employee interviews during the investigations of that era. See *In re Harbatkin v. New York Dep’t of Records and Info. Servs.*, 971 N.E.2d 350 (N.Y. 2012), *cert. denied*, 133 S. Ct. 1239 (2013).

357. See *Connick v. Myers*, 461 U.S. 138, 144 (1983) (“The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated.”).

358. *Shelton v. Tucker*, 364 U.S. 479 (1960).

359. *Id.* at 481, n.1 (quoting from Section 2 of Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958).

360. *Id.* at 490.

361. 385 U.S. 589 (1967). See HEINS, *supra* note 355, for a thorough analysis of the *Keyishian* case and the Supreme Court’s decision. In the book, Heins weaves together constitutional legal history, the history of the anti-Communist purge in academia, personal stories of the victims of the purge, and the implications of that era on present day academic free speech issues.

sedition” utterances, and advocating for the “overthrow of the government by force, violence or any unlawful means,” were unconstitutionally vague.<sup>362</sup> The Court’s decision centered on the imprecise draftsmanship of the at-issue laws, finding that key terms were undefined or ambiguous to pass constitutional muster.<sup>363</sup> In addition, the Court found that the statutory disqualification for membership in an organization that advocated the forceful overthrow of the government was overbroad because it bars “employment both for association which legitimately may be proscribed and for association which may not be proscribed consistent with First Amendment rights.”<sup>364</sup>

One of the notable aspects of the *Keyishian* decision is its unequivocal emphasis on the special status of academic freedom under the First Amendment:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.<sup>365</sup>

Decisions like *Shelton* and *Keyishian*, which overturned overly broad restrictions on public employee associations and speech, helped set the stage for the Court’s landmark decision in *Pickering v. Board of Education*.<sup>366</sup> Another key societal factor leading to the *Pickering* decision was the aggressive public sector union organizing efforts taking place throughout the nation.<sup>367</sup>

In *Pickering*, the Court enunciated for the first time a constitutional framework for judicial post-hoc examination of an adverse action taken against a public employee based upon the content of her or his speech.<sup>368</sup> Under *Pickering* and its progeny,<sup>369</sup> a public employee’s right to speak as a citizen on an issue of public concern or importance under the First Amendment is balanced against a government employer’s interest “as an employer, in promoting the efficiency of

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362. *Keyishian*, 385 U.S. at 609 (1967).

363. *Id.*

364. *Id.*

365. *Id.* at 603.

366. 391 U.S. 563 (1968); see Mary-Rose Papandrea, *Social Media, Public School Teachers and the First Amendment*, 90 N.C. L. REV. 1597, 1611-12 (2012).

367. See Jerry Wurf, *An Address to the Mayors* (June 19, 1967), reprinted in ROBERT E. WALSH, *SORRY . . . NO GOVERNMENT TODAY: UNIONS VS. CITY HALL 70-80* (1969).

368. *Pickering*, 391 U.S. at 568.

369. See *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *City of San Diego v. Roe*, 543 U.S. 77 (2004); *United States v. Nat’l Treas. Emp. Union*, 513 U.S. 454 (1995); *Waters v. Churchill*, 511 U.S. 661 (1994); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138, 144 (1983); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979); *Smith v. Ark. State Highway Emp.*, 441 U.S. 463 (1979); *Perry v. Sindermann*, 408 U.S. 593 (1972).

the public services it performs through its employees.”<sup>370</sup> The balancing test described in *Pickering* was later refined in *Connick v. Myers*<sup>371</sup> and in subsequent decisions.

Protected civil liberties for public employees under the First Amendment are broader in some respects, and narrower in others, than those protected by the NLRA and other collective bargaining laws. Like collective bargaining laws, the First Amendment protects public employees associating with each other in a union. However, that constitutional provision “is not a substitute for the national labor relations laws” and it does not require a government employer to listen to, respond to, recognize or bargain with the union.<sup>372</sup> In contrast to the private sector, as well as to the scope of protections under the Taylor Law, the First Amendment affords non-policymaking public employees broad protections for engaging in off-duty political activities.<sup>373</sup> Individual and collective concerted activities limited to government workplace conditions are less likely to be protected under the First Amendment than similar activities under the NLRA and analogous state collective bargaining laws. The shifting burdens of proof in retaliation claims under the First Amendment, NLRA, MPERA, and FPERA are similar.<sup>374</sup>

While case law applying the First Amendment to public sector social networking is not yet fully developed, the legal principles developed under *Keyishian*, *Pickering*, *Connick*, and subsequent decisions provide clear guidance. The analytical framework for determining whether public employee speech is protected under the First Amendment supports the Supreme Court’s dictum “that the government as employer indeed has far broader powers than does the government as sovereign” over the citizenry.<sup>375</sup>

Constitutional protections for speech and association by public employees are strongest when the activities are off-duty, related to social and political

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370. *Pickering*, 391 U.S. at 568.

371. *Connick*, 461 U.S. at 144.

372. *Ark. State Highway Emp.*, 441 U.S. at 464. The potential application of the public concern standard to associational activities would undermine the proposition that public employees have First Amendment protections for associating into a union. See Herbert, *The Chill of a Wintry Light?*, *supra* note 25, at 629-30.

373. *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). See also *City of Saratoga Springs*, 18 NYPERB ¶ 3009 (1985).

374. See *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977); 251 N.L.R.B. 1083 (1980), enforced NLRB v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *Pasco Cnty. Sch. Bd. v. Fla. Pub. Emp. Relations Comm’n*, 353 So. 2d 108, 117 (Fla. Dist. Ct. App. 1977); *Mich. Educ. Support Pers. Ass’n v. Evart Pub. Sch.*, 336 N.W.2d 235 (Mich. Ct. App. 1983).

375. *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (“On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public.”); *Waters v. Churchill*, 511 U.S. 661, 671 (1994).

issues, and not directly connected to the workplace.<sup>376</sup> To be protected, the activities do not have to be concerted but the substance has to be more than personal gripes over workplace issues such as a job assignment and the behavior of supervisors.<sup>377</sup> A stand-alone off-duty post by a public employee, without any response from others, might be protected under the First Amendment so long as it is found to touch upon a matter of public concern.

### 1. Posts Made Pursuant to an Employee's Official Duties

The first step in determining whether the First Amendment protects a public employee's social media post is whether it was undertaken pursuant to the employee's official duties. This step is necessary because in *Garcetti v. Ceballos*,<sup>378</sup> the Court held that speech by a public employee pursuant to official duties is devoid of First Amendment protections. Under *Garcetti*, when a public employee speaks pursuant to official duties, he or she is speaking as an employee rather than a citizen, and therefore the speech is unprotected.<sup>379</sup> The *Garcetti* exclusionary rule is an important counterpoint to the private sector, where an essential element for protections under Section 7 of the NLRA is that the activity was undertaken by an employee for mutual aid and protection.<sup>380</sup>

When the Court announced the rule in *Garcetti*, it declined to articulate a "comprehensive framework" for defining in future cases what constitutes an employee's official duties.<sup>381</sup> While stating that "the proper inquiry is a practical one," the Court rejected reliance upon the content of job descriptions because they "often bear little resemblance to the duties" employees are expected to perform.<sup>382</sup>

Although most public employees are not officially assigned to engage in work-related social networking, the content of posts by employees related to work responsibilities might lack any First Amendment protections.<sup>383</sup> The lack of constitutional protections in that context might have particular repercussions in the field of public education, where teachers are increasingly using social

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376. See *City of San Diego*, 543 U.S. at 80 ("[When public] employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it." (quoting *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454, 475 (1995))).

377. See *Ricciuti v. Gyzeni*, 832 F. Supp. 2d 147, 158 (D. Conn. 2011) ("Considering the public interest in an employee's speech also helps to guard against a danger that government employees will feel tempted to 'go public'—an easy thing to do in an age of blogs and social media—every time they lodge a complaint or criticism at work.").

378. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

379. *Id.* at 424-25.

380. See *id.*

381. *Id.* at 424.

382. *Id.* at 424-25.

383. See *Secunda*, *supra* note 48, at 687-88.

media for various purposes including peer-to-peer exchanges,<sup>384</sup> and as a means of communicating with students and parents.

In response to Justice Souter's dissent, the *Garcetti* majority included *dicta* in the decision concerning academic freedom under the First Amendment. The scope of protections for social networking by academics and teachers in public education will depend upon how the following *dicta* is applied in future cases:

Second, Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>385</sup>

As Marjorie Heins has noted “[t]he Court's once full-bodied appreciation of academic freedom as essential to the educational enterprise and to democracy was reduced [in *Garcetti*] to a querulous and ambiguous aside.”<sup>386</sup>

Since *Garcetti*, circuit courts have ruled that so long as a public employee's speech is in furtherance of his or her work responsibilities, it is considered to be pursuant to official duties, regardless of whether it was required by a job description or responsive to an employer's directive.<sup>387</sup> Those circuit decisions call into question a District Court decision holding that a high school teacher's use of social networking to communicate with his students about homework and to forge better teacher-student relationships was not pursuant to his official

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384. Jason Tomassini, *Social Networks For Teachers On The Rise As Popular Social Media Raise Concerns*, EDUC. WEEK, HUFF POST, (Jan. 8, 2013, 7:36 PM), [http://www.huffingtonpost.com/2013/01/08/teachers-gravitate-to-soc\\_n\\_2433747.html](http://www.huffingtonpost.com/2013/01/08/teachers-gravitate-to-soc_n_2433747.html).

385. *Garcetti*, 547 U.S. at 425.

386. HEINS, *supra* note 355, at 263.

387. See *Weintraub v. Bd. of Educ. of the City of New York*, 593 F.3d 196, 198 (2d. Cir. 2010) (holding that elementary school teacher's grievance complaint about the failure of an administrator to discipline a student “was in furtherance of one of his core duties as a public school teacher, maintaining class discipline, and had no relevant analogue to citizen speech,” and therefore was pursuant to his official duties); *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008) (finding that professor's complaint to university officials concerning the handling of an educational grant was “for the benefit of students” and therefore aided in the fulfillment of his pedagogical duties); *Williams v. Dall. Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (holding that “[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties.”); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir. 2007) (holding that “a public employee's duties are not limited only to those tasks that are specifically designated.”). See also *Rohrbough v. Univ. of Colorado Hosp. Auth.*, 596 F.3d 741 (10th Cir. 2010). Cf. *Elkins v. City of Sierra Madre*, 710 F.3d 1049 (9th Cir. 2013); *Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006) (holding that speech by a public employee in her or his capacity as a union representative is not subject to the *Garcetti* exclusionary rule).

duties because the school district did not obligate him to use social media.<sup>388</sup> As one scholar has rightfully stated, *Garcetti* “might give schools absolute authority to prevent or restrict their teachers’ use of social media” for pedagogical purposes.<sup>389</sup> Even casual social networking between teachers and students on subjects unrelated to course work might be excluded from constitutional protections under a broad reading of *Garcetti*.<sup>390</sup> Nevertheless, a strong argument can be made that pedagogically related teacher-student social networking should not be exempt from First Amendment protections under *Garcetti*, based upon the importance of academic freedom.<sup>391</sup>

Segregating work-related posts in a separate social media account and using a disclaimer may be prudent employee measures to maximize the likelihood of First Amendment protections. Separating work-related social media activities from personal social networking is a cornerstone of a policy implemented by at least one large school district.<sup>392</sup> This type of protocol can help avoid problems resulting from the way social media blurs the line between professional and personal discussions.

The prophylactic value of a disclaimer is exemplified in *Stengle v. Office of Dispute Resolution*,<sup>393</sup> where the express purpose of an off-duty blog maintained by an impartial hearing officer raised an issue of fact as to whether the blog was pursuant to official duties. The blog entries included her comments on special education issues under a class action settlement agreement and her experiences as a hearing officer.<sup>394</sup> Although she was one of two hearing officers appointed to the class action settlement advisory board, the disclaimer stated that the blog was intended as a forum to present her perspectives as a parent of a class member and to share information with other class members.<sup>395</sup> Nevertheless, the use of a mere disclaimer by a public employee, without additional facts, will

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388. *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 298, 309 (D. Conn. 2008).

389. *Papandrea*, *supra* note 366, at 1618.

390. *Id.*

391. See Elise Rosen Puzio, *Why Can't We Be Friends?: How Far Can The State Go In Restricting Social Networking Communications Between Secondary School Teachers and Their Students?*, 34 *CARDOZO L. REV.* 1099, 1121 (2013) (“In sum, if teachers are to fulfill their vital role in democracy, they must be free to utilize all tools and employ all methods that will bring our society closer to achieving our educational goals. The courts have given extensive guidance regarding what they consider to be of central importance to the principle of academic freedom. This principle should be defined to cover a teacher’s interest in communicating with students through social networking because these communications encompass many of the qualities courts consider central to an interest protected by academic freedom.”).

392. *Social Media Guidelines*, *supra* note 278.

393. 631 F. Supp. 2d 564 (M.D. Pa. 2009).

394. *Id.* at 570.

395. *Id.*



probably not be sufficient evidence to demonstrate that a social media post was not pursuant to official duties.<sup>396</sup>

## 2. Whether the Post Touches Upon An Issue of Public Concern

If the social networking is found not to be pursuant to the employee's official work duties, the second step of the inquiry is whether the posting touches upon a matter of public concern. As stated elsewhere, the public concern standard is an amorphous one, leading to contradictory results.<sup>397</sup> To meet the standard, a posting must relate "to any matter of political, social, or other concern to the community"<sup>398</sup> or be the subject of "legitimate news interest, that is, a subject of general interest and of value and concern to the public at the time of publication."<sup>399</sup> The fact that the speech may be controversial in nature, or was made in private, does not affect whether it relates to a matter of public concern.<sup>400</sup> However, if the speech does not satisfy the public concern standard, balancing under *Pickering/Connick* is unnecessary because it is unprotected under the First Amendment.<sup>401</sup>

To determine whether a public employee statement meets that public concern standard, a court will examine "the content, form, and context of a given statement, as revealed by the whole record."<sup>402</sup> For example, in *Connick*, the content of an assistant district attorney's intra-office questionnaire to her professional colleagues, as well as the context of the questionnaire, were considered in determining that the vast majority of the questions did not touch upon a matter of public concern.<sup>403</sup> The questionnaire was prepared and distributed after the assistant district attorney was involuntarily transferred, and it solicited responses about the office's transfer policy, supervisors, office morale, the need for a grievance committee, and whether others felt pressured to work on particular political campaigns.<sup>404</sup> The Court found that while the inquiry concerning political pressure touched upon an issue of public concern, the

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396. *See id.*

397. Herbert, *The Chill of a Wintry Light?*, *supra* note 25, at 609-13.

398. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

399. *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004).

400. *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) ("Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.").

401. *Connick*, 461 U.S. at 141.

402. *Id.* at 147-48.

403. *Id.* at 148.

404. *Id.*

remaining questions were tied to internal workplace grievances and, therefore, unprotected.<sup>405</sup>

The more the content of employee speech comments on a news report or social and political events, the more likely it will be found to satisfy the public concern test.<sup>406</sup> For example, a probationary employee's short oral response in the workplace to a radio report about the attempted assassination of President Reagan satisfied the test.<sup>407</sup> On the other hand, speech limited to the sale of pornography by a public employee is not likely to meet the public concern test because it does "nothing to inform the public about any aspect of [the employer's] function or operation" nor was there any basis for concluding that the activities were "of concern to the community."<sup>408</sup>

*Connick, Rankin v. McPherson*,<sup>409</sup> and *City of San Diego v. Roe*<sup>410</sup> demonstrate that, in contrast to collective bargaining laws, the First Amendment is far less likely to provide protection for public employee social media exchanges limited to a discussion about work issues, and/or a possible collective grievance concerning workplace conditions. For example, a first grade teacher's post describing herself as the warden of future criminals was found to constitute a personal complaint about her job rather than a statement on a matter of public concern.<sup>411</sup> To have constitutional protections, the content of a post must be explicitly or implicitly infused with social, public policy, or political issues. There is usually a relationship between workplace issues and broader public policy questions, which may explain why public sector employees are more likely to engage in off-duty community and political activities tied with work than their private sector counterparts.<sup>412</sup> Linkage between public sector workplace conditions and public policy issues in social networking posts does not occur in a vacuum, however. Increased expressions of those connections will not occur without fertilization through education, training, and mentoring.

The First Amendment and collective bargaining laws share some common ground with respect to the self-absorbed egotism prevalent in the culture of social networking. Neither set of doctrines protect employees for social media content limited to personal complaints about work or narcissistic announcements and musings. For example, a student teacher's posting of a photograph of herself wearing a pirate's hat and holding a cup with a caption that read "drunken pirate" was found not to touch upon a matter of public concern based

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405. *Id.* at 149.

406. *Rankin v. McPherson*, 483 U.S. 378 (1987).

407. *Id.*

408. *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004).

409. 483 U.S. 378 (1987).

410. 543 U.S. 77 (2004).

411. *In re O'Brien*, A-2452-11T4, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013).

412. REINARMAN, *supra*, note 32, at 186-88, 192-94.

upon the teacher's admission at trial that the posted photograph was personal in nature.<sup>413</sup>

To determine whether a posting meets the public concern test under the First Amendment requires an examination of the facts and circumstances of the at-issue post based upon a textual and contextual analysis similar to that applied in NLRB cases, but using distinct constitutional standards.<sup>414</sup> In one First Amendment case, a District Court ruled that anonymous posts by a deputy sheriff on a local newspaper's on-line forum did not meet the public concern standard when the posts are "taken as a whole and in full context."<sup>415</sup> The posts mixed the deputy sheriff's opinions concerning candidates in the upcoming sheriff's election with allegations concerning his supervisor and statements about the personal life of one of his co-workers.<sup>416</sup> In another federal case,<sup>417</sup> the court found that two off-duty posts made by a county clerk employee on her Facebook wall about the firing of four colleagues touched upon a matter of public concern because the terminations received wide publicity and information about the discharges generated angry responses from county residents who were Facebook friends of the employee.<sup>418</sup>

The parallel nature of the inquiries under the First Amendment and the NLRA is further exemplified by two decisions considering the relatively narrow question of whether the selection of the "like" option on a Facebook page is a protected activity. A federal judge held that a deputy sheriff's mere "liking" of a Facebook page of the sheriff's political opponent is not sufficient speech to merit First Amendment protections.<sup>419</sup> In contrast, the ALJ in *Triple Play*,<sup>420</sup> concluded that selection of the "like" option on a Facebook page "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity" under the NLRA.<sup>421</sup> Final resolution of whether selecting the "like" option on Facebook is protected awaits appellate review by

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413. Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140, at \*16 (E.D. Pa. Dec. 3, 2008).

414. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

415. Gillman v. Schlagetter, 777 F. Supp. 2d 1084, 1095 (S.D. Ohio 2010).

416. *Id.* at 1090.

417. Mattingly v. Milligan, No. 4:11CV00215, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011).

418. *Id.*

419. Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D.Va. 2012). According to news reports, the decision has been appealed to the Fourth Circuit and Facebook has submitted an amicus brief in support of the plaintiff. See Michael Kirkland, *Getting Fired for a Facebook 'like'*, UPI.COM (Aug. 19, 2012, 3:30 AM), [http://www.upi.com/Top\\_News/US/2012/08/19/Under-the-US-Supreme-Court-Getting-fired-for-a-Facebook-like/UPI-40851345361400/](http://www.upi.com/Top_News/US/2012/08/19/Under-the-US-Supreme-Court-Getting-fired-for-a-Facebook-like/UPI-40851345361400/).

420. Three D LLC, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).

421. *Id.*

the Fourth Circuit and a determination of exceptions from the ALJ's decision pending with the NLRB.<sup>422</sup>

### 3. The Balancing of Interests Concerning Posts under *Pickering/Connick*

After a court finds that a social media post by a public employee was not in furtherance of official duties, and that the substance touched upon an issue of public concern, it will then balance the interests of the employee to speak out on such issues against “the government’s interest in the effective and efficient fulfillment of its responsibilities to the public.”<sup>423</sup> Among a public employer’s interests are avoiding disruptions in regular operations, disharmony among co-workers, erosion of close working relationships requiring personal loyalty and confidentiality, impairment of discipline and supervisory control, and obstructions in the employee’s ability to perform work responsibilities.<sup>424</sup>

In applying the balance, a court will give “greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.”<sup>425</sup> A public employer is not obligated to “allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”<sup>426</sup> Actual disruption does not have to be demonstrated; a reasonable prediction of future workplace disruptions can suffice to tip the balance in the employer’s favor under certain circumstances.<sup>427</sup> The closer the content is to core issues of public concern, and the activity takes place off-duty, the greater the employer’s burden under the balancing test.<sup>428</sup> Prior to taking an adverse personnel decision, however, an

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422. Legal issues arising from Facebook exchanges are not limited to labor and employment law. There have been conflicting judicial ethics opinions from various jurisdictions concerning the ethical appropriateness of social network befriending between judges and attorneys. See Craig Estlinbaum, *Social Networking and Judicial Ethics*, 2 ST. MARY’S J. ON LEGAL MAL. & ETHICS 2, 5-6, 15-21 (2012).

423. *Connick v. Myers*, 461 U.S. 138, 150 (1983). “Among the relevant facts and circumstances that will be examined is whether a statement impairs discipline, disrupts workplace harmony, has a detrimental impact on close working relationships, impedes the performance of the employee’s duties, or otherwise interferes with the operations of the public agency.” See Herbert, *The Chill of a Wintry Light?*, *supra* note 25, at 613.

424. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 (1968).

425. *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

426. *Connick*, 461 U.S. at 152.

427. *Waters*, 511 U.S. at 673. See Lindsay A. Hitz, *Protecting Blogging: The Need For An Actual Disruption Standard in Pickering*, 67 WASH & LEE L. REV. 1151, 1165-76 (2010) (surveying decisions in Eight and Ninth Circuits decisions relating to actual or potential disruption in public employee First Amendment cases).

428. *Connick*, 461 U.S. at 152-53, n.13.

employer is legally obligated to act reasonably in gathering the facts necessary to decide whether the speech may have constitutional protections.<sup>429</sup>

In *Connick*, the Court found that an employer's interests outweighed the assistant district attorney's interests regarding the questionnaire because the employer had a reasonable belief that its distribution constituted insubordination and might have disrupted the functioning of the office, undermined supervisory authority, and destroyed close working relationships.<sup>430</sup> In contrast, the First Amendment interests of the employee in *Rankin*,<sup>431</sup> to comment on an attempted assassination of a president, was found to outweigh the employer's interest in that case because there was no evidence of an actual, or a reasonably potential, adverse impact in the workplace resulting from the comment. In reaching its decision, the Court emphasized that the statement was made in private to another employee and did not discredit the office.<sup>432</sup>

The weight given to an employer's reasonable prediction of workplace disruption under the *Pickering/Connick* balancing constitutes a substantial difference from public sector collective bargaining laws. As demonstrated in Part II(C), an employee can lose statutory protections only when there is evidence of a "real threat" of disruption in Florida,<sup>433</sup> and evidence of actual disruption in New York,<sup>434</sup> emanating from an employee's conduct. The different applicable standards concerning workplace disruption resulting from speech can have major significance in the area of public sector social networking.

Court of Appeals' decisions in *Richerson v. Beckon*<sup>435</sup> and *Curran v. Cousins*<sup>436</sup> illustrate the current state of First Amendment protections under the *Pickering/Connick* balancing test concerning internet-based communications. In *Richerson v. Beckon*, the Ninth Circuit affirmed the dismissal of a First Amendment claim by a teacher based upon evidence that the content of her blog posts resulted in actual workplace disruption.<sup>437</sup> In 2007, Tara L. Richerson was assigned by the school district to new positions requiring her to coach and mentor less experienced teachers.<sup>438</sup> A core component of those duties was

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429. *Waters*, 511 U.S. at 678.

430. *Connick*, 461 U.S. at 151–52.

431. 483 U.S. 378 (1987).

432. *Id.*

433. Dist. Bd. of Tr. of Palm Beach Junior Coll., 11 FPER ¶ 16101 at 327 (1985), *aff'd*, Dist. Bd. of Tr. of Palm Beach Junior Coll. v. United Faculty of Palm Beach Junior Coll., 489 So. 2d 749 (Fla. Dist. Ct. App. 1986).

434. Cnty. of Tioga, 44 NYPERB ¶ 3016 (2011).

435. *Richerson v. Beckon*, No. C07-5590, 2008 WL 833076 (W.D. Wash. Mar. 27, 2008), *aff'd*, 337 F. App'x 637 (9th Cir. 2009).

436. *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007).

437. *Richerson*, 2008 WL 833076, at \*5.

438. *Id.* at \*1.

maintaining a confidential and trusting relationship with each mentee.<sup>439</sup> After participating in interviews of candidates for her former position, Richerson posted a blog entry critical of the selection process including derogatory comments about the “Boss Lady 2.0” and the selected replacement.<sup>440</sup> Subsequently, Richerson posted another entry critical of the union’s chief negotiator: “What I wouldn’t give to draw a little Hitler mustache on the chief negotiator.”<sup>441</sup> When the blog entries became known, the school district received complaints from teachers and other employees including at least one teacher who refused to be mentored by Richerson.<sup>442</sup> Following a review of the posts and the employee complaints, the district transferred Richerson from her new positions.<sup>443</sup>

As noted, however, actual disruption is not a prerequisite in many cases to tip the balance under *Pickering/Connick* in favor of an employer. In *Curran v. Cousins*, the First Circuit deferred to the sheriff’s reasonable prediction of substantial risk of disruption in the sheriff’s department caused by a correction officer’s posts on the discussion board of a password protected union website.<sup>444</sup> The postings referred to the sheriff, who is African-American, as Hitler, urged Department administrators to engage in insubordination, and compared correction officers to the victims of the Shoah.<sup>445</sup> The First Circuit concluded that the statements were unprotected under the First Amendment because they “directly went to impairing discipline by superiors, disrupting harmony and creating friction in working relationships, undermining confidence in the administration, invoking oppositional personal loyalties, and interfering with the regular operation of the enterprise.”<sup>446</sup>

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439. *Id.* at \*2.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Richerson*, 2008 WL 833076, at \*2.

444. *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007).

445. *Id.* at 41.

446. *Id.* at 50; *see also* *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) (To the extent that police officer’s sexually explicit website touched upon an issue of public concern, the City’s interests in maintaining an effective and efficient police department is particularly strong, which outweighed the officer’s interests. After the officer’s website became publicly known, the public started to denigrate other officers in the department, potential recruits asked questions about the website, and there was a concern whether the website would adversely impact the recruitment of female officers.); *Gillman v. Schlagetter*, 777 F.Supp.2d 1084, 1095 (S.D. Ohio 2010) (termination of police officer due his anonymous postings did not violate the First Amendment because comments interfered with the efficient operation of a public safety organization creating disharmony in the department and destroyed trust between plaintiff and the rest of the department); *Stengle v. Office of Dispute Resolution*, 631 F. Supp. 2d 564 (M.D. Pa. 2009) (Hearing officer’s blog entries were not constitutionally protected because employer’s interests in efficiency and maintaining the appearance impartiality were sufficient to justify the adverse action. In reaching

There is a strong societal need for courts, when applying the *Pickering/Connick* balancing test to employee social networking, to be vigilant in examining the reasonableness of an employer's response, instead of deferring to the reactions of supervisors, co-workers, or others to the content and virality of a post. The easy accessibility and fast dissemination of a post, along with the volatile subcultural response when an item "goes viral," can result in irrational and uninformed workplace overreactions. The speed of distribution of a post's content from the internet to newspapers, cable, and radio can increase the power of the heckler's veto in public employment.

The failure to apply adequate judicial scrutiny can lead to the suppression of unpopular off-duty speech and associations in social networking because the power of the medium can precipitate hysteria.<sup>447</sup> Judicial restraint in the face of electronically-generated overreactions can take the law back to the pre-*Pickering* era of public sector labor history, when individuals and organizations were lawfully hounded by government employers based upon the unpopularity of their speech and associations. To avoid that risk, the law needs to proceed with prudence to ensure that our society's libertarian principles are not tossed out with the bathwater when it comes to speech in cyberspace.<sup>448</sup>

#### 4. Employer Policies That May Chill Protected Activity under First Amendment

As we saw in Part II(A) and (B), *supra*, broad employer social media policies can run afoul of the NLRA and state collective bargaining laws when they chill employee rights to engage in protected activities. In the public sector, the First Amendment also places legal limitations on policies that prohibit or restrict potential speech through social media.<sup>449</sup> The scope of constitutional scrutiny, however, is less stringent than under the NLRA, which calls into

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this conclusion, the court emphasized that the government can restrict employee speech based on its *potential* to disrupt, not only *actual* disruptiveness).

447. Frenzied and instantaneous misinformation disseminated through social media was on full display following the Boston Marathon bombings in April 2013. See James Gleick, "Total Noise," *Only Louder*, NY MAG (Apr. 20, 2013), available at <http://nymag.com/news/intelligencer/boston-manhunt-2013-4/> ("The Boston bombings, shootings, car chase, and manhunt found the ecosystem of information in a strange and unstable state: Twitter on the rise, cable TV in disarray, Internet vigilantes bleeding into the FBI's staggeringly complex (and triumphant) crash program of forensic video analysis. If there ever was a dividing line between cyberspace and what we used to call the 'real world,' it vanished last week.").

448. See *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010) (emphasizing the need for caution "when considering the whole concept of privacy expectations" in the electronic workplace under the Fourth Amendment).

449. *United States v. Nat'l Treas. Emp. Union*, 513 U.S. 454, 468 (1995) ("In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens.").

question the *dictum* in *Garcetti* about private and public sector employers having an equal need for “a significant degree of control over their employees’ words and actions . . . .”<sup>450</sup>

To determine whether employer prohibitions on employee speech violate the First Amendment, courts will apply the standards from *Pickering*, *Connick*, *Roe*, and *Garcetti*. For example, a written policy requiring that “all Sheriff’s Office employees shall keep official agency business confidential” was found constitutional because it restricted only unprotected speech under *Garcetti* relating to employees’ professional duties.<sup>451</sup> In another case, a ban on an employee continuing personal communications with a recently terminated friend was found permissible under the First Amendment because personal communications do not satisfy the public concern standard.<sup>452</sup>

If the subject matter of the prohibition relates to a core issue of public concern, an employer has a greater burden to justify a prior restraint under the *Pickering/Connick* balancing test.<sup>453</sup> When a workplace prohibition extends to future off-duty employee speech regarding issues of public concern, the employer must show “that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of the government.”<sup>454</sup> In *Whitney v. City of Milan*<sup>455</sup> the Sixth Circuit held that a mayoral directive prohibiting an employee from participating in litigation by a recently terminated employee alleging gender discrimination and public corruption was unconstitutional because the litigation raised issues of public concern, and the mayor failed to demonstrate that his interest in restricting the speech outweighed the employee’s interests under the legal standard applied to prior restraint.<sup>456</sup> In finding the balance in favor of the employee, the court cited the limitless duration of the prohibition, the lack of prior actual disruption caused by the employee, and the speculative nature of the mayor’s concerns over workplace disharmony.<sup>457</sup>

The first court decision to address the constitutionality of an explicit ban on public employee use of social networking was rendered in 2011 by a Missouri state court judge.<sup>458</sup> In that case, the court enjoined a newly enacted state law

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450. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

451. *Milwaukee Deputy Sheriffs Ass’n v. Clarke*, 574 F.3d 370, 381-85 (7th Cir. 2009).

452. *Whitney v. City of Milan*, 677 F.3d 292, 297 (6th Cir. 2012).

453. *Id.* at 296.

454. *United States v. Nat’l Treas. Emp. Union*, 513 U.S. 454, 468 (1995).

455. *Whitney*, 677 F.3d at 297.

456. *Id.*

457. *Id.* at 298.

458. *Missouri State Teachers Ass’n v. State of Missouri*, No. 11AC-CC00553, 2011 WL 4425537 (Mo. Cir. Ct. Sept. 23, 2011).



prohibiting teachers from establishing, maintaining, or using a non-work related internet site that permits “exclusive access” with a current or former student.<sup>459</sup> In enjoining the law, the judge found that as a matter of fact “social networking is extensively used by educators. It is often the primary, if not sole manner, of communications between [teachers] and their students.”<sup>460</sup> In his three-page decision and order, the judge did not examine the law under *Pickering/Connick/Garcetti*.<sup>461</sup> Instead, the judge concluded that the law was unreasonably broad, noting that it might prohibit social networking between teachers and their own family members, and it would have a chilling effect on speech. Following issuance of the injunction, the Missouri state legislature repealed the statute.<sup>462</sup>

The ubiquity of social networking, and the multiplicity of its forms, creates challenges for employers in crafting social media policies that are both lawful and practical. While First Amendment case law concerning social networking remains in an embryonic stage, the constitutional implications of workplace policies on electronic communications under the Fourth Amendment, to which we now turn, are much clearer.

#### *B. Privacy Protections for Public Sector Social Networking*

As Pauline T. Kim has argued, there is a strong connection between employee rights to free speech and privacy.<sup>463</sup> Employee personal and associational discourse frequently occurs through private communications. Access to an individual’s social media account is protected through a user name and password. While Facebook permits users to restrict access to the content of a page through privacy settings, a 2012 study found that close to 13 million Facebook users in the United States admit to not using the privacy settings.<sup>464</sup> Nevertheless, many in our society incorrectly assume that social networking and other forms of workplace-related electronic communications have strong, enforceable privacy protections.

In order for the content of a social media page to be protected under the Fourth Amendment against an unreasonable search and seizure by the

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459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*; See Sheryl Allenson, *Missouri senate approves measure to repeal teacher “Facebook law”*, WOLTERS KLUWER EMP’T LAW DAILY (Sept. 17, 2011), <http://www.employmentlawdaily.com/index.php/2011/09/17/missouri-senate-approves-measure-to-repeal-teacher-facebook-law/>.

463. Kim, *supra* note 19, at 925-29.

464. *Facebook & your privacy: Who sees the data you share on the biggest social network?* CONSUMER REPORTS (June 2012), <http://www.consumerreports.org/cro/magazine/2012/06/facebook-your-privacy/index.htm>.

government,<sup>465</sup> an individual must have a reasonable expectation of privacy.<sup>466</sup> The applicable test for determining that issue was first articulated by Justice John M. Harlan in his concurrence in *Katz v. United States*: “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person [has] exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>467</sup>

When a reasonable expectation of privacy exists, the Fourth Amendment generally requires a government official to obtain a judicial warrant before conducting the search and seizure.<sup>468</sup> The warrant requirement, however, is inapplicable when a public employer engages in a work-related search of its workplace.<sup>469</sup> In a recent decision by the New York Court of Appeals, however, the majority concluded that a warrant was not required before a public employer attached a GPS device to an employee’s personal car for purposes of monitoring his movements outside of the workplace.<sup>470</sup> A warrant is also unnecessary when data is in plain view or when it has been voluntarily provided by a third person.<sup>471</sup>

There are distinct standards with respect to enforceable employee privacy protections in the government workplace under the Fourth Amendment. In *O’Connor v. Ortega*,<sup>472</sup> the plurality applied a two-step test to decide whether a public employer’s search of an employee’s office violated the Fourth Amendment. The initial issue is whether the employee had a reasonable expectation of privacy based upon the “operational realities of the [particular] workplace.”<sup>473</sup> To make that determination, a court examines workplace practices, procedures, and regulations.<sup>474</sup> If the employee had a reasonable expectation of privacy, then the court examines the reasonableness of the

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465. The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

466. *Katz v. United States*, 389 U.S. 347 (1967).

467. *Id.*

468. See Junichi P. Semitsu, *From Facebook to Mug Shot: How the Dearth of Social Networking Privacy Rights Revolutionized Online Government Surveillance*, 31 PACE L. REV. 291, 328 (2011).

469. See Nat’l Treasury Emp. Union v. Von Raab, 489 U.S. 656 (1989).

470. CUNNINGHAM V. NEW YORK STATE DEPT OF LABOR, NO. 123, 2013 WL 3213347 (JUN. 27, 2013).

471. Semitsu, *supra* note 468, at 329-30.

472. *O’Connor v. Ortega*, 480 U.S. 709 (1987).

473. *Id.* at 717.

474. *Id.*

employer's intrusion into the employee's privacy expectations resulting from the work-related search.<sup>475</sup>

The Supreme Court began to tackle constitutional privacy issues involving public sector electronic communications in *City of Ontario, Cal. v. Quon*.<sup>476</sup> While the case involved text messaging, the constitutional privacy principles are relevant to public sector social networking, particularly when the activity involves use of the employer's equipment.

In rendering its decision, the Court expressed deep concerns about the risk of judicial error "by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."<sup>477</sup> In words equally relevant to privacy issues in the rapidly evolving social media culture, the Court observed:

Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instrument for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matter can purchase and pay for their own.<sup>478</sup>

In *Quon*, a unanimous Court rejected a police officer's Fourth Amendment challenge to his employer accessing and reading his text messages sent and received through an employer-provided pager.<sup>479</sup> It held that the employer's search was reasonable under Fourth Amendment standards because it was justified from inception and its scope was reasonable under the circumstances.<sup>480</sup> The purpose of the employer's search was premised upon reasonable concerns about the adequacy of the character limit in its lease agreement with the service provider and whether the employer was paying for extensive personal texts by its officers.<sup>481</sup> The scope of the search was found reasonable because it was limited

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475. *Id.* at 725-26.

476. *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010).

477. *Id.*

478. *Id.* at 2630.

479. *Id.*

480. *Id.*

481. *Id.* The search in *Quon* emanated from the employer's unilateral decision to end a past practice of permitting officers to pay for monthly overages they incurred and thereby avoid having their text usage scrutinized by their supervisor. The unilateral change in that practice was probably mandatorily negotiable under the applicable California public sector collective bargaining law. *See Claremont Police Officers Ass'n v. City of Claremont*, 139 P.3d 532 (Cal. 2006). CAL. GOV. CODE § 3504 states: The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not

to reviewing the content of on-duty text messages during a two-month period when the officer exceeded the allotted characters.<sup>482</sup>

Without determining the issue, the Court concluded that the officer had, at best, a limited reasonable expectation of privacy in his text messages because the pager was for use during police emergencies, the officer received notice from workplace policies that his texts were subject to audit, and he should have reasonably known that his on-duty texts may be subject to scrutiny during litigation.<sup>483</sup> Other factors mentioned for determining an enforceable privacy expectation included whether reviewing the messages is necessary for performance evaluations and compliance with freedom of information laws.<sup>484</sup> Under the circumstances of the case, the Court concluded “a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used.”<sup>485</sup> Notably unresolved by the decision was the dispute between the parties over whether supervisory statements and practices that deviated from the employer’s policies created an enforceable expectation of privacy.

The Supreme Court emphasized in *Quon* the centrality of employer policies in determining whether workplace privacy expectations are reasonable: “And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.”<sup>486</sup> The difference in design between social media and texting may make workplace policies less significant in determining workplace privacy rights concerning social networking. The operational realities of a username, password, and privacy settings on a social media account might outweigh the impact of a government workplace policy stating that employees lack an expectation of privacy in social networking when using the employer’s equipment.<sup>487</sup>

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include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

482. City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2629 (2010).

483. *Id.* at 2631.

484. *Id.* at 2629.

485. *Id.* at 2631.

486. *Id.* at 2630.

487. See R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp. 2d 1128 (D. Minn. 2012) (finding that a student had a reasonable expectation of privacy with respect to her privacy protected social media messages). See also United States v. Gines-Perez, 214 F. Supp. 2d 205, 225 (D.P.R. 2002), *rev'd on other grounds*, 90 F. App'x 3 (1st Cir. 2009) (finding defendant lacked a subjective expectation of privacy and commenting that “[w]hile it is true that there is no case law on point regarding this issue, it strikes the Court as obvious that a claim to privacy is unavailable to someone who places information on an indisputably, public medium, such as the Internet, *without taking any measures to protect the information.*”) (emphasis in original); Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369, 373-74 (D. N.J. 2012). See also

There is a tendency among social media enthusiasts to “friend” multiple individuals including supervisors, co-workers, and even strangers. The lack of discernment in requesting and accepting invitations increases the probability that an employer may learn of a post, particularly one deemed offensive or troubling, from an employee’s social media friend without implicating the Fourth Amendment.<sup>488</sup>

## V. CONCLUSION

It is possible that in the next few years, an enterprising group of scholars will post a report outlining their findings on American culture and values based upon a study of the content of social media. Rather than using polling, questionnaires or semi-structured interviews, the report will be based upon the content of data sets provided by social media companies. Unlike other research subjects, participants in social media cannot escape from their virtual memory. A portion of the data studied by the scholars will be available shortly through the Library of Congress’s archive of billions of tweets, thanks to a 2010 contract the library has with Twitter.<sup>489</sup> In devising the research project, the scholars chose to ignore the central commercial component of social media because information about

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Herbert, *supra* note 154, at 73-76 (discussing precedent concluding that the sender of an unrestricted e-mail lacks a reasonable expectation of privacy).

488. *See United States v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012) (“Where Facebook privacy settings allow viewership of postings by ‘friends,’ the Government may access them through a cooperating witness who is a Facebook friend without violating the Fourth Amendment.”). The same employer conduct, however, might still violate federal and state electronic privacy laws. *See Pietrylo and Marino v. Hillstone Rest. Group*, No. 06-5754, 2009 WL 3128420 (D. Ct. N.J. 2009) (holding that evidence supported jury finding that employee did not voluntarily consent to restaurant manager gaining access to employees’ chat room); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548 (S.D.N.Y. 2008) (employer violated Stored Communications Act 18 U.S.C. §§ 2701-2711 when it accessed former employee’s Hotmail account without authorization by utilizing former employee’s username and password information stored on employer’s computers). *But see City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2629 (2010) (finding that public employer did not violate the Fourth Amendment when it read the transcripts of police officer’s text messages obtained from the service provider), *with Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008), *cert. denied sub nom. USA Mobility Wireless, Inc. v. Quon*, 130 S. Ct. 1011 (2009) (concluding that the service provider violated the Stored Communications Act by providing employer with the transcripts of a police officer’s texts without his consent).

489. *See Gayle Osterbert, Update on Twitter Archive at the Library of Congress*, LIB. OF CONGRESS BLOG (Jan. 4, 2013), <http://blogs.loc.gov/loc/2013/01/update-on-the-twitter-archive-at-the-library-of-congress/> (“The Library’s focus now is on addressing the significant technology challenges to making the archive accessible to researchers in a comprehensive, useful way. These efforts are ongoing and a priority for the Library.”).

what people purchase, eat, read and watch is perpetually monitored and studied by social media companies and their advertisers.<sup>490</sup>

The future report is destined to disappoint. It is unlikely to reflect a society that prioritizes education, knowledge, virtue, enterprise, and equality. Instead, the report might describe a contemporary culture of narcissism far beyond what Christopher Lasch decried over three decades ago.<sup>491</sup> The scholars will likely find that posts and tweets about political, labor, community, or spiritual issues were substantially outnumbered by idle words about banal topics written by people who appeared to have no time to think. To the extent the content involved work, the posts will have primarily focused on individualized complaints about supervisors, work frustrations, and other burdens associated with having a job. At the same time, the report will inevitably highlight posts filled with extraordinary forms of creative expression.

Whether the scholarly study is already in progress is unknown. What is known, however, is that social networking is substantially expanding electronic written communications, for good and ill, on many subjects including work. It constitutes a modern-day printing press with a potential readership that far exceeds what is possible with traditional print media. It is also a powerful tool for various forms of organizing. Users can write, read and exchange thoughts, and help to mobilize others to engage in action such as voting.

There are troublesome qualities, as well. By design, social networking is a documentation medium permitting access, review, and surveillance of communications and activities on a scale far beyond the dreams of espionage agents for 20th century domestic intelligence agencies and employers.<sup>492</sup> Electronically stored information related and unrelated to a protest can become the target of prosecutorial demands for access even when a person is charged with mere violations.<sup>493</sup>

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490. See AL GORE, *THE FUTURE: SIX DRIVERS OF GLOBAL CHANGE* 79 (2013) (“Social media sites like Facebook and search engines like Google are among the many companies whose business models are based on advertising revenue and who maximize the effectiveness of advertising by constantly collecting information on each user in order to personalize and tailor advertising to match each person’s individual collection of interests.”).

491. CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (1979).

492. See AUERBACH, *supra* note 65, at 97-114 (describing the use of espionage by private sector employers to spy upon union organizing efforts); FRANK J. DONNER, *THE AGE OF SERVEILLANCE: THE AIMS AND METHODS OF AMERICAN POLITICAL INTELLIGENCE SYSTEM* (1980) (delineating a system of clandestine federal government spying on political and labor activities in the Twentieth Century); FRANK J. DONNER, *RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* 41-43 (1990) (describing the use of local police agencies to monitor labor activities).

493. See *People v. Harris*, 945 N.Y.S.2d 505 (N.Y. Crim. Ct. 2012) (denying motion by a defendant charged with disorderly conduct during a protest, which sought to quash a subpoena *duces tecum* seeking subscriber information and content information from his social networking service provider); *People v. Harris*, 949 N.Y.S.2d 590 (N.Y. Crim. Ct. 2012) (granting, in part, and

The architecture and culture of social media can also cause communicative misjudgments resulting in serious workplace consequences. The ubiquity of personal devices and the impulsiveness encouraged by the technology increases the substantial risk of electronic communicative collisions. While participants in social media are responsible for their behavior, the regularity of stories about inappropriate employee posts and tweets, particularly in the public sector, indicates that the conduct is not solely due to personal or professional failings.

Until the development of social networking, few desired or had the means to expose their inner thoughts, feelings, daily personal events and humor to a world-wide audience. Humor, in fact, frequently falls flat in the electronic communicative world. Attempts at humor in social media are less likely to constitute tools, as Langston Hughes described, that can “suddenly cleanse and cool the earth, the air and you.”<sup>494</sup> The lack of facial expressions and vocal intonations, and the rapidity of the exchanges, can lead to substantial misinterpretations, a result that undermines the medium’s communicative value.

The NLRB’s actions over the past few years, and the national publicity it has generated, have resulted in a helpful societal recognition of the relevance of labor law to the use of technological communicative devices. Developments in the private sector might reawaken societal recognition of the importance of the liberties and rights granted by public sector collective bargaining laws and statutory and negotiated tenure protections. Despite a public sector labor law regime favoring associational activities under the First Amendment and state laws, the case law discussed in this article does not indicate that there has been an overwhelming embrace of social media for associational purposes. This may be due to the particular issues presented in the reported cases, the cultural shift over the past decades towards individualism over group activities, and/or the lack of available information concerning the scope of protected activities.

The case law and interpretative memoranda concerning social media delineate two core labor law questions: what constitutes protected speech in cyberspace and what are legal limits to the terms of employer policies. As we have seen, these issues are central in both the public and private sectors, along with questions of privacy and unlawful surveillance.

This growing body of decisions has applied well-established legal principles without regard to the differences inherent in interactive electronic communications. Those differences include the fact that, unlike most water cooler discussions, social networking frequently involves exchanges between employees and individuals with no connection to the employer or a union.

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denying, in part, a motion by the defendant’s service provider to quash the same subpoena *duces tecum* seeing records from defendant’s social networking account).

494. LANGSTON HUGHES, THE COLLECTED WORKS OF LANGSTON HUGHES, VOL. 9: ESSAYS ON ART, RACE, POLITICS AND WORLD AFFAIRS 525 (2002).

Determining intent and purpose in that context is more difficult. The transcriptions of social media posts are often disjointed, and subject to multiple meanings and interpretations. Discussions related to work can bleed into personal and political discussions making it difficult to pinpoint whether the subject is protected. The blending of topics can also complicate conclusions with respect to the employer's motivation. To determine future social media cases under collective bargaining laws and the First Amendment may require a combination of dexterous dissection and careful suturing of electronic comments.

While the law will never be able to keep pace with the current speed of technological innovation, the behavioral norms associated with social networking demonstrate a need for retuning labor law doctrines to ensure that work-related civil liberties and protections are maintained in cyberspace. This can best be accomplished through legislative initiatives like the recent state laws restricting employer access to social media accounts. In addition, carefully drafted workplace policies, collective bargaining and workplace training can significantly aid in avoiding conflicts over public sector social networking. Finally, in determining whether public sector social media activities are protected, greater consideration should be given to the impulsiveness caused by the technology, the overreactions posts can engender, and the importance of legal checks to ensure that the principles of free speech, freedom of association, privacy and due process are preserved.