Monitoring Your Employees On and Off the Clock: *Social Media Use at Work*

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Social Media Use at Work

a. The Doctrine of Vicarious Liability

Illinois Courts use and apply the Section Restatement of Agency which identifies three general criteria for determining whether the acts of an employee fall within the scope of employment:

i. Conduct of a servant is within the scope of employment if, but only if:

(1) It is of the kind he is employed to perform;
(2) It occurs substantially within the authorized time and space limits;
(3) It is actuated, at least in part, by a purpose to serve the master… [.]

ii. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Restatement (Second) of Agency Section 228 (1958), cited in *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 862 N.E.2d 985, 992 (Ill. 2007); *Pyne v. Witmer*, 129 Ill.2d 351, 360, 543 N.E.2d 1304, 1308 (Ill. 1989).

In the majority of cases where an employee's deviation from the scope or course of employment is neither slight nor extreme or marked, or where the surrounding facts and circumstances permit legitimate inferences as to whether the deviation was still within the business of the employer, the jury or fact finder will determine whether the complained of actions by an agent occurred within the scope of employment. *See, Pyne v. Witmer*, 129 Ill.2d 351, 361-62, 543 N.E.2d 1304, 1309 (Ill. 1989); *Sunseri v. Puccia*, 97 Ill.App.3d 488, 422 N.E.2d 925, 930 (1st Dist. 1981) ("whether an employee has departed from the scope of employment by acting purely for his own interests, rather than at least in part for the employer, is normally a question for the jury (cites omitted)"). Of significance, the Illinois Appellate Court explained in *Sunseri*, an employer incurs liability for the damages caused by the intentional torts of an employee which are not "unexpectable" in light of the duties to be performed by the employee. *Id.*

The scope of employment or agency is not the only route for liability exposure. The alternative theory of apparent agency concerns whether an agent had authority to bind an entity, for example, even a partnership, to a specific agreement based on the words or conduct of the principal. *See, Zahl v. Krupa*, 365 Ill.App.3d 653, 850 N.E.2d 304, 311-12 (2nd Dist. 2006).

b. Potential Liability Concerns

i. Confidential Information. As one legal author depicted in the *Duke Law and Technology Review*:

> Anti-employer blogs pose a huge potential risk for employers, large and small, seeking to protect important business relationships and good will. These losses can be in the form of diminished sales, diversion of high-level resources… decreased stock value, loss of shareholder confidence and/or bruised employee morale.

Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process is Effected*, 2007 DUKE L & TECH. REV. 2, at ¶9N.23, quoting, John L. Hines, Michael H. Cramer & Peter T. Berk, *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. L. J. 97 (2003).

For most businesses, the greatest potential consequence of employee misuse of social media on the job involves the loss of trade secret protection of business or economic data, along with increased litigation risks.

The Illinois Trade Secrets Act requires any person or business entity claiming a trade secret to undertake reasonable efforts to maintain the secrecy or confidentiality of the alleged "trade secret." 765 ILCS 1065/2(d)(2). The Illinois Trade Secrets Act defines a trade secret as follows:

> "Trade Secret" means information, including but not limited to, technical, or non-technical data, a formula, pattern, compilation, program, device, method, technique, drawing, process, financial data, or list of actual or potential customers or suppliers, that:
>
> (1) is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy or confidentiality.

765 ILCS 1065/2(d). As one can see, an employee who improperly uses social media can, depending on what is disclosed, disqualify such information as a "trade secret" by making such information generally known to other persons through a social media site posting [765 ILCS 1065/2(d)(1)] or by disclosing certain information or providing links so as to thereby shed the information of trade secret coverage. [765 ILCS 1065/2(d)(2)].

One must keep in mind that depending on the nature and circumstances surrounding any information disclosed in social media usage by an employee, Illinois Courts apply the following factors when determining whether a trade secret exists:

(1) The extent to which the information is known outside the plaintiff's business;
(2) The extent to which it is known by employees and others involved in the plaintiff's business;
(3) The extent of measures taken by plaintiff to guard the secrecy of the information;
(4) The value of the information to the plaintiff and to the plaintiff's competitor;
(5) The amount of effort or money expended by the plaintiff in developing the information; and
(6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

See Stenstrom Petroleum Services Group, Inc. v. Mesch, 375 Ill.App.3d 1077, 874 N.E.2d 59, 971-72 (2nd Dist. 2007), citing Section 757 of the Restatement (First) of Torts. As one readily finds, the information that an employee could disclose in the use of social media, if adverse, could directly impact the first three factors of the trade secret analysis under Illinois law.

Employers may note that even publicly available information compiled in one location may qualify as confidential information that a restrictive covenant may protect. *See Lifetec, Inc. v. Edwards*, 377 Ill.App.3d 260, 880 N.E.2d 188, 196-97 (4th Dist. 2007). In *Lifetec*, the Illinois Appellate Court found that the confidentiality practices associated with the use and identity of key customers, including various listings, ordering patterns, quote reports and open quotes consisting of bids provided to customers for purchases all qualified as potentially confidential material and thereby affirmed the trial court's decision granting the former employer's request for a preliminary injunction while returning the case to the trial court for clarification of various parts of the order. *Id.,* 880 N.E.2d at 200.

Employees must additionally maintain an awareness of federal law, specifically the Computer Fraud and Abuse Act, 18 USC Section 1030. In a recent opinion, the U.S. Court of Appeals, Seventh Circuit, reinstated a complaint filed under this federal statute. *See, International Airport Centers, LLC v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006). In *Citrin*, the former employee's new employer was not named as a defendant. The opinion, however, shows the need to confirm that any new employee has not brought with them any confidential data from a former employer through the use of burning CD-ROMs or by transferring or storing electronically stored information that is confidential on items such as hard drives or external data storage device or by any other means, arguably including social media websites.

Under Illinois law, there are a variety computer crime statutory provisions including computer fraud, 720 ILCS 5/16D-5. In essence, the Illinois statutory provision designates as criminally fraudulent conduct the offense of accessing or causing to be accessed a computer program or data for the purposes of obtaining money or control over any such money, property or services of another in connection with a scheme or artifice to defraud or as part of a deception. 720 ILCS 5/16D-5(a)(3). Persons found guilty of such a computer fraud, or other violations of the same statute, have committed the offense of computer fraud and are guilty of a felony which, depending on the circumstances of the violation and the amount of property obtained, varies in its classification. 720 ILCS 5/16D-5(b).

c. Other Types of Confidential Information

In *The Permanente Medical Group, Inc. v. Cooper*, No. Rg 05-203029 (Cal. Super. Alameda Co., filed 2005), the Court enjoined a blog posting which contained private patient data. In July 2004, Alyssa D. Cooper discovered that internal technical computer information was available on a public website maintained for computer maintenance purposes by her former employer, Kaiser Health Plan, which included patient information. Ms. Cooper posted a link to the data on her blog and was eventually found liable. More significantly, Kaiser was fined $200,000 by regulators for allowing patient data to become

available to the public. See, Brave New Cyber World: The Employer's Legal Guide to the Interactive Internet, R. Paul, L. Chung, 24 Lablaw 109, at p. 16 of computer printout of article.

On May 26, 2020, OSHA issued a memorandum on COVID-19 to its regional administrators and state plan designees. The attached memorandum goes into effect on May 26, 2020. This new memorandum changes prior OSHA guidance on the recording of employee cases of COVID-19 as an occupational illness. Due to some states and regions re-opening, OSHA seeks to broaden its prior guidance and provide some direction on when an employer should record a COVID-19 case as an occupational illness. The memo also seeks to provide guidance to agency enforcement staff about whether an employer has taken enough investigative steps to determine if an employee with COVID-19 has the illness because of work-related conditions. While OSHA does not expect an employer to perform a medical investigation, the baseline steps for an employer to take include: 1) asking the employee how the COVID-19 illness was contracted; 2) discussing with the employee work and non-work activities that may have led to the COVID-19 illness while respecting employee privacy; 3) reviewing the employee's work environment for potential exposure to the illness; and 4) considering whether other employees in the same work environment have also contracted COVID-19. OSHA will evaluate an employer's reasonableness based on whether the employer looked at COVID-19 transmission clusters of workers, customers, and the general community, reviewed the timing of the employee's exposure at work or away from work to COVID-19 and their later contraction of the disease, and considered whether the employee's job duties require closely working with co-workers or customers who are COVID-19 cases. If an employer cannot determine whether an employee more likely than not was exposed to COVID-19 in the workplace, the guidance suggests that an employer need not record the COVID-19 illness as a work-related occupational disease under the code for respiratory illness on the OSHA Form 300. OSHA staff will evaluate an employer's investigation for whether it was conducted in a reasonable and good faith manner. Furthermore, employers must keep in mind that information learned at a later date may change an initial determination that an employee's COVID-19 illness was not work-related into a work-related occurrence that is later recorded and reported under OSHA regulations. Finally, this guidance details that because COVID-19 is an illness, an employee can request that their name not be entered or included in the employer log or OSHA Form 300 submittal, and the employer must comply with such an employee request under 29 CFR 1904.29(b)(7)(vi).

d. Free Speech Rights

The First Amendment to the U.S. Constitution states that "Congress shall make no law… abridging the freedom of speech." This protection applies to the states through the Fourteenth Amendment. The constitutional protections apply to speech over the internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 851 (1997) (explaining that First Amendment rights fully apply to communications over the internet). For the First Amendment to apply to a specific employment situation, however, there must be state action. A Delta Airlines baggage handler who had a service record of 26 years learned this limitation the hard way after having a letter complaining about his employer published in the Denver Post. Delta's termination of his employment for "conduct unbecoming of a Delta employee" was upheld with the court noting that the plaintiff was simply not raising matters of safety, illegality or public concern, and underscored that Delta was not a public employer, so no right of free speech insulated the plaintiff from his discharge. *See, Marsh v. Delta Air Lines, Inc.*, 952 F.Supp. 1459, 1460-63 (D. Colo. 1997). Under the Constitution of the State of Illinois, Article 1, Section 4, "all persons may speak, write and publish freely, being responsible for the abuse of that liberty. In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." While the Illinois constitutional protection for free speech may or may not apply, the standard should be kept in mind when formulating a social media use policy.

e. National Labor Relations Act & National Labor Relations Board Office of the General Counsel Reports Concerning Social Media Cases

On June 26, 2014, the U.S. Supreme Court issued its opinion in the case known as *National Labor Relations Board v. Noel Canning,* 573 U. S. ___, No. 12 – 1281 (2014). The Supreme Court held that the President lacked the authority to make recess appointments to the National Labor Relations Board during a time when the Senate had a three day recess. The Constitution grants the President the power "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. Art. II, Section 2, Clause 3. The Senate held a three day recess when the appointments were made to the NLRB. The Supreme Court found the recess too short to qualify for the cited clause providing an exception to the primary requirement that the President must obtain "the Advice and Consent of the Senate" before appointing an "Office[r] of the United States." U.S. Const. Art. II, Section 2, Clause 2. Because the Supreme Court held that the recess appointments lacked a legal basis, much discussion has occurred over the validity of

the opinions and actions taken by the NLRB when a quorum of its Board members required participation of three members whom the President appointed to the NLRB through the Recess Appointments Clause. Nevertheless, in light of the absence of any great policy changes undertaken by the NLRB, a survey of the NLRB's actions taken during the past several years, including during the time span from when the recess appointments were made in 2011 onward, is advisable for all businesses to undertake.

Employers must note any regulations or treatment of employees' web 2.0 communications so as not to commit an alleged unfair labor practice under the National Labor Relations Act. The NLRA extends protection to both unionized, and in certain designated ways, non-unionized work places. For example, 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 158(a)(3) of this Title.

29 USC §157. Under the NLRA, employers may not "interfere with, restrain, or coerce employees in the exercise of" Section 7 rights by employees. 29 USC §158(a)(1). Legal authors have opined that the cited provisions likely extend to electronic communications by an employee where they involve "concerted activity" for "mutual aid or protection." See, Katherine M. Scott, When is Employee Blogging Protected by Section 7 of the NLRA?, 2006 Duke L. & Tech. Rev. 17, ¶16 (2006). At any rate, employers should expect to confront the issue of how unions or employees may electronically communicate their "concerted activity" for "mutual aid or protection" through social media.

A number of developments have occurred with significant rulings and reported developments by the National Labor Relations Board. The acting general counsel for the NLRB has issued two reports concerning social media cases, first on August 18, 2011 Memorandum OM 11-74 and January 24, 2012 Memorandum OM 12-31.

The acting general counsel through these memoranda seek to provide some guidance on developments within the agency's decisions that relate to the use of social media by employees and its impact under the laws, rules, and procedures governing NLRB cases. The acting general counsel in the first report reviewed 14 different cases where social media intersected with NLRB law. In the first discussed case, five employees of a non-profit social services agency had authored statements uploaded on Facebook concerning the allegations made against them of poor job performance expressed by one of their co-workers. The NLRB decided that the discharged employees were engaged in protected concerted activity as set forth in 29 U.S.C. §§157 and 158. The complained about co-worker had previously sent her own number of text messages that critiqued the job performance of other employees. The NLRB decided that the Facebook postings authored by the discharged employees qualified as concerted activity under *Meyers Industries* (Meyers I), 268 NLRB 493 (1984), *rev'd sub nom Prill v. NLRB,* 755 F.2d 941 (D.C. Cir. 1985), *cert denied*, 474 U.S. 948 (1985), *on remand, Meyers Industries* (Meyers II), 281 NLRB 882 (1986), *aff'd sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert denied*, 487 U.S. 1205 (1988). Under the *Meyers* opinions, an activity qualifies as concerted once an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself [or herself].

The agency decided that the communications posted on Facebook were nothing more than a textbook example of concerted activity, just placed on a different platform, one of social networks. The communications started with one employee appealing to her co-workers for assistance and conducting a survey through Facebook of her co-workers on the issue of job performance, all to ready herself for an expected meeting with the executive director, an event which occurred due to the input of another co-employee. The communications concerned job performance and staffing level issues and were conducted by co-workers. Where communications about employee staffing levels clearly implicate working conditions, such communications qualify as protected activity, whether or not communicated over the internet. *Citing Valley Hospital Medical Center*, 351 NLRB 1250, 1252-54 (2007), *enfd. sub nom. Novata Service Employees Union, Local 1107 v. NLRB*, 358 F.Appx. 783 (9th Cir. 2009). In addition to the communications and criticisms directly involving job performance and staffing or workload issues, the resulting meeting the employee had with management also implicated the potential of workplace discipline. As a result, the communications over Facebook addressed terms and conditions of employment and originated in connection with an employee readying for a meeting with the employer to discuss matters related to those issues. As a result, the Facebook communications qualified as concerted activity for "mutual aid or protection" under Section 7. Moreover, the

swearing and/or sarcasm to the extent it existed in the Facebook communications were marginal in nature and not opprobrious under the test annunciated in *Atlantic Steel Co.,* 245 NLRB 814, 816-17 (1979).

The ambulance service employer maintained an internet and blogging policy. The terminated employee had authored negative remarks about her supervisor and posted them on her personal Facebook page. The comment drew posts from the employee's co-workers in support of her statements, which led to additional comments criticizing the supervisor authored by the employee. The employer suspended the employee and later terminated her based on her Facebook postings and based on the violations of the employer's internet policies.

The employer's policy barred employees from communicating disparaging remarks when discussing the company or supervisors or depicting the company through any means without the permission of the company. The postings followed a request by the supervisor to the employee to draft an incident report regarding a customer complaint about the employee's performance. The timing had no impact in the view of the agency based upon its precedent that a protest of supervisory actions receives Section 7 protection. *Citing Datwyler Rubber and Plastics, Inc.,* 350 NLRB 669 (2007). Moreover, again noting the above-cited Atlantic Steel authority, the use of the word "scumbag" did not cause the employee to lose concerted activity protection. The Facebook posting did not occur during work time, and happened outside of the workplace. The ill-advised use of the term "scumbag" was not joined with any type of threats and the agency viewed the postings as following the supervisor's unlawful refusal to provide the employee with a union representative combined with an unlawful threat of discipline.

The agency specifically challenged the employer's policy that barred employees from posting pictures of themselves in any media if the pictures showed the company in any way, including company uniforms, corporate logos, or the ambulance vehicle. Under Section 8(a)(1), the agency viewed the policy as barring an employee from conducting protected activity because they could not post a picture of employees carrying a picket sign with the company's name or an employee wearing a t-shirt with the company logo in relation to a protest over terms and conditions of employment. The agency also viewed as unlawful the portion of the policy that precluded employees from making disparaging comments in communications about the company or when discussing superiors, co-workers, or competitors. *Citing University Medical Center*, 335 NLRB 1318, 1320-22 (2001), *enf. denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003). In *University Medical Center*, the NLRB found that a similar rule proscribing "disrespectful conduct" towards others violated the prohibition against interfering with or restraining the rights of employees to exercise their Section 7 rights. 29 U.S.C. §158(a)(1). Moreover, the policy's additional language barring employees from using language or conduct that was inappropriate or of a general offensive nature and rude or discourteous behavior to a client or co-worker as impermissibly encompassing a wide span of conduct without containing limiting language required to remove the ambiguity in the role, thereby prohibiting Section 7 activity.

In the third case, the acting general counsel discusses a case where the Board concluded that the luxury automobile dealership employer violated 29 U.S.C. §158(a)(1) by firing a sales person who had posted photographs and statements on his Facebook page that criticized a sales event held by the employer. Once again, the agency perceived the written statements as arising from protected concerted activity that encompassed concerns of employees which related to commissions, and did not disparage the employer's product nor communicate statements that were so "egregious" as to withdraw the protection of the Act. In particular, the terminated employee and other sales persons had concerns over the inexpensive food and beverages that the general sales manager intended to serve at an all-day event to promote a new car model. The employee at issue photographed the food and beverages provided at the event along with co-workers posing with the food and a banner used for the new car model event. Later the employee posted on his Facebook page the photographs of the vehicle in the pond preceding the sales event along with photographs from the sales event with sarcastic comments about the employer going "all out" with the noted inexpensive food used for the new model promotion. The employee also authored comments with the photos that contained his critiques of the food and beverages provided. Through a part-time co-worker mentioning the postings to a supervisor, the employer examined the employee's Facebook page, printed the photos and comments related to both the pond incident and the sales promotion. The general sales manager told the employee to remove his photographs and comments from his Facebook page and the employee did so. The next day at work, the employee arrived and was called to a meeting which reviewed the embarrassment to the dealership over his postings and concluded with the employee being sent home while a final decision was reached over his employment. Soon thereafter, the employee was

terminated. Later, the employer asserted that the true reason for discharging the employee was his posting of the photographs of the car in the pond, meaning the employee had inappropriately made light of a serious accident.

In contrast, the agency found the employee was pursuing protected concerted activity. The discussions over Facebook flowed directly from co-worker discussions about their frustration over the new car promotion event and therefore concerned their employment. Employees had concerns about the resulting effect of the employer's choice of refreshments would have on sales and thereby the sales person's commissions. The agency also disbelieved that the employer would meet its burden of showing it would have discharged the employee in the absence of such protected activity. [*Wright* decision – would employer have otherwise discharged employee?].

Moreover, under *Atlantic Steel* or *NLRB v. Electrical Workers Local 1229* (Jefferson standard), 346 U.S. 464 (1953), the employee's comments remained protected. Under *Atlantic Steel*, the employee's Facebook postings over the sales event were not so harsh as to lose the protections afforded by the Act. What outbursts the employee exhibited were less offensive than other conduct found protected by the Board. Applying Jefferson standard, the Board found that the employee's postings were not disparaging of the product of the employer, nor were they disloyal. The communications placed on Facebook exhibited frustration with the choice of food at a sales event and did not criticize the quality of the employer's cars or the performance of the dealership, nor did the employee criticize [directly?] the employer's management. Therefore, there was no need for the employee's postings to directly or clearly state that they were related to a labor dispute – they were neither disloyal nor disparaging comments.

The employer sports bar and restaurant discharged and threatened to sue two employees over Facebook conversations initiated by a former co-worker about tax withholding practices of the employer under its internet/blogging policy which barred "inappropriate discussions." The agency viewed the discharge and threats of legal action along with the internet policy all as unlawful. Early in 2011, several existing and former employees found they owed state income taxes for 2010 over earnings at the sports bar restaurant. The subject was requested by one of the employees to be placed on an agenda for a management meeting with employees. In February 2011, a former employee posted on her Facebook page a statement which contained a shorthand expletive stating displeasure over the now owed state income taxes. The statement also critiqued employer's owners as unable to properly fill out paperwork. After one employee clicked "like" other comments from other employees followed about not previously owing tax monies and referring to the upcoming management meeting. Customers also posted comments along with one employee who in addition to stating she owed money referred to one of the owners as "such an asshole." The complainant employees were not working on the day they made their Facebook-based communications. When one of the employees returned to work the next day, she was told her employment was terminated based on her Facebook posting and because she was not "loyal enough." Another employee reported to work the next day, and was then confronted about the Facebook communications and was terminated along with being informed that he would hear from counsel who represented the employer. That employee did later receive a letter from the employer's counsel, which stated that suit would be filed against her unless she withdrew her "defamatory" statements about the employer and its principals published on Facebook.

Based on precedents, the agency viewed concerted activity as encompassing "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where employees bring "truly group complaints" to the attention of management. *Meyers II*, 281 NLRB at 887. The employer's administration of income tax withholdings qualified as a concern about a term and condition of employment. Moreover, the topic was to be discussed at an upcoming management meeting and flowed from "truly group complaints" while also considering future group activity. The statements did not lose concerted activity protection under *Atlantic Steel* based on any claimed defamatory nature of the statements. The statements at issue concerned a core matter protected under Section 7. The comments occurred outside of work, on non-working time, did not disrupt operations and did not, in the view of the agency, undermine supervisory authority. Though not initiated by an unfair labor practice of the employer, the agency viewed the postings as less offensive than other behavior found protected by the Board. As for the employer's claim of defamation, there were no indications that the statements were maliciously false. Indeed, the agency viewed the statement regarding income tax withholding as not even false, much less malicious. Moreover, the agency viewed the threats to sue for engaging in protected activity as constituting an additional violation under U.S.C. §9158(a)(1). Even if a reasonable basis for a potential legal action existed, the threats to sue the

charging party employees constituted unlawful conduct because of what would reasonably result in interfering with the employee's exercise of their rights under 28 U.S.C. §157.

The employer's internet/blogging policy also failed in the eyes of the agency. The policy stated that the employer allowed for the free exchange of information and camaraderie among employees, but asserted that the electronic communications by the employees that revealed confidential and proprietary information about the employer, or engaged in inappropriate discussions about the company, management, or co-workers might mean the employee is violating the law and subject to disciplinary action, including discharge. The agency found that the policy stated that employees were subject to discipline for inappropriate discussions about the company management and/or co-workers was reasonably interpreted to constitute a restraint on Section 7 activity. The broad terms of the policy would typically apply to protected criticisms of the employer's labor policies, treatment of employees, and the employee's terms and conditions of employment with the employer. Further, the policy did not specifically define what was meant by the wide-ranging term "inappropriate discussions" nor were any specific examples provided or limitations that excluded Section 7 activity. Without such limitations or concrete examples of what the policy covered, the agency viewed the employees as reasonably interpreting the employer's electronic communications rules as prohibiting their discussions of terms and conditions of employment amongst themselves or with third parties.

The agency viewed a report or employee's posting of unprofessional and inappropriate tweets to a work-related Twitter© account as not protected. Following the employer's encouragement of employees to open Twitter© accounts and directives to use social media to get news stories out, the employee created a Twitter© account and screen name and controlled the content of its use. He disclosed in his Twitter© account that he was a reporter for the employer's newspaper and included a link to the newspaper's website. In the following year of 2010, the employee uploaded a tweet that criticized the copy editors of the employer paper. Here, the challenge for the employee was the lack of evidence that he had discussed his concerns with any of his co-workers. Later on, the HR director asked the employee about posting concerns on Twitter© instead of speaking to people within the organization. The HR director admitted that the social media policy did not yet exist and was still in the formulation stage. Within about a week, the employer told the reporter he was barred from posting his complaints or comments about the newspaper in any public form. The reporter stated his understanding of the directive. While continuing to tweet and use other social media to post about various matters, the reporter abstained from making public comments about the paper. Later on, the employee posted a tweet that critiqued a local television station. Shortly thereafter, the reporter was called to a meeting with the managing editor, the city editor, and his team leader and asked why he was tweeting about homicides. At that time, the reporter was directed not to tweet about anything work-related. The managerial personnel indicated the social media policy had still not yet been established. Two days later, the employer suspended the reporter for three days without pay and terminated the reporter's employment upon his return to work. A termination letter stated that the reporter failed to abstain from using derogatory comments in social media forums that would damage the good will of the employer and the employer lacked confidence that the reporter could sustain its expectation of professional courtesy and mutual respect. The agency perceived the discharge as not violating 29 U.S.C. §158(a)(1) because the conduct at issue was not protected and concerted, nor did it relate to the terms and conditions of the reporter's employment or seek to involve other co-workers and issues related to employment. While some of the statements of the employer could be interpreted as prohibited types of conduct in response to what are protected as 28 U.S.C. §157 rights, the statements were not overbroad verbally conveyed "rules" but rather guidance specific to the context of the reporter's discipline and specific and appropriate conduct. The agency also relied on the fact that the employer had not yet developed a written social media policy.

An employee bartender who was discharged for posting a message on his Facebook page concerning his employer's tipping policy, communicated and replied to a question from a non-employee, did not qualify as protected concerted activity. The unwritten policy of the employer restaurant/bar was that waitresses do not share tips with bartenders, even though bartenders aid waitresses in serving food. In response to a Facebook communication with a relative in 2011, the bartender stated that he had not received a raise in 5 years and was performing the work of waitresses without tips. The bartender also called the customer "rednecks" and asserted that he hoped they choked on glass as they drove home drunk. The bartender employee did not discuss his Facebook posting with any of his co-workers and none of them responded to his posting. Nevertheless, a week later, the employer's night manager told the employee that he was probably going to be terminated

over his Facebook posting. Indeed, the employee received a Facebook message from the employer's owner telling him that his services were no longer required and the next day the day manager left him a voice message telling the bartender he was fired over his Facebook posting about the employer's customers. Here, there was no evidence of concerted activity. Though the Facebook posting discussed terms and conditions of employment, the bartender had not discussed the posting with any of his co-workers and none of the co-workers had responded. Moreover, there were no employee meetings or attempted efforts to start group action over the tipping policy or raises. Finally, the internet communications did not arise from the bartender's conversation with a fellow bartender months earlier about the tipping policy.

The employer terminated an employee over posted messages on the Facebook page of a U.S. senator who represented the employee's state. The employer provided emergency and non-emergency medical transportation and fire protection services to a variety of customers. On the senator's Facebook wall, the employee had commented in response to the senator's comments that 4 fire departments in the state had received federal grants. The employee detailed her complaints that several fire departments had contracts with her employer because it was the cheapest service in town and paid employees $2 less than the national average. The employee further commented that the state was looking for more cheap companies to farm jobs out to and she critiqued that her employer had only 2 trucks for an entire county along with detailing an incident in which a responding crew to a cardiac arrest call did not know how to perform CPR. The employee did not discuss her Facebook communications with other employees before or after posting them. The employee indicated that she intended to inform the senator about her disagreement over the handling of emergency medical services in the state along with asserting that her company was not helping the situation. The employee did not contemplate the senator helping her with her employment situation. The employee had not discussed wages with other employees after the employer had announced a wage gap and there was a lack of evidence that employees had met or organized any group action to raise wage issues with the employer. The employer terminated the employee 10 days after her Facebook communications because they disparaged the employer and disclosed confidential information about its response to a service call. The employer also asserted that the employee's comments violated the employer's code of ethics and business conduct policy. The agency viewed the situation as not involving concerted activity because the employee did not discuss her posting with any other employee. Moreover, no employee meetings or attempt to initiate group action had occurred. The employee had made no efforts to take employee complaints to management and conceded that she did not expect the senator to remedy the situation. Trying to inform a public official about a condition of emergency medical services in her state did not qualify as concerted activity.

The Agency found that a non-profit facility did not act unlawfully when it discharged an employee for writing inappropriate Facebook posts that referred to the employer's mentally disabled clients. The employee held the job of recovery specialist and while working during an overnight shift conversed on her Facebook wall with two of her Facebook friends. One of her statements included describing how "spooky" it was while being located overnight in a mental institution. The employee also wrote about a client making her laugh, while not knowing whether the client was laughing at her, with her, or voices inside the client. The two friends who commented on the employee's posts were not co-workers. One of the Facebook friends was a former client of the employee, who then contacted the employer to report her concern. The next time the employee reported for work, she was terminated. The discharge letter cited the phone call from the former client and quoted the Facebook posts of the employee. The letter included a statement that "we are invested in protecting people we serve from stigma" and further stressed that the employee's actions were not "recovery oriented" to the extent the illnesses of the clients were being cited as sources of personal amusement by the employee. The employer's letter also cited confidentiality concerns as well as noting that the posts were written or uploaded when the employee should have been working. As a result, the Agency did not find that the employee was engaged in any protected concerted activity. The Facebook posts were not discussed with any of her fellow employees, nor did her co-workers respond to her posts. Further, the employee's Facebook postings were not connected to any group action or collective concerns of the employees. Moreover, the Facebook posts did not refer to any terms or conditions of employment. Merely communicating with Facebook friends about what was occurring during her work shift did not qualify for any protection according to the Agency.

Where an individual employee's Facebook postings expressed an individual gripe with a supervisory assistant manager, such postings fail to qualify as concerted activity subject to NLRA protection. The employee posted a comment that criticized the new assistant manager and described the "tyranny" of the store while asserting that many employees would soon quit. Several co-workers responded to the comment but only expressed emotional support or asked the employee why he was so

uptight. The employee then detailed that he was chewed out for mispricing or misplacing merchandise and used a profane comment to describe the assistant manager. Some co-workers stated supportive comments and one other co-worker told the employee to "hang in there." The store manager received a print-out of the Facebook comments, which led to a meeting where the employee was told his comments were slander and that he could be fired. The store manager imposed a 1-day suspension on the employee that barred promotion opportunities for a 12-month period. A discipline report was also written citing the employee for stating bad things on Facebook about the employer and assistant manager, contrary to company guidelines and further explaining that the employee could be terminated if such behavior continued. The employee later deleted the Facebook postings. The Agency took no action upon finding that the language at issue did not contain any suggestion that the employee intended to start any group action with his fellow employees. Personal expressions of frustration about an individual dispute with a supervisor, and the absence of any postings otherwise interpreting the employee's postings failed to produce any evidence that showed that the employee's postings were a logical extension of prior group activity.

The Agency found the union violated Section 8(b)(1)(A) by interrogating employees at a non-union jobsite about their immigration status. The union videotaped their interrogation and then posted an edited version of the video they created on YouTube, as well as the Facebook page of the local union. The union representatives who visited the non-union worksite did not identify themselves or disclose their union affiliation. One of the members carried a video recorder and documented another member asking the onsite workers questions as part of a claimed inspection based on reports of illegal workers. The interrogation included questions about the non-union workers' immigrations status, whether they possessed ID's, the dates of their hire, and details about their compensation, taxes, social security numbers, or numbers assigned by their employer. The employees tried to resist answering questions, but the union agents instructed the employees not to return to their tasks. When the employees disclosed they did not have identification, the union agents said they would return in half an hour and that the employees should then have identification. The same union personnel traveled to another level at the worksite and asked similar questions of the employees at that location. The videotape of approximately 18 minutes was given by the union in a DVD format to various federal and state governmental officials. A local union member edited the video to a shorter length of 4 minutes, added written editorial comments, and posted the video on YouTube and on the local union's Facebook page. The Agency found the union's videotaped alleged investigation violated Section 8(b)(1)(A) because it had a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights. [*citing Electrical Workers Local 98* (Tri-M Group LLC), 350 NLRB 1104, 1105-08 (2007), *enforced*, 317 Fed. Appx. 269 (3rd Cir. 2009); *Electrical Workers Local 98* (MCF Services), 342 NLRB 740, 752 (2004), *enforced*, 251 Fed. Appx. 101 (3rd Cir. 2007). The union threats to call immigration authorities and have employees deported also qualified as unlawful coercion under the same provision. The videotape the union agents created demonstrated the performance of coercive conduct. The posting of the edited version of the videotape on YouTube and on the Facebook page of the local union also qualified as unlawful conduct. The same coercive message was conveyed to workers at the jobsite through the social media outlets used by the local union.

A hospital social media policy was found overly broad because it could reasonably be construed as prohibiting protected concerted activity related to an employee's working conditions. The hospital employer issued a social media blogging and social networking policy later included in the employer's employee handbook. Rule 4 of the social media policy barred employees from employing social media in a manner that would violate, compromise, or disregard the rights and reasonable expectations of privacy or confidentiality held by any person or entity. Rule 5 of the same policy barred communications or posts that could embarrass, harass, or defame the hospital or any employee, officer, board member, representative, or staff member of the hospital. Rule 6 contained a similar proscription against statements that were inaccurate or that could damage the goodwill or reputation of the hospital employees and staff as well as the hospital.

The investigation occurred following displeasure that several nurses had with one of their colleagues who was frequently absent and thereby causing extra demands on their workload and schedule. The charging parties that complained to their manager who according to them, had done nothing to fix the situation. The frequently absent nurse called-in sick again. Shortly thereafter, the charging party wrote a comment on her Facebook page that discussed her issues about her colleague's recent absence. The posting referred to the co-worker's pattern of absences and use of illness days that disrupted the work schedule. The charging party employee concluded her post by inviting anyone with additional details to contact her. One of the friends of the charging party's Facebook friends provided a copy of the posting to the employer. Later the charging party

was disciplined for her posting on Facebook and told that she had just spoken poorly about the hospital in violation of the employer's social media policy. As a result, the employer terminated the charging party's employment.

The Agency concluded that portions of the social media policy of the employer proved unlawful. The Agency cited *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) when finding that Rule 4 lacked the required definitiveness or specific guidance as to what the employer categorized as private or confidential. Moreover, the Facebook complaints that formed the basis for the discharge related to the charging party's working conditions and would constitute protected activity under the Act if she were a statutory employee. As a result, the Agency found that Rule 4 could reasonably be construed as barring protected employee discussions of wages and other terms and conditions of employment and was therefore unacceptably overbroad. Rules 5 and 6 were also found overbroad, since they could commonly apply to protected criticisms of employment or labor policies and treatment of employees by the employer. Moreover, the hospital employer's social media policy did not define the broad terms it used, and perhaps most significantly did not include an exemption or savings clause that excluded Section 7 activity from the scope of its policy. As a result, the Agency found that when the employer applied and interpreted the broad language in Rule 5 to encompass the charging party's statement of displeasure about her colleagues workplace conduct as placing additional demands on the remaining staff as disciplinary action that would reasonably lead to employees to think that protected complaints about their working conditions were prohibited by the employer's social media policy.

The Agency found an employer's handbook, which barred employees from using microblogging features on their own time to discuss company business on their personal accounts, detailed in an online social networking policy, overbroad. The same policy also contained a provision that prohibited employees from posting material they did not wish their manager or supervisor to view or that could place their job in jeopardy. The policy additionally prohibited employees from disclosing sensitive or inappropriate data about the employer and from posting pictures or comments about the company or its employees that could be viewed as inappropriate. The policy warned employees that one picture or comment that could be interpreted as inappropriate if taken out of context could end up in the wrong hands and result in an employee losing employment. The Agency found that the prohibited conduct portion of the policy was unlawful under the law discussed in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), where a rule is found to be unlawful if it specifically restricts Section 7 activities. Alternatively, if such a rule does not explicitly restrict protected activities under the NLRA, it still becomes unlawful upon a showing that:

i. an employee would reasonably view the language as barring Section 7 activity;
ii. the rule was created in response to union activity; or
iii. the employer has applied the rule to restrict employees from raising or using their Section 7 rights.

The Agency found all the cited terms of the policy unlawful since they typically would apply to Section 7 protected discussions or critiques of workplace policies or treatment of employees by the employer. Moreover, the online policy and the handbook failed to specify what types of activities would place employment in jeopardy or would qualify as sensitive or inappropriate. The absence of such limitations or specific examples resulted in the Agency finding that the employees could reasonably view such rules as barring their Section 7 protected right to discuss wages, terms, and conditions of employment as well as communicating about such subjects through posting pictures. Interestingly, the Agency also found the employer's policy barring employees from using the name, address, or other data about the company on their personal profiles as unlawful. The employer lacked any explanation for its policy. Further, the Agency assumed that even if the policy had a protected legitimate interest by barring disclosure of certain protected company data to outside parties, presumably such as competitors, the prohibition was not drafted narrowly enough to address such concerns. In addition, the Agency viewed the prohibition as particularly coercive against employee's Section 7 rights due to what employees would typically disclose in personal profile pages through social networking sites where employees find and communicate with each other about Section 7 protected topics.

Another employer found that its social media policy provisions received a split determination by the Agency – as being partly lawful and partly unlawful. One guideline survived agency analysis because it was narrowly drafted to address harassing conduct and could not be reasonably viewed as impeding with an employee's Section 7 protected conduct. Two other provisions did not survive the same scrutiny. The employer operates a chain of supermarket stores. In its social media and electronic communication policy, a statement was included indicating that the policy sought to guard the reputation of the employer while governing communications by the employee during both work and off work time. Guideline 3 of the policy

barred employees from pressuring their co-workers to use, connect or communicate with them through social media. Guideline 5 barred employees from disclosing through photos, personal data about fellow employees, company clients, partners, or the employer's customers without their consent. Guideline 6 barred employees from using the logo of the employer or photos of its store brand or product without written authorization.

In addition to applying *Lutheran Heritage*, the Agency also applied *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). The *Lafayette Park Hotel* analysis concerns whether or not an employer violates Section 8(a)(1) of the National Labor Relations Act by maintaining a work rule that "reasonably tend[s] to chill employees in the exercise of their Section 7 rights."

Upon applying both *Lafayette Park Hotel* and *Lutheran Heritage*, the Agency found that Guideline 3, which precluded employees from pressuring their fellow employees to friend or otherwise connect with them through social media could not be reasonably viewed as depriving or limiting employee's exercise of their Section 7 activity rights. The Rule, labelled as Guideline 3, was both sufficiently specific in what it precluded, and clear that its application was limited to harassing conduct. Guideline 3 did not relate to the engagement by employees in protected concerted or union activity.

The Agency, however, found that Guideline 5 was overbroad and could be reasonably viewed as limiting Section 7 activity. Guideline 5 could be reasonably read as barring the right of employees to discuss wages and other terms and conditions of employment. Further, Guideline 6 would restrain an employee from engaging in protected activity since photos of employees picketing a facility bearing the name of the employer, or peacefully circulating handbills around the store, or wearing a t-shirt containing the logo of the employer in connection with a protest involving terms and conditions of employment, all constituted protected Section 7 activity.

A different employer and grocery store chain used a media relations and press interviews policy in its employee handbook under which the public affairs office bore responsibility for all official external employer communications. The policy detailed that employees were directed to maintain confidentiality about sensitive data and specified that the employer desired one person to speak on its behalf in order to provide an appropriate message and avoid claims of misinformation. The policy additionally precluded employees from using cameras in the store parking lot without prior approval from the corporate office. The employees were advised in the policy to answer all media questions by stating they were not authorized to comment for the employer or did not have the requested data, and to take the name and number of the media organization and to call the public affairs office.

The Agency began its analysis with citing a prior ruling that employees have a Section 7 right to speak to reporters about wages and other terms and conditions of employment. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990). Therefore, media communication rules cannot be overbroad so as to deter employees from exercising their Section 7 rights to speak with media reporters about working conditions.

Yet, an employer's media policy that only seeks to procure and maintain a consistent and controlled message on behalf of the employer company, and that seeks to limit employee contact with media only to the extent necessary to obtain that result is not reasonably viewed as restricting Section 7 communications. In *AT&T Broadband & Internet Services*, Case 12-CA-21220 at 10, advice memorandum dated November 6, 2001, the Agency found that a policy which stated that " the company will respond to the news media in a timely and professional manner *only* through the designed spokespersons" cannot be viewed as "a blanket prohibition" barring all employee contact with the media. Additional language in that policy referred to "crisis situations" and the need to ensure "timely and professional" replies to media inquiries aided in clarifying that the rule at issue there was not intended to encompass Section 7 activities. Along those lines, the Agency similarly found that the employer's media policy stated more than once that its purpose was to ensure that only one person spoke for the employer company. Although the policy directed employees to answer media inquiries in a specified way, the required replies did not indicate the thought that the employees could not speak on their terms and conditions of employment. Of further interest, the Agency also found that the rule barring employees from having cameras in the store was not unlawfully overbroad. The policy barring such use of cameras both appeared after and before instructions to employees about how to respond to media inquiries and events that received external attention. The Agency reasonably interpreted the rule as indicating that the referenced cameras were news cameras, and not the personal cameras of employees. Therefore, this section of the media policy was also found lawful since it did not chill the exercise of Section 7 conduct by any employees.

The Agency conducted an additional inquiry that led to finding the first social media policy an employer enacted was unlawful, but as amended, became lawful. The first policy, implemented in 2010 barred discriminatory, defamatory or harassing web entries about individual employees, the workplace environment or work-related issues on social media sites. In June 2011, the employer replaced its initial social media policy with one that barred the use of social media to post or display statements about co-workers, supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing or a violation of other workplace policies prohibiting discrimination, harassment or hostility on account of age, race, religion, sex, ethnicity, nationality, disability or any other protected class, status or characteristic.

The Agency found the first social media policy unlawful under *Lutheran Heritage* since the listed prohibitions contained wide-ranging terms such as "defamatory," which could otherwise cover discussions about terms and conditions of employment or workplace issues since the policy could be reasonably viewed as covering otherwise protected critiques of labor policies or treatment of employees by the employer. Moreover, the inquiry found that the employer had actually applied the first version of the social media policy to limit or control protected Facebook communications its employees had about their employment conditions. As a result, employees would reasonably view such language of the first version of the social media policy as prohibiting communications about their working conditions.

The second or amended version of the social media policy qualified as lawful. In its finding, the Agency relied on prior Board authority, which found that a rule prohibiting "statements which are slanderous or detrimental to the company" as part of a series of examples of prohibited conduct including "sexual or racial harassment" and "sabotage" as not to be reasonably interpreted as restricting Section 7 activity. *Tradesmen International*, 338 NLRB 460, 460-62 (2002). Moreover, the second version or amended version of the social media policy had not been used to discipline any Section 7 activity. Finally, the amended policy for social media usage covered obviously egregious conduct, which would not be reasonably interpreted as governing Section 7 activity.

A drugstore operator's social media policy qualified as lawful. The policy requested employees to limit their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. The policy also barred employees from referencing or disclosing confidential or proprietary information, including personal health information about customers or patients. The same policy also prescribed employees from communicating through social media about "embargoed information," which encompassed launch and release dates and pending reorganizations. While the Agency found that the policy could possibly be construed by employees as covering communications about the terms and conditions of their employment, the context of the rule should be reasonably viewed as addressing only communications that could implicate security regulations. Further, the proscription against disclosing confidential or proprietary information was not overbroad within the context of the employer's business of selling pharmaceuticals and dealing with health-related data of patients and customers, which carries with it, privacy interests. Finally, the corporate data described as "embargoed information" did not concern the working conditions of the employees who had no protected right to discuss such data.

A separate provision in the rules of the employer stated that when employees engaged in social networking activities for personal purposes, they had to indicate that any views they held were their own and did not reflect those of their employer. The same provision also barred employees from referring to the employer by name and from publishing any promotional content. The Agency determined that employees could not reasonably read the rule as impinging on Section 7 activity since the rule began with the statement referencing that "special requirements apply to publishing promotional content online" and defined content to encompass material "designed to endorse, promote, sell, advertise or otherwise support the employer and its products and services," which reference the context of Federal Trade Commission regulations. Therefore, this provision would not be reasonably construed by employees as applying to their discussions about terms and conditions of employment, since such communications would not fall in the category of communications to promote or advertise on behalf of the employer.

In contrast to the validity or invalidity of social media policy rules, the Agency conducted a separate investigation over the termination of an administrative assistant in an office area at the employer's plant. Moreover, the facts establish that the employer knew that its employees frequently sought advice from the charging party employee about work problems. The charging party employee had been terminated after she posted comments on Facebook that complained about a reprimand she received for her involvement in work-related problems of her co-employees.

The factual context indicated that after a severe winter storm, a tank yard manager approached the charging party employee and a quality control supervisor to ask who made it to work the prior day after the storm. When the tank yard manager left upon hearing they had not made it to work, he stated he knew females would not arrive for work. The charging party employee e-mailed their supervisor and an HR assistant to complain about the sexist remark and received no response. The following day the charging party employee posted a message on Facebook and using some profanity, indicated she could handle jokes but did not desire being told that she was less of a person because of her gender. While the charging party employee was Facebook friends with several co-workers, only the quality control manager replied during the conversation spanning the next several hours. During that conversation, the charging party employee made derogatory remarks about the sexist manager. Then several friends expressed support for the charging party's negative statements about the manager and one person told the charging party employee to go further with the matter. One week later, the employer fired an employee near the area where the charging party employee worked. She then posted a Facebook message that she could not believe employees were getting terminated because they asked for help and with other statements, displayed that she was very upset.

Upon returning to her work area, the employer's president called the charging party employee to a meeting and said that what occurred was none of her business. The president stated while it was acceptable that employees spoke to her, management did not approve that she gave her opinion to such employees. The charging party employee stated that she simply told employees to keep a log and take notes that they could use to help them later. Later that day, she posted more comments on Facebook. Later the same day, the employer's president terminated the charging party employee over her emotional involvement followed by the Facebook postings from which the president had printouts. The charging party employee stated that she did not use the company computer on company time as the president claimed, and instead used her cell phone. The president stated that he also did not like the comments the charging party employee posted the prior week about the tank yard manager and he had had enough. The president then signed an employee warning report which, among other items, stated that the charging party had continued to voice her opinion on Facebook on company time, which was unprofessional, would not be tolerated, and that she continued with conduct that involved her with other employee problems after being coached on not pursuing such involvement. In addition to applying the *Meyers* cases, the Agency also expressed that the Board had previously held that an employer's discharge of an employee to prevent further employee discussions of terms and conditions of employment is unlawful. *Parexel International, LLC,* 356 NLRB No. 82, slip op. at 4 (2011). While the employer was concerned with the charging party employee's involvement in her co-worker's work-related issues, such communications included discussions with fellow employees about terms and conditions of employment. As a result, the Agency concluded that the charging party was discharged for her protected concerted activity of engaging in discussions with her co-workers about working conditions and that the employer unlawfully acted in a "pre-emptive strike" manner because of its fear of what those discussions might produce.

In similar fashion, the Agency found that a veterinary hospital violated Section 8(a)(1) by terminating two employees and disciplining two other employees over their Facebook complaints about their supervisor and a promotion decision by the employer. The Agency concluded that the employees were engaged in protected concerted activity and their terminations and workplace discipline constituted unlawful conduct. The incident that led to the postings occurred in 2011 when the employer promoted an employee to the position of "co-manager." The charging party employee told co-workers that she was upset over the manner in which the position had been filled and the selection of the co-manager. The employee later the same day posted a Facebook message which detailed her being informed that her work was not worth anything and that she could not do it anymore. Three co-worker "friends" replied to the post resulting in a communications in which the employees complained about claimed mismanagement and the person who received the co-manager promotion. The charging party employee detailed that she had not received a raise or a review in three years, and that the promoted co-manager had not performed any work along with stating that the employer did not know how to tell people when they had performed a good job. The employer terminated the charging party employee and one of her co-workers while disciplining two other co-workers over their Facebook posts.

The Agency found that the Facebook comments discussing shared concerns over terms and conditions of employment which qualified as "concerted activity for mutual aid and protection" within the meaning of Section 7. Moreover, given that there were multiple employees involved in the discussion, the communication qualified as concerning a term or condition of

employment in a concerted matter. The discussions shared concerns over matters that were important terms and conditions of employment, including the selection of an employee for co-manager as well as the quality of supervision and opportunity to be considered for promotion. The Agency applied the *Meyers* cases and concluded that the employees were pursuing concerted activity through their comments posted on the charging party employee's Facebook page. The post sparked a collective dialogue that produced responses from three of the charging party employee's co-workers and their conversations concerned group concerns of the employees over significant terms and conditions of employment. Furthermore, the posts wherein one co-worker stated it would be pretty funny if the good employees quit, combined with the concluding statement of the charging party employee that this situation was not over and that her days were limited, could be viewed as stating an intent to initiate group action. Further, the cited statements could have initiated collective action by the employees to change their working conditions. While the statements were generally categorized as stating a preliminary viewpoint of potential group action, such group action was stopped by the employer's preemptive discharge and discipline of all the employees who participated in the Facebook posts. As a result, the Agency concluded that the employer unlawfully halted the protected concerted activity of the employees who were discharged or disciplined over their Facebook posts.

The Agency found that a charging party employee had engaged in protected concerted activity when she posted a message on another employee's Facebook page, rendering her connected discharge unlawful. The employer operates a popcorn packaging facility. Before the posting at issue occurred, numerous employees had discussed between themselves the negative attitude and disliked supervision of an operations manager and its impact on the workplace. Several employees, including the charging party employee, had stated their concerns to management officials or to a consultant whom the employer had hired. The charging party placed a comment during the course of a Facebook conversation where other employees had discussed the excessive drama at the workplace and discipline of a co-employee who had been written up for a being a "smart ass" along with the absence of needed bags at work and the requirement to work on a Saturday. One of the co-employees also indicated that the employer had complained about who goes on break and for how long and that employees were not performing their required functions. The charging party employee posted various comments, including one wherein she stated she hated the workplace and could not wait to leave. Her statements also asserted that the operations manager brought drama to the workplace and was the person who made the work environment so poor. A co-employee then posted that she wished she could find another job and that it was hard to find a full-time job.

About a week later, the employer terminated the charging party employee over her Facebook postings about the employer and its operations manager. The Agency cited Board authority holding that when an employee complains and criticizes a supervisor's attitude and performance, such communications may be protected by the Act, *Arrow Electric Company, Inc.*, 323 NLRB 968 (1997), *enforced*, 155 F.3d 762 (6th Cir. 1998), along with explaining that the protest of supervisory actions qualifies as protected conduct under Section 7. *Datwyler Rubber and Plastics, Inc.*, 350 NLRB 669 (2007).

The Agency viewed the charging party employee's behavior as consisting part of the concerted activity of the employees for mutual aid and protection. Restated, it was an extension of the earlier group action encompassing complaints by the employees about managers, and the operations manager, along with shared views about terms and conditions of employment. The charging party employee's statements have to be viewed in context of the entire discussion about the terms and conditions of employment that were ongoing with employees and concerned Section 7 topics related to the terms and conditions of employment, including the discipline of a co-worker, inadequate supplies, and work scheduling. In performing its analysis, the Agency applied *Atlantic Steel Co.*, 245 NLRB 814, 816-17 (1979) because the Facebook communications were more like conversations between employees that are overhead by third parties, rather than an intentional conveyance of employee communications to a third party or the public, which analysis would be covered by *NLRB v. IBEW*, Local No. 1229 (*Jefferson Standard*), 346 US 464, 472 (1953). In light of the variance provided by the use of social media as a tool, the Agency decided to adopt a modified *Atlantic Steel* analysis that weighs not only the disruption to workplace discipline, but that also uses the *Jefferson Standard* factors to evaluate the existence of any disparagement of the products or services of the employer when designating the speech of employees that qualifies for protection. As a result, the Agency found that the charging party employee's Facebook discussion retained the protections afforded by the NLRA because the subject matter involved the employer's operations manager and her effect on the workplace, a topic that is protected during employee discussions of the workplace, along with several other Section 7 topics that clearly touched on or implicated

terms and conditions of employment. The factor weighing against the finding of protection constitutes the fact that the Facebook communications were not initiated by any unfair labor practice.

Using its newly adopted and modified *Atlantic Steel* analytical framework, the Agency stressed that the communications occurred at home during nonwork hours and thus were not disruptive of workplace discipline. In addition, while the charging party employee complained about the operations manager, no verbal or physical threats accompanied the complaints and the Agency noted that the Board had previously found more severe name calling and personal characterizations still received protection under the NLRA.

Nevertheless, the Agency also had to account for the fact that some nonemployee members of the public would also view the Facebook communications, thereby requiring an evaluation of the impact by the communications on the reputation and business of the employer. The Agency allowed that the charging party employee's comments about the operations manager constituted criticism, but that under Board law, such comments did not lose protection as defamatory. The statements were not so severely disparaging as to fall outside the Act's boundaries. Moreover, the Facebook communications did not criticize the employer's product or business policies. Given that the only countervailing factor was that the Facebook communications were not provoked by an unfair labor practice, the Agency found that the charging party employee's Facebook posting still qualified for protection under the NLRA.

The Agency applied similar factors when determining that a hospital employer violated the NLRA by disciplining and discharging the charging party employee, a nurse, based on messages he posted during a seven-month period. The NLRB found the messages constituted protected concerted activity and were not so defamatory or disparaging as to fall outside the protections afforded by the Act. The background facts at the hospital workplace included a situation where a recently terminated hospital employee killed one supervisor and critically wounded another, during an incident that occurred two years earlier. While the internal investigation found that the termination was properly handled, the charging party employee stated multiple times that the conduct of the employer played a part in the shooting incident. The charging party employee also had a letter published in the paper a year earlier in which he discussed the "abuse" of the employees by the employer and criticized the "management style" of the employer. The charging party employee was also quoted in a newspaper ad during that year in which a healthcare coalition proclaimed that an advisory board found enough evidence to support investigating the conduct of the employer on a number of topics, including whether the employer had contributed to the shootings. In the same year, the union adopted a resolution thanking the charging party employee for all of his hard work related to the passing of a resolution by the nurses regarding workplace bullying in healthcare.

In 2010, the charging party employee posted an online comment on the local newspaper website following a letter to the editor he had written that was also posted. The employee referred to an unfair labor practice charge which had alleged that the employer unlawfully disciplined the union's local president. Three months later the charging party employee posted another local newspaper online letter criticizing the employer. In one part, the letter asserted that the corporate abuse of the hospital employer was documented and continuing and that this "national corporate paradigm" had a severe negative impact at the hospital. The same month, the charging party employee received a written reprimand over his 2010 statements. The employer asserted that the charging party employee's statements were false and misleading and that his more recent comments were inflammatory and harmed the reputation of the hospital employer. Three weeks later, the charging party employee posted another letter to the editor on the website of the local newspaper. In part, the letter discussed the "management style" of the employer but primarily took aim at the monopoly status and the hospital's interaction with city officials. Two days later, the charging party employee responded to an inquiry about the management style of the hospital with an answer stating that though he could be fired, the management style of the employer was "far worse" than bullying, meaning that employees who stood up to management received attacks and isolation and that information about employees that was personal was used to destroy them. The charging party employee detailed examples involving four other employees who stood up to management and as a result, were manipulated or abused. The charging party employee also referred to an arbitrated case in which an employee had still not received his ordered back pay.

Just over a week later, the hospital employer suspended the employee and noted that while the initial recent blogging activity did not require corrective action, the employee's reply contained misleading and defamatory statements that harmed the hospital employer. Just under three months later, the charging party employee made a presentation to a municipal assembly. The presentation contained statements about multiple unfair labor practices being filed, policy changes that were forced, the

murder/suicide incident, discharges that were unfair, as well as claimed harassment and bullying occurring at the workplace. The charging party employee posted the text of his presentation on his Facebook page and in an online comment on the newspaper's web page. Just over a week later, the hospital employer discharged the employee for posting his presentation. The hospital asserted that the posting breached the conditions of the employee's prior disciplinary actions. The hospital also asserted that the employee's statements were untrue and intended to harm the leadership of the hospital.

The Agency found the comments and communications of the charging employee related to an ongoing labor dispute between the hospital employer and its employees. Even in the statements that could be arguably viewed as "over the top," the Agency, while not using such a description, found that the charging party employee still was referring to allegations of claimed mistreatment of employees by the employer. Protected activity includes communications about alleged mismanagement by the employer, its mistreatment of employees, unfair labor practices, forced policy changes, alleged unfair firings, harassment and bullying. As a result, under the *Meyers* cases, the statements were protected since they logically flowed from the collective concerns of the employees who were made with or on the authority of other employees. In addition, other statements arose from long-standing concerted activity of the employees over claimed employer misconduct and its alleged abuse of employees. Fellow employees also showed their support of the statements with Facebook statements in support of the comments and thanking the charging party for acting on their behalf.

Upon applying the afore-discussed *Jefferson Standard* analysis, as modified for social media usage, the Agency additionally referred to the "great care [which] must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues." *Allied Aviation Service Co.*, 248 NLRB 229, 231 (1980), *enforced*, memorandum ruling 636 F.2d 1210 (3rd Cir. 1980). The Agency viewed the criticisms of the charging party employee as general statements regarding the employer's treatment of its employees and their working conditions, which did not disparage the employer's providing of healthcare services. Moreover, upon applying the "malice" standard detailed in *New York Times v. Sullivan*, 376 US 254, 280 (1964), the Agency did not find any evidence indicating that the charging party employee made statements with knowledge of their falsity or with reckless disregard for their truth or falsity. Restated, the charging party employee's statements did not constitute defamation that would lack protection under the NLRA. Moreover, within the context of labor disputes, some "rhetorical hyperbole" is still protected under the Act. Further, where an employee such as the charging party relays in good faith what he or she has been told by another employee, whether accurate or not, and reasonably believes such information be accurate, such communications still receive protection under the Act. *Valley Hospital Medical Center*, 351 NLRB at 1250, 1252-53 (2007).

In contrast, where the employer operated a children's hospital, the Agency found that the employer lawfully disciplined the charging party employee because the charging party employee was not engaged in protected concerted activity. The charging party employee was riding in an ambulance with a paramedic co-worker who was sucking his teeth. The charging party employee found the behavior distasteful and posted a comment on Facebook stating that the co-worker's behavior was driving her nuts. Two non-employee Facebook friends responded with supporting comments. The charging party employee replied that she was about to beat her co-worker with a ventilator.

Upon picking up the patient and starting the transport, the charging party employee noticed similarities of the patient's behaviors with her stepson, which led to her asking the mother whether anyone had told her that her daughter was autistic. The co-worker found the charging party employee's remarks unprofessional and stated an intent to discuss the incident the following day.

Upon the co-worker seeing the charging party employee's Facebook post shared by a colleague, the co-employee sent an e-mail to management complaining about the charging party employee's Facebook comments and transport conduct. The children's hospital management told the charging party employee she was no longer part of the transport team. The next day, the children's hospital employer suspended the charging party employee for two days over her threatening Facebook comments threatening her co-worker and other negative Facebook comments about her co-worker. The charging party employee returned to work following her suspension but was no longer a part of the transport group. Later the same month, the charging party employee received a corrective action form to explain her suspension. The form referred to the Facebook post threat by the charging party employee to hit her co-worker with a ventilator and the unprofessional comments she made to the patient's mother in addition to an earlier Facebook comment that respiratory therapists did not know what they were talking about. The Agency found the Facebook post was unprotected because it did not discuss employment conditions or

terms. Personal complaints by the charging party employee about her co-worker did not qualify as protected concerted activity. Moreover, the charging party employee made no recommendation as to what action the employer should take. With respect to the earlier Facebook post about respiratory therapist, the Agency did not view the comment as establishing concerted activity since the charging party employee did not discuss her Facebook post with any fellow employees and no co-workers responded. In addition, the comment cannot be reasonably viewed as trying to initiate group action or as arising from collective concern of the employees. Personal complaints about something that happened during an employee's shift do not qualify as protected concerted activity.

An employer's truck driver did not engage in concerted activity protected under the NLRA. Furthermore, the trucker was not constructively discharged. On New Year's Eve at the end of 2010, the charging party truck driver was stuck in Wyoming due to a winter storm that closed various roads. The charging party employee made several calls trying to reach an on-call dispatcher but did not succeed. He then placed Facebook posts which stated that the company was running off all the good hardworking drivers. No employees joined the charging party's Facebook conversation. One of the friends of the charging party was the operations manager of the employer. The operations manager posted a response critiquing the charting party. During their Facebook conversation, the charging party employee expressed concern over his posting and feared that he would be fired. The operations manager stated there was no need to worry about what he said anymore and that she heard another company was hiring. Simultaneously, the operations manager held a Facebook conversation with the office manager. The office manager stated that she hoped the charging party employee would arrive the next day so that she could be the "true bitch" that she was. The charging party returned to the employer's facility a little over a week after the initial Facebook posting. The customer service supervisor told the charging party employee he had lost his status as lead operator because of his Facebook comments and unprofessionalism. As a lead operator, the charging party employee hated new drivers and received an additional $100 per month for his cell phone bill. Roughly two weeks later, the employee returned and no one spoke to him. The charging party employee then took three days off and resigned and claimed he was forced to resign because of the way the office personnel acted towards him.

The Agency found no evidence of concerted activity under the analysis provided by the *Meyers* cases. The charging party employee did not discuss the Facebook post content with any of his fellow workers and none of the co-workers responded to his complaints about work-related matters. There was also insufficient evidence to indicate that what Facebook activity occurred constituted a continuation of earlier collective concerns. Moreover, the communications of the charging party on Facebook could not be viewed as trying to induce or initiate group action. Personal expressions of frustration and boredom do not qualify for protection under the NLRA. As a result, the threats and reprisals that followed from the operations manager and office manager, along with removal of the charging party from his lead operator post, were lawful because they were not done in retaliation for any protected concerted activity. In addition, no unlawful surveillance of protected concerted activity occurred since there was no union or protected concerted activities in existence that could be subject to surveillance. Furthermore, since the charging party had friended his supervisor on Facebook, he had invited her to view his Facebook page, meaning that there was no evidence that the manager was acting at the direction of the employer or that the manager was on Facebook for the sole purpose of monitoring employee postings. Finally, the employee could not show that he had been constructively discharged. The complained-of "silent treatment" was not difficult or unpleasant enough to produce a resignation, especially since the bulk of the charging employee's hours were spent outside the office on the road.

An employer's wholesale distribution facility did not act unlawfully when it discharged the charging party employee who had posted on his Facebook page a criticism of his supervisor which the employer viewed as threatening and inappropriate. The Agency did not find that the charging party employee was participating in protected concerted activity. The charging party employee felt ill in January 2011 and asked his operations manager supervisor if he could leave work early to go home. The operations manager told the charging party he could leave but it would cost him an attendance point. The charging party employee already had three attendance points and completed his shift since he did not want to risk another attendance point. After work, the charging party left and then accessed his Facebook account wherein he used curse words and posted comments to his Facebook account stating that it was too bad when your boss does not care about your health. A response came from a third party non-co-worker asking if the charging party was worried. The charging party employee replied that he was just "pissed" because he had worked there for almost five years, but was treated as if he had just started and wrote

that he was not really worried. The charging party employee also stated his thought that the employer was just trying to provide him a reason to be fired because he was about "a hair from setting it off."

Six of the co-workers of the charging party are his Facebook friends but none of them responded to this post. The charging party employee called in sick the next two days. The third day the HR manager told the charging party employee that he was aware of the inappropriate Facebook comments and showed him printouts, which contained a profile showing the charging party was an employee of the employer. The HR manager said the comments about "setting it off" were viewed as a statement about bringing a gun to the warehouse and shooting everyone. The charging party employee asserted that he was "just venting" and that "setting it off" meant cussing someone out or walking out of the job and that he would never harm anyone. The employer suspended the charging party without pay pending an investigation and, two days later, discharged the employee for violating company policy through Facebook comments that were inappropriate, threatening, and violent. The Agency concluded that the charging party employee did not engage in any concerted activity recognized by the *Meyers* cases. While the postings discussed or addressed terms and conditions of employment, the statements did not intend to start or persuade co-workers to engage in group action. Further, none of the co-workers replied to the charging party employee's postings with similar concerns. Finally, the charging party employee's posting did not arise from previous employee meetings or attempts to start a group action over the sick leave or the absenteeism policy of the employer. Since the charging party himself described his communications as "just venting," no protection existed under the NLRA.

f. Office of the General Council Div. of Operations – Management Memorandum OM12-31 of January 24, 2012

Given the volume of social media cases dealt with by the Agency, the General Counsel issued another memorandum discussing a series of social media cases investigated and determined by the Agency staff.

In the first of its next series of cases, the Agency found that a collection's agency employer had an unlawful rule and thereby unlawfully terminated a charging party based on her protected concerted Facebook postings. The charging party employee was employed in the in-bound calls group at one of the call centers operated by the employer. The in-bound calls group performs the function of answering all phone calls made by debtors in response to initial calls made by a different employee group. The charging party asserted that the in-bound group employees collected more funds than another employee group because they interacted with the individuals who returned calls and were usually discussing the repayment of debts. Employees received an hourly rate and bonuses based on the total amount of payments they obtained from debtors. The charging party's in-bound calls group typically received more in bonuses than employees in the other group, known as the out-bound calls group. The charging party employee described herself as the second-best performing employee based on the volume of payments received. As a result, she received a large percentage of her compensation in bonuses. The charging party's supervisors, however, told the charging party employee that based on low call volume in the in-bound calls group, they were transferring her to one of the out-bound calls group. The charging party employee protested her transfer to her supervisor based on her high performance level. After work, the charging party posted a status update on her Facebook page and while using expletives, asserted that her employer had made a mistake. Moreover, the employee said she was finished with being a good employee. The charging party was Facebook friends with about 10 coworkers, including her direct supervisor. One co-worker responded and stated she was supportive and also angry. Another co-worker posted a similar statement. Further, several former employees also posted comments stating that only bad behavior was rewarded and that the employer viewed honesty, integrity, and commitment as a foreign language. One co-worker posted that the employer would rather pay $9 an hour to certain people while getting rid of smarter and higher paid employees. The charging party employee replied and stated that if the employer kept the $9 an hour people, the employer would get sued. A different former employee raised the possibility of a class action and asserted that there were sufficient smart people to get them sued. Upon the charging party employee's return to work, she was told at the end of the day that her employment was terminated based on her Facebook comments. The employer showed a copy of the Facebook wall to the employee. The employer relied on a rule it promulgated which barred employees from "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media, or through the media." The Agency found the rule overbroad since one could read it as deterring employees from exercising their Section 7 rights by barring discussion of unfair treatment at work, or terms and conditions of employment, including compensation. Moreover, the rule lacked any limiting language specifying that the rule did not limit employee's use of their Section 7 rights under the National Labor Relations Act.

The Agency next reviewed whether the termination of the charging party employee implicated actions that were "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.* (Meyers I), 268 NLRB 493, 497 (1984), *rev'd subnom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *on remand, Meyers Indus.* (Meyers II), 281 NLRB 882 (1986), *aff'd, subnom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). In these inquiries, the Agency relies on the concerted activity definition that "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers II,* 281 NLRB at 887.

Under this analytical framework, the Agency noted that while the charging party started the Facebook discussion because of her transfer to a lower compensated position, her coworkers and former coworkers replied with comments that seconded the frustrations of the charging party and cited the employer's treatment of its employees. As a result, the discussion that was created clearly touched on terms and conditions of employment. The communications also qualified as concerted activity by consisting of the initiation of group action through the discussion of complaints with fellow employees. Moreover, it was undisputed that the employer knew about the charging party employee's Facebook statements which were used as the grounds for her termination. The evidence the Agency found also supported finding that the employer terminated the charging party employee because of the subsequent communications generated amongst its employees about workplace problems. As a result, the Agency determined that the employer unlawfully fired the charging party employee in retaliation for her protected future concerted activity.

Of significance, the Agency additionally found that the termination also violated Section 7(a)(1) of the NLRA because it occurred through the use of an unlawfully, overbroad, non-disparagement rule. In so doing, the Agency cited a recent Board holding that "discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by:

i. engaging in protected conduct or
ii. engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act."

The *Continental Group, Inc*. 357 NLRB No. 39, *slip op*. at 4 (2011). An employer will not sustain liability for discipline imposed through using an overbroad rule only if it can show that the employee's conduct actually interfered with the work of the employee or that of other employees, or otherwise actually interfered with the operations of the employer and that such interference was the grounds for the discipline. Because the employer terminated the charging party employee based upon an unlawfully overbroad rule, and there was no evidence that the charging party's conduct actually interfered with her work or the work of other employees, the discharge was additionally unlawful on those grounds as well.

An employer that operates a chain of home improvement stores did not violate the Act based on the charging party employee engaging in concerted activity, but lost on its claim that its social media policy and no solicitation rule were lawful under the Act. The "spark" was a charging party employee who was reprimanded by a supervisor in front of the regional manager for not performing a task that the employee had never been instructed to perform. During the lunch break, the charging party employee updated her Facebook status with a comment that used an expletive followed by the name of the employer store. The charging party employee subsequently posted a comment, in less than an hour that stated the employer did not appreciate its employees. The four co-worker Facebook friends of the charging party did not respond to this post. Though the charging party employee told two of her coworkers and a supervisor about the incident that led to her Facebook post, she only received statements of sympathy without any communications that others viewed the incident as a group concern or any interest in taking group action. None of the charging party employee's subsequent communications with her coworkers, including a co-worker friend with whom she dined, led to a primary discussion of work-related issues. Shortly thereafter the store manager and HR manager met with the charging party employee about her Facebook comments. The charging party employee expressed her personal frustration over the incident where she was told that she had not performed tasks that she had not been instructed or trained to perform. Nevertheless, the employer terminated the charging party's employment over her Facebook postings. Within a week thereafter, the employer circulated a new social media policy that governed all social networking communications. The policy detailed restrictions on employees' use of confidential or proprietary employer information and said that within the context of external social networking, employees should largely avoid identifying themselves as employees of the employer unless there was a legitimate business need or unless they were discussing terms and conditions of employment in an appropriate manner.

The employer's handbook also contained a no solicitation/no distribution rule barring employees from soliciting team members while on company property. The same policy barred employees from soliciting others while working on company time or located in company work areas.

With respect to the charging employee's termination, the Agency found that the Facebook postings expressed an individual gripe that did not concern group action or concerted activity. Moreover, the postings did not stem from prior communications about terms and conditions of employment, such as occurred in other instances with the charging employee's coworkers. The communications also did not indicate the possibility or preparation for group action, much less solicitation for group action. Expressions of sympathy do not qualify as communications intended to discuss the terms and conditions of employment or taking group action.

The employer's subsequent promulgated social media policy did not fare as well. The Agency disliked the employer's social media policy's use of the word "appropriate" when detailing the manner in which its employees had to discuss employment terms and conditions. Such language was reasonably viewed as barring "inappropriate" discussions of terms and conditions of employment, along with underscoring the absence of any policy definition of what constituted an "appropriate" or "inappropriate" communication about terms and conditions of employment. The policy provided no specific examples of what was covered or exempted by the policy. As a result, the Agency found that employees would reasonably read the rule as barring protected Section 7 activity, including criticizing labor policies of an employer, treatment of employees, and terms and conditions of employment.

Moreover, the Agency determined that the "savings clause" of the social media policy failed to address the noted ambiguities in the provisions or to dispel any deterrence of employees from exercising their Section 7 rights. Though the savings clause was specific in detailing the Section 7 rights of employees, the clause failed due to the absence of any statement that such discussions included communications which the employer deems "inappropriate."

The Agency additionally found troublesome the solicitation ban in the policy because such rules covering non-work areas during non-work time are "an unreasonable impediment to self organization…in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 (1945). Therefore, solicitation policies that barred employees' solicitation on company property during non-work time are presumptively unlawful even through a retail business like the employer can lawfully ban solicitation during non-work time in the selling areas of its business. Moreover, employees would reasonably view the rule barring the soliciting of team members while on company property to bar or prohibit engaging in Section 7 solicitation during non-work time in non-selling areas of the property of the employer. Further, employees would reasonably read the portion of the rules barring employees from soliciting "on company time or in work areas" as also covering solicitation during non-work time such as paid breaks in a non-selling work area. As a result, the Agency determined that the post-termination social media policy issued by the employer was unlawful.

An employer restaurant chain incurred a similar outcome, with the Agency finding that the individual employee's Facebook activity was unprotected, but the employer's rules on Facebook posts were unlawfully overbroad. The employee handbook contained a rule specifying that "insubordination or other disrespectful conduct" and "inappropriate conversation" by an employee would lead to disciplinary action. The charging party employee worked as a bartender at one of the employer's restaurants. The charging party employee had a workplace dispute with a co-employee bartender whom the general manager had recently hired. The new bartender was a close friend of the general manager. The new bartender received assignments for several favorably profitable weekend shifts, but he was the least senior in the position. The charging party employee and a co-worker complained to the general manager about the new bartender's failure to clean up the bar resulting in more work for the following bartender. The assistant manager had written-up the new bartender for making drinks for customers from a premade mix while charging them for drinks as if they were made from scratch with more expensive premium liquor. The assistant manager noted the conduct in the new bartender's personnel file and the charging party employee learned of this event.

The next day, the charging party employee posted on her Facebook page a status update detailing the incident and stating that the new bartender was a cheater who was "screwing over" the customers. In response to the status update, a former co-worker asked if the bartender was stealing, to which the charging party employee replied that the incident had been mentioned at a staff meeting, along with the increasing cost of liquor. The charging party later posted on the same day that

the business would die from dishonest employees and management that looked the other way. A co-worker posted agreement, but warned the charging party to be careful about what she posted. Another co-worker agreed. The next morning, the charging party employee posted she had every right to discuss her feelings. The charging party employee's stated concerns were if customers found out about such behavior they would stop buying drinks at the bar, or tip at a lower rate, thereby resulting in a decrease in her income. In addition, she expressed her concerns over the new bartender's dishonest conduct. A fellow bartender personally shared complaints with the charging party employee following her Facebook posts about other ways the new bartender made their jobs more difficult, while not sharing the charging party employee's thoughts about the alcohol substitution concern. Simultaneously, the new bartender and two servers complained to the general manager about the charging party employee's Facebook posts and their anxiety that customers would see the posts.

The employer discharged the charging party employee for violating work rules and using unprofessional communications on Facebook to fellow employees. The Agency found the charging party employee's Facebook posts only bore a slight connection to the terms and conditions of employment. Moreover, her posts did not state her concern about the new bartender's conduct causing customers to stop buying drinks or to decrease their tips. At most, the Agency found that the posts arose from the charging party employee's concern that the service her employer was providing was inadequate. As a result, the connection between her Facebook posts and protected concerted activity under Section 7 were too remote, meaning that her discharge did not violate Section 8(a)(1) even if her conduct was concerted and even if she had been discharged under an overbroad rule. The Board based its conclusion on prior law holding that employee protests over the insufficient quality of service provided by an employer are not protected where such concerns have only a remote connection to the terms and conditions of employment. *Five Star Transportation, Inc.,* 349 NLRB 42, 44 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008). As a result, the charging the party employee failed to show that she was engaged in conduct to address the job performance of her co-worker or supervisor that adversely impacted her working conditions, which would have qualified as protected activity. *Georgia Farm Bureau Mutual Insurance Cos*., 333 NLRB 850, 850-51 (2001).

A healthcare provider employer experienced a similar outcome with the Agency. While the Agency found that the employer's social media policy violated Section 8(a)(1), the charging party employee's termination under the policy was not unlawful because the conduct at issue did not qualify as protected concerted activity or fall within the scope of Section 7. The charging party employee, a phlebotomist, had a series of workplace conflicts with her coworkers. The charging party employee received insults and threats from her co-workers following the termination of a co-employee. Her attempts to resolve the issue by discussing it with her supervisor and using the employer's employee assistance program failed. Thereafter, the charging party employee posted angry and profane comments on her Facebook wall aimed at her coworkers and employer. The comments included statements that she hated people at work, that her co-workers blamed her for everything, that she had anger problems, and wanted to be left alone. Another co-worker had similar experiences with the same person. Two other employees read the posts and provided them to the employer. The lab director met with the charging party employee to state the HR department had received a complaint about her Facebook postings. The charging party employee received a written warning for violating the employer's social media policy. The employer also discharged the charging employee for multiple violations under the progressive discipline policy of the employer.

The social media policy barred employees from using social media to engage in unprofessional communications that could negatively impact the reputation of the employer or interfere with the mission of the employer. The policy additionally proscribed unprofessional or inappropriate communications about members of the employer's community. The Agency, citing *Lutheran Heritage*, determined the policy violated Section 8(a)(1) because one could reasonably read the policy as deterring employees from exercising their Section 7 rights. Such rights include the protections afforded to employees for statements that criticize employer's employment practices, such as employee payer treatment. Moreover, the policy lacked any limiting language that excluded Section 7 activity from the scope of its restrictions. While the rule did specify certain examples of unprotected conduct, such as displaying sexually oriented material or disclosing trade secrets, additional examples could be reasonably viewed as including protected conduct, such as inappropriately sharing confidential material related to the business of the employer, including personnel actions. Upon applying the *Continental Group, Inc.,* analysis discussed above, the Agency found that the charging party employee was not participating or engaged in protected concerted activity as discussed and analyzed under the *Meyers* cases. The postings exhibited personal anger that the charging party

employee had with her coworkers and employer, which arose from her personal concerns. The communications did not discuss common concerns of employees. None of the language at issue showed an intent to initiate or induce coworkers to engage in group action, and the charging party did not engage in any such conduct, even to the extent she may have implicated common concerns that bear some connection to Section 7 of the Act. The overwhelming intent of the comments instead reflected a series of personal and rather extreme or intense rants against coworkers and general profanities about the employer, which, even within the context of an overbroad social media policy, showed that the charging party was not terminated for activity that either is protected by Section 7 or touched upon concerns underlying Section 7.

In a separate proceeding, the Agency applied *Lafayette Park Hotel* and *Lutheran Heritage* when finding that certain provisions in an employer's communication systems policy were reasonably viewed as chilling Section 7 protected activity in violation of Section 8(a)(1). The policy provisions at issue dealt with use of the name of the employer and the use of social media communications. The employer operates clinical testing labs nationwide. It issued a revised communication systems policy on its intranet to its roughly 30,000 employees. The first provision the Agency examined barred employees from discussing data of a confidential sensitive or private nature about the company on or through company property to anyone outside of the company without prior approval of senior management or the law department. The Agency began its analysis of the provision by underscoring that employees have a Section 7 right to talk about their wages and other terms and conditions of employment, both amongst themselves and with non-employees. Any rule that bars employees from talking about such terms and conditions of employment, or sharing data about themselves and their coworkers with outside parties violates Section 8(a)(1). Moreover, employees would view such a provision as barring them from discussing with third parties Section 7 issues, including wages and working conditions. Whether or not the policy only prohibited communications or disclosures made on or through company property was irrelevant to the Agency. Employees retained the right to engage in Section 7 activities on the premises of the employer during non-work time and in non-work areas. In addition, the employer could not cite any examples of the type of data it deemed confidential, sensitive, or non-public, or relevant contexts of such communications, in order to clarify that its policy did not bar protected Section 7 activity. The Agency additionally found that the provision violated Section 8(a)(1) within the range that it compelled employees to obtain prior approval from the employer before engaging in protected activities.

The Agency also rejected the portion of the policy barring the use of the name or service marks of the company outside of the course of business without receiving prior approval from the law department. Employees have a Section 7 right to use the name or logo of the employer along with protected concerted activity such as communicating with fellow coworkers or the public about a labor dispute. *Pepsi-Cola Bottling Co*., 301 NLRB 1008, 1019-20 (1991), *enforced*, 953 F.2d 638 (4th Cir. 1992). Such a provision is reasonably interpreted as impinging on the Section 7 rights of employees to use the name and logo of the employee and protected concerted activity which encompasses the distribution of paper or electronic leaflets, pamphlets, billings, cartoons, or picket signs related to a protest over the terms and conditions of employment. Such use of the logo and service marks of the employer do not constitute infringement as in causing product confusion and do not remotely implicate the non-commercial use of a name, logo, or trademark by employees who are initiating or participating in Section 7 activity.

Additionally problematic was the provision of the policy barring employees from publishing any representation about the company without prior approval from senior management and the law department. The broadly worded prohibition encompassed statements to the media, media advertisements, electronic bulletin boards, web logs, and voicemail. The NLRB has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enforced sub nom. Nevada Service Employees Union, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009). A workplace policy that bars employee communications to the media or requires prior approval for such communications is unlawfully overbroad. Moreover, the policy at issue went even further by barring all public statements regarding the company, which necessarily encompassed protected Section 7 communications among and between employees and a union. In a separate provision of the same policy, the employer required the employees to use social networking sites to communicate in an honest, professional, and appropriate manner without the use of defamatory or inflammatory statements about the employer, its subsidiaries, shareholders, officers, employees, customers, suppliers, contractors, and patients. The Agency found the use of wide-ranging

terms, such as “professional” and “appropriate” as being reasonably viewed as barring employees from communicating on social networking sites with other employees or with third parties about matters protected by Section 7.

The Agency also found unlawful a separate social networking and web log policy provision which required employees to first obtain approval to identify themselves as employees of the employer and to additionally state that their comments constitute their personal opinions that do not necessarily reflect the opinions of the employer. The Agency began its analysis by stressing the important function played by personal profile pages in enabling employees to use online social networks to identify and communicate with fellow employees at their own or other locations. As a result, the Agency found this policy particularly harmful to the employee’s exercise of their Section 7 right to engage in concerted action for mutual aid or protection, and therefore unlawfully overbroad. Compelling employees to specifically state that their comments are their own personal opinions, not those of their employer, every single time they post on social media would significantly impose a burden on the employee’s exercise of their Section 7 rights to discuss working conditions, or criticize labor policies of their employer, all in violation of Section 8(a)(1).

The Agency also viewed as improper an additional provision of the employer’s policy which allowed it to request employees to temporarily or permanently stop posting communications if the employer believed it was necessary or advisable to confirm compliance with securities regulations or other laws were in the best interests of the company. The policy compelled employees to first communicate with their supervisor or manager about any work-related concerns and provided that any failure to follow the policy could result in corrective action, including discharge. While the first part of the policy provision did not specifically restrict employee communications, the Agency found the overly restrictive burden on Section 7 activity by compelling compliance with a threat of discipline that employees first bring any “work-related concerns” to the employer rendered the policy unlawful.

g. The Electronic Communications Privacy Act

The Electronic Communications Privacy Act (ECPA), which is an amendment to the Wiretap Act, prohibits intercepting communications such as e-mail. 18 U.S.C. §2510. Employers, however, are rarely found liable for violating the privacy rights of employees under the ECPA. Specifically, employers are allowed to intercept a communication that is likely to further any legitimate business interests of its business, including determining whether employees are revealing company secrets to competitors. *See Fraser v. Nationwide Mut. Ins. Co.*, 352 F. 3d 107 (3rd Cir. 2003), *on remand*, 334 F.Supp.2d 755 (E.D. Pa. 2004). Another federal appellate court has stressed that the ECPA was intentionally formed so as to provide stored electronic communications less protection than communications intercepted during their transmission. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 877 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193, 1235 S. Ct. 1292 (2003). Applying the understanding of the ECPA discussed in the *Konop* opinion would result in finding that electronic communications or information kept on blogs, webpages, forums, bulletin boards, WIKIs and the like, are less likely to receive the protections afforded by the prohibitions contained in the ECPA. *Id.*

The "contemporaneous" interception standard allows for the slightest gaps in transmission. *U.S. v. Szymuszkiewicz*, 622 F.3d 701, 706 (7th Cir. 2010) ("Either the server in Kansas City or Infusino's computer made copies of the messages for Szymuszkiewicz within a second of each message's arrival and assembly; if both Szymuszkiewicz and Infusino were sitting at their computers at the same time, they could have received each message with no more than an eye blink in between. That's contemporaneous by any standard."); *Shefts v. Petrakis*, No. 10-cv-1104 (C.D. Ill. Sept. 12, 2012) (slip op. at 25) ("Notably, any emails sent by Plaintiff on his Yahoo! account via his desktop computer would have been captured by Spector Pro *as they were transmitted* to Yahoo! via the internet. Therefore, Spector Pro contemporaneously captured Plaintiff's electronic communications within the meaning of the ECPA, and Defendants were able, if they were at their monitoring station while Plaintiff was using his Yahoo! email account, to view Plaintiff's communications as he viewed them.").

The Stored Communications Act was passed as part of the Electronic Communications Privacy Act of 1986. 18 USC §§2702-2711. The Fourth Amendment to the U.S. Constitution provides the basis for the federal statute. Under the SCA, the government must first obtain a search warrant based on probable cause for searching a home absent unique circumstances. Since a user of social media is using or employing a block of computer storage, the focal point of the SCA would be the network service providers regulated by the statute. The SCA bars intentionally accessing a network in an unauthorized manner through which an electronic communication service is provided, and thereby obtaining access to wire or electronic communications while electronically stored in such a system. The SCA exempts, from its penalties, conduct authorized by a

user of that service with respect to a communication of or intended for that user. Users are defined by the SCA as persons who use the services and are duly authorized to use the service. 18 USC §2510(13). In *Konop*, the plaintiff placed two co-workers on a list of users eligible to view his website. *Konop*, 302 F.3d at 880 (explaining that summary judgment for employer on SCA claim was reversed since employee who gave the employer the password to the plaintiff's website was not an authorized user of the website at the time the employer viewed it). The co-workers who gave Konop's employer the password to view the plaintiff's website led to the employer viewing disparaging remarks about the company president. *Id* at 872. Since there was no evidence that the two co-workers ever actually accessed the plaintiff's website and thereby "used" the plaintiff's website, the summary judgment granted to the employer on the SCA claim was reversed. *Id* at 880. As a result, employers should be careful when investigating an employee's password-protected internet site including Facebook pages and other similar webpages, blogs or forums, so as not to violate the SCA.

h. Hostile Work Environment Exposure

In *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 62, 751 A.2d 538 (N.J. 2000), an employee sued the defendant employer over derogatory comments that were made on and contained in a company electronic message board. The New Jersey Supreme Court reversed the summary judgment previously granted to the employer. The *Blakey* Court stated that the message board bore a sufficient connection to the employer that, if it had notice of the postings, could incur liability for a hostile work environment. ("[E]mployers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace."); *see also Espinoza v. County of Grange*, 6043067, consul. with G043345 (Cal. Ct. App. Feb. 9, 2012) (unpublished) (Slip op at 13) ("Employees accessed the blog on workplace computers as revealed by defendant's own investigation. The postings referred both directly and indirectly to plaintiff, who was specifically named in at least some of them, and the postings discussed work-related issues. It was reasonable for the jury to infer the derogatory blogs were made by coworkers. Management sent two emails to employees directing they discontinue posting improper comments on the blog. This suggests the administrators believed employees were posting.").