

The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies

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ABSTRACT

Social media has profoundly changed communications for our personal and professional lives, from social networking to job searching, to social movements and more. Facebook, Twitter, LinkedIn, Pinterest, Tumblr, Instagram, blogs, and other emerging social media platforms have redefined our methods and means for speech, interaction, and connection. Computers, e-readers, and smartphones are the means for this intense multi-platform engagement in social media. This engagement results in the blurring of work and personal time, on work and personal equipment, and accounts. The already complex employment relationship is further complicated as companies seek to protect their brand, trade secrets, and employee communications by publishing social media policies. In the context of unfair labor practice cases, the National Labor Relations Board has reviewed social media policies and other

employer actions that interfere with employees' rights that apply whether employees are in a union or not. This article outlines the top ten cases in this area to instruct employers and employees on what policies and comments are lawful or protected. The cases encompass employer policies that employees would reasonably perceive to infringe upon their rights to engage in protected concerted activities, and instances where employees are disciplined or discharged for engaging in protected activity.

INTRODUCTION

In recent cases that captured the interest of the news media, the National Labor Relations Board (NLRB or the Board) applied the National Labor Relations Act¹ (NLRA or the Act) to protect a variety of employee activities. For example, the Board protected employee discussions on social media, such as Facebook and Twitter, about wages, hours and working conditions, union organizing, and concerted communication for mutual aid and protection. The complaints of unfair labor practices involved social media policies (SMPs) that chilled protected speech under the Act and, in some instances, the discipline and discharge of employees engaged in concerted activities protected under the NLRA. In both types of cases, the Board made clear that for NLRA protection the communication on social media platforms is subject to the same standards as discussions that take place face-to-face at work in real time around the water cooler.² Despite the clarity of these cases, a surprising number of managers remain unaware that the NLRA's protection of work-related communications extends to non-union employees in the private sector.³ This oversight can ensnare any business in a costly and time-consuming legal issue, which could have been very easily avoided if managers had more familiarity with the rules of labor and employment law.

¹ National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012).

² See Steven Greenhouse, *Even if it Enrages the Boss, Social Net Speech is Protected*, N.Y. TIMES, Jan. 21, 2013, <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html> (quoting NLRB Chairman Mark G. Pearce that “[m]any view social media as the new water cooler”).

³ JEFFREY M. HIRSCH ET AL., UNDERSTANDING EMPLOYMENT LAW 80 (2d ed. 2013) (noting NLRA Section 7 protection of speech for nonunion employees in private sector); see also *NLRA Claims Sneak Up On Nonunion Employers*, HR MATTERS E-TIPS, <http://www.ppspublishers.com/ez/html/031406txtb.html> (last visited Sept. 17, 2013).

The NLRB reacts to unfair labor practices relating to infringement of employees' Section 7 rights by requiring employers to remedy unlawful discipline or discharge actions by reinstating employees back into the position they would have been in absent the unlawful discrimination—with full back pay, plus interest for any periods of suspension or discharge.⁴ Furthermore, the NLRB also requires employers to post both a notice of employee rights under the NLRA and a statement that the employer will not commit unfair labor practices in the future.⁵ With respect to overbroad SMPs or other employer policies, the Board requires revisions to fit within the contours of the NLRA.⁶ The Board requires that notices be posted outlining employee rights under the NLRA; such notices generally state that the employer's policy has been revised to remedy problem areas, and that the employer will not commit unfair labor practices in the future.⁷ If employers usually communicate with employees by email, the Board will require such notices to be sent to employees' email.⁸

In order to understand the NLRB's oversight of employer SMPs, one needs to explore the growing number of Board decisions, the Board's Acting General Counsel's three summary reports regarding the social media cases considered by the Board's Division of Advice (DOA), as well as advisory opinions from the DOA that serve as guidance to regional offices on the subject area of interference with protected activity on social media. These decisions, reports, and memos detail what types of social media, confidentiality, and other restrictive policies infringe upon NLRA protected concerted activities. They also emphasize the Board's willingness to order revision of employer SMPs that infringe upon protected employee speech, even when employers do not enforce such policies. This Article outlines the evolution of the social media cases, some of which were disposed of by Advice Memorandum and settlement or Administrative Law Judge (ALJ) decisions rather than Board

⁴ DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW: TEXT & CASES 125–26 (15th ed. 2013) (discussing the NLRB's expansive remedial powers); *see infra* Part II (discussing remedies awarded in the top ten cases).

⁵ See *infra* Part II (discussing the full range of remedies ordered). *See supra* notes 236–61 and accompanying text (summarizing the full range of remedies ordered).

⁶ *See infra* Part II (detailing required revisions in the top ten cases outlined).

⁷ *See, e.g.*, EchoStar Techs., L.L.C., No. 27-CA-066726, 2012 WL 4321039, at 36–39 (N.L.R.B. Div. of Judges Sept. 20, 2012), *aff'd*, (Nov. 1, 2012) (outlining remedy including notice posting).

⁸ *See* J. Picini Flooring, 356 N.L.R.B. No. 9, 2010 WL 4318372 (Oct. 22, 2010).

decisions. The top ten cases will be considered in chronological order, highlighting the key issues and important rules derived for future guidance to employers and employees alike. While the NLRB is currently facing legal challenges to its power to enforce the NLRA,⁹ the Board and its Acting General Counsel (AGC) maintain that employers must abide by the strictures of the NLRA and revise SMPs and other rules that chill Section 7 activities, like concerted communication on social media.¹⁰

The Board's AGC, Lafe Solomon, has been extremely vocal about the Facebook firing/employer SMP cases. He made excellent use of the media interest in these cases to carry the Board's message to the public by stressing the important workplace rights protected by the NLRA. The visibility of the Board in the social media cases came at

⁹ See, e.g., *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013) (overruling NLRB order against Canning because two NLRB members were appointed unconstitutionally, leaving the Board without a valid quorum to act). The NLRB has asked the Supreme Court to review this appellate court decision. See *Noel Canning v. NLRB*, 705 F.3d 490, cert. granted, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281); see also Lawrence E. Dubé, *NLRB Petitions Supreme Court to Review Noel Canning Ruling on Board Appointments*, Daily Lab. Rep. (BNA) No. 80, at A-1 (Apr. 25, 2013) (noting Board's argument that the *Canning* decision created a "square conflict" with a 2004 Eleventh Circuit decision). In *Canning*, the D.C. Circuit ruled that the NLRB does not have the power to make decisions with its current composition because of controversial appointments made by President Obama in January 2012. 707 F.3d at 490. The court reasoned that the Senate was not technically in an intersession recess, so that the vacancies that President Obama filled during this recess did not occur during an actual recess and were not filled during an official recess as outlined in Article II, thus creating two constitutional barriers to the validity of the appointments. *Id.* at 512.

This ruling places the agency's current orders and decisions in limbo until the Supreme Court considers this new complication regarding the constitutional validity of these appointments to the NLRB. With respect to this paper, the NLRB's pronouncements on SMPs and discharge and discipline for violation of such policies may not be immediately enforceable in the federal courts. See also *NLRB v. New Vista Nursing & Rehab.*, 2013 U.S. App. LEXIS 9860 (3d Cir. May 16, 2013) (holding that the President's intrasession recess appointment of Member Craig Becker to the NLRB in March 2010 was invalid, and therefore, the three member Board panel, which included Member Becker, that issued a bargaining order in the instant case, was not valid).

¹⁰ Section 7 of the National Labor Relations Act provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3).

29 U.S.C. § 157 (2012).

an opportune moment. Despite its use of administrative rulemaking, the Board was forced to postpone the rule's effective date because the D.C. Circuit Court refused to enforce the Board's orders on the rule.¹¹ One of the best-kept secrets in labor law is that the NLRA protects concerted communications of both nonunion and unionized private sector employees. For the Board to remain relevant to the American people, it must get this information to the working public, because the base of private sector union members has shrunken over the past decades.¹² During 2011 and 2012, at approximately six-month intervals, AGC Lafe Solomon issued three reports on the social media cases summarizing the Board's treatment of the cases that were sent to the Division of Advice for uniform treatment.¹³ In Part I below, this Article highlights cases from these reports as well as some of the NLRB's most recent decisions.

I

TABLE SUMMARY OF TOP TEN NLRB FACEBOOK FIRING AND SOCIAL MEDIA CASES

The following table represents the key aspects of the top ten cases. These include (1) the case name, which provides the identity of the respondent company in an unfair labor practice charge; (2) the source of authority—whether from an NLRB Division of Advice (DOA)

¹¹ Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 957–59 (D.C. Cir. 2013) (invalidating the Board's Notice Posting rule on First Amendment and statutory grounds, finding that employers could not be forced to speak by posting such Board notices in the absence of an unfair labor practice); *Employee Rights Notice Posting*, NAT'L LAB. REL. BOARD, <http://www.nlrb.gov/poster> (last visited Oct. 25, 2013).

¹² See U.S. Bureau of Labor Statistics, *Economic News Release: Union Members Summary*, U.S. DEP'T OF LABOR (Jan. 23, 2013), <http://www.bls.gov/news.release/pdf/union2.pdf>. The percentage of union members as a percentage of total wage and salary workers has fallen from 20.1% in 1983 to just 11.3% in 2012, private sector workers (the population covered by the NLRA) were 6.6% union members, while public sector workers were 35.9% union members. *Id.*

¹³ See Office of the Gen. Counsel, NLRB, Memorandum OM 11-74, Report of the Acting General Counsel Concerning Social Media Cases (Aug. 18, 2011) [hereinafter AGC's First Report], available at <http://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies>; Office of the Gen. Counsel, NLRB, Memorandum OM 12-31, Report of the Acting General Counsel Concerning Social Media Cases (Jan. 24, 2012) [hereinafter AGC's Second Report], available at <http://www.employmentandlaborinsider.com>; Office of the Gen. Counsel, NLRB, Memorandum OM 12-59, Report of the Acting Gen. Counsel Concerning Social Media Cases (May 30, 2012) [hereinafter AGC's Third Report], available at <http://www.huschblackwell.com>; see also Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957 (2012) (discussing social media cases considered by NLRB through early 2012).

Memorandum, or NLRB decision; (3) the date of memorandum, decision, and/or settlement; (4) the outcome—whether unfair labor practices (ULPs) were found with respect to a discharge, overbroad rule, or SMP—and any remedies ordered such as reinstatement or revision of an SMP or other policies along with posting notices of required action on premises and electronically; and (5) union presence—whether the employees were already organized in a union, were currently organizing, or were not members of a union and no union was present. Although Part II will present a detailed discussion of each case, these are the important characteristics in these cases. Thus, the table makes for a rapid method of comparison.

TABLE OF TOP TEN NLRB FACEBOOK FIRING AND SOCIAL MEDIA CASES

<i>Case Name</i>	<i>Source of Authority</i>	<i>Date(s)</i>	<i>Outcome & Remedies</i>	<i>Union Presence</i>
<i>American Medical Response (AMR)</i>	NLRB DOA Memorandum	10/5/10 Memo Settlement, 2/8/11 Private Monetary Settlement on Discharge	Revise SMP Nationwide as ULP- Post Notice, No Reinstatement	Union
<i>Walmart</i>	NLRB DOA Memorandum	5/30/12	No ULP on Discharge, Revised SMP 5/4/12 a good model so no ULP	No Union
<i>Costco</i>	NLRB	9/7/12	Revise Rules including regarding Electronic Postings b/c ULP -Post Notice	Union was organizing
<i>Knauz BMW</i>	NLRB	9/28/2012	Discharge not ULP but Revise SMP b/c ULP & Post Notice	No Union
<i>EchoStar</i>	NLRB	9/20/2012	Revise SMP and rules re contacting government agencies, etc. b/c ULP- Post Notice	No Union
<i>HUB</i>	NLRB	12/14/2012	Discharges ULPs as § 7 activity- Post Notice -No SMP revisions ordered	No Union
<i>DirecTV</i>	NLRB	1/25/2013	Discharge ULP Reinstatement-Revise handbook & SMP nationwide- Post Notice	Union was organizing
<i>Jones & Carter</i>	NLRB	2/8/2013	Discharge ULP -Revise confidentiality rule to allow discussing salaries Post Notice	No Union
<i>Bettie Page Clothing</i>	NLRB	4/19/2013	Discharges ULPs Reinstate and Revise Rules re Salary Disclosure etc.- Post Notice	No Union
<i>Dish Network</i>	NLRB	4/30/2013	Discharge lawful due to safety violations -Revise SMP b/c ULP- Post Notice	Union just elected

II

THE NLRB ENFORCES EMPLOYEES' RIGHT TO ENGAGE IN
PROTECTED CONCERTED ACTIVITIES AND CLOSELY SCRUTINIZES
EMPLOYER SOCIAL MEDIA POLICIES (SMPs) EVEN ABSENT
ENFORCEMENT

*A. AMR—The First Facebook Firing Case—The NLRB in the News
on Social Media Use—Settlement Included Requirement to Revise
SMP*

The *American Medical Response (AMR)* case makes the top ten because it is the first case that launched Facebook firing and regulation of SMPs by the NLRB to the forefront of the news media.¹⁴ Over the last five years, when the NLRB directed its attention to the issue of NLRA protection of employee use of social media, it weighed in on two areas: employer discharges for protected activities and overbroad employer policies that infringe on Section 7 rights.¹⁵ Initially, the Board's action in this area was largely in the background, rather than in the news, with the Board's Division of Advice (DOA) ruling by Advice Memoranda on early cases.¹⁶ When the AMR DOA Memorandum was reported in fall of 2010, the news went viral, pushing the NLRB's pursuit of unfair labor practices

¹⁴ Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Jonathan J. Kreisberg, Reg'l Dir., Region 34 regarding Am. Med. Response of Conn., Inc., No. 34-CA-12576 (Oct. 5, 2010) [hereinafter *AMR Advice Memo*], available at <https://www.nlrb.gov/case/34-CA-12576>.

¹⁵ See AGC's First, Second & Third Reports, *supra* note 13 (summarizing range of social media cases considered including cases involving discharges and policies that needed to be revised); see also Lawrence E. Dubé, *NLRB's Solomon Tackles Social Media Cases, Giving Wal-Mart Policy Revision a Green Light*, Daily Lab. Rep. (BNA) No. 105, at AA-1, AA-4 (May 31, 2012) (summarizing NLRB social media cases as of May 2012).

¹⁶ See Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Marlin O. Osthus, Reg'l Dir., Region 18 regarding Sears Holdings (Roebucks), No. 18-CA-19081 (Dec. 4, 2009), available at <http://www.employerlawreport.com/uploads/file/Advice%20memorandum.pdf>; Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to J. Michael Lightner, Reg'l Dir., Region 22 regarding MONOC, No. 22-CA-29008, -29083, -29084, -29234 (May 5, 2010). For several years the Board directed all social media cases to the Division of Advice, but now the Board requires submission of cases only "if they raise new or difficult issues not covered by previously-issued Advice memoranda." See Memorandum from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers on Report on the Midwinter Meeting of the ABA Practice & Procedure Committee of the Labor & Employment Law Section, Mem. GC 13-04, at 16 (Mar. 19, 2013). The memorandum noted that "[t]here are no immediate plans to issue another General Counsel report concerning social media policies or other employer rules/policies." *Id.* at 17.

surrounding employee social media use into the spotlight.¹⁷ While the *AMR* case was not precedent-setting because the NLRB and AMR settled,¹⁸ it nonetheless had a significant impact. The case alerted the public to the fact that the NLRA applies to employees broadly in the private sector, and that the NLRB will pursue charges against employers where SMPs or adverse employment acts are alleged to have infringed on employees' protected concerted activities.

The *AMR* case involved an emergency medical technician (EMT) who was suspended after she inadequately filled out an incident report relating to a customer complaint.¹⁹ Once home, she posted derogatory remarks about her supervisor on Facebook, describing him as a "scumbag" and a "17" (AMR code for a psychiatric patient).²⁰ Thereafter, she was fired.²¹ The supervisor had refused the EMT's lawful request to have her union representative assist her with the incident report.²² Thus, it could be argued that this prompted, and to some extent justified, her online complaints.²³ The EMT and the company ultimately reached a private settlement regarding her discharge.²⁴ AMR also reached a settlement with the Board,²⁵ and as a condition of the settlement, the Board required the company to

¹⁷ See Christine Neylon O'Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK UNIV. L. REV. 29, 29 (2011) (discussing *AMR* case and the law concerning social media and Section 7 of NLRA); see also Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES, Nov. 9, 2010, at B1, <http://www.nytimes.com/2010/11/09/business/09facebook.html> (discussing *AMR* case); *AMR Advice Memo*, *supra* note 14.

¹⁸ See Press Release, NLRB, Settlement Reached in Case Involving Discharge for Facebook Comments (Feb. 8, 2011), available at <http://www.nlrb.gov/news-outreach/news-story/settlement-reached-case-involving-discharge-facebook-comments>.

¹⁹ *AMR Advice Memo*, *supra* note 14, at 2–4.

²⁰ *Id.* at 3.

²¹ *Id.* at 4–5.

²² *Id.* at 3. This was problematic because the EMT was a union member and she was allegedly threatened with discipline for requesting a union representative at an investigatory interview that reasonably could (and did) lead to discipline, a practice outlawed since 1975. See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257–60 (1975) (outlining the *Weingarten* right, so named for the Court recognized this right for the first time).

²³ See O'Brien, *supra* note 17, at 47–49 (discussing the four-part test used to determine if an employee's conduct is egregious).

²⁴ See Melanie Trottman, *Facebook Firing Case is Settled*, WALL ST. J. (Feb. 8, 2011), <http://online.wsj.com/article/SB10001424052748704422204576130631738779412.html>.

²⁵ NLRB Settlement Agreement, No. 34-CA-12576 (Feb. 7, 2011) (copy on file with author).

revise its SMP nationwide.²⁶ AMR agreed to revise its rules regarding blogging and internet posting, standards of conduct, and solicitation and distribution, to prevent improper restrictions of employees' rights both during and after working hours.²⁷

B. Walmart—Proactively Revised SMP Conforms to NLRA Requirements Set Forth in NLRB Advice Memorandum

The *Walmart* case is the second in the top ten because this case resulted in a company's revised SMP being touted as an exemplar of legality under the NLRA.²⁸ The NLRB's Region 11 Director submitted this case for advice on whether Walmart's SMP was unlawfully overbroad, and whether its discharge of an employee for Facebook comments was an unlawful employment act.²⁹ The employee worked as a Walmart greeter.³⁰ On his personal Facebook page, he identified himself as a Walmart employee and five to ten of his Facebook friends were co-workers.³¹ His privacy settings were all set to "Public."³² In 2011, this employee posted a series of comments about work and customers on his Facebook wall.³³ Specifically, he wrote:

The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can't afford to feed them you shouldn't be allowed to have them . . . Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out! . . . Just go to your nearest big box store and start picking them off . . . We cater too much to the handicapped nowadays! Hell, if you can't walk, why don't you stay the f@*k home!!!!³⁴

²⁶ See Michelle Amber, *Connecticut Company Settles ULP Charges Prior to ALJ Hearing in Facebook Firing Case*, Daily Lab. Rep. (BNA) No. 25, at A-2 (Feb. 7, 2011) (discussing settlement requirement that AMR revise its SMP).

²⁷ *Id.*

²⁸ Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Chip Harrell, Reg'l Dir. of Region 11, Walmart, No. 11-CA-067171, at 5 (May 30, 2012) [hereinafter *Walmart Advice Memo*], available at [http://op.bna.com/dlrcases.nsf/id/ldue-8utm6f/\\$File/WalMart%20Advice%20Memo.pdf](http://op.bna.com/dlrcases.nsf/id/ldue-8utm6f/$File/WalMart%20Advice%20Memo.pdf). The SMP was revised in response to unfair labor practice charges. *Id.* at 1.

²⁹ *Id.*

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 4.

After viewing these postings, one co-worker wrote that she could not wait for the employee to be punished for these comments and expressed her wish to witness the punishment.³⁵ A Walmart customer characterized the comments as “beyond disturbing,” especially given that a fatal shooting had occurred just a year before in the same store.³⁶ This customer complained to Walmart that the comments “scared [her] to the point that [she did] not think [she could] come back in [the] store.”³⁷ After an investigation confirmed the identification of the employee who posted the comments, the employee explained that these were not pointedly angry comments, but comments to let off steam.³⁸ He further acknowledged that the postings were in “bad taste” and showed “poor judgment.”³⁹ He explained that they were a form of personal “entertainment” and “therapy,” because he enjoyed “get[ting] people thinking,” and seeing what kind of “reaction [he could] get.”⁴⁰ Walmart discharged the employee for his Facebook postings.⁴¹ The employee’s postings did not implicate any protected concerted activity.⁴² Additionally, although Walmart denied that its SMP was overbroad, it revised the policy during the interim, effectively curing any defect.⁴³ Therefore, the parties settled the case.⁴⁴

The NLRB’s Regional Director submitted this Walmart case to the DOA for advice on two points: whether Walmart violated Section 8(a)(1) by discharging the employee based on his Facebook postings, and whether Walmart’s SMP then in effect was overly broad and, therefore, in violation of the National Labor Relations Act.⁴⁵ As to the employee’s discharge, the Board’s DOA outlined that the employee’s charge against Walmart should be dismissed since the NLRA was not implicated in this adverse employment action.⁴⁶ In the

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 4–5.

³⁹ *Id.*

⁴⁰ *Id.* at 5.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 1. Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157.” 29 U.S.C. § 158(a)(1) (2012).

⁴⁶ *Walmart Advice Memo*, *supra* note 28, at 4–5.

DOA's view, the greeter's conduct was "wholly distinct from activity that falls within the ambit of Section 7."⁴⁷ The Facebook comments did not involve protected concerted activity since the communications did not "address working conditions, nor did they arise out of any concern or complaint about his working conditions."⁴⁸ In fact, the Charging Party admitted that "he was not angry at anyone at work."⁴⁹ Therefore, the DOA concluded that the conduct for which the employee was discharged was not protected by Section 7.⁵⁰

As to the second query, the DOA declined to rule on whether Walmart's SMP at the time of discharge was unlawfully overbroad in violation of Section 8(a)(1).⁵¹ The Advice Memorandum noted that Walmart has a legitimate right to prohibit certain workplace communications as long as the policy does not burden protected communications about terms and conditions of employment.⁵² The Memorandum cited as lawful employer prohibitions on: disclosure of trade secrets; confidential internal or commercially sensitive information that yields a competitive advantage; and discriminatory, harassing, obscene, threatening, bullying or defamatory comments.⁵³ Section 8(a)(1) proscribes work rules to the extent they "reasonably tend to chill employees in the exercise of their Section 7 rights."⁵⁴ The DOA reasoned that although Walmart denied that its original SMP violated the law, its current and revised SMP⁵⁵ did not infringe on protected communications.⁵⁶ The DOA also reasoned that "[e]mployees would not reasonably construe the Employer's current social media policy to prohibit Section 7 activity" and therefore, the issue of the legality of the former SMP was moot.⁵⁷ It further noted that the revised SMP was sufficiently illustrative, as it was replete with examples and discussion of prohibited conduct.⁵⁸ Therefore,

⁴⁷ *Id.* at 5 (quoting The Cont'l Grp., Inc., 357 N.L.R.B. No. 39, 2011 WL 3510489, at *5 (2011)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² *Id.* at 3.

⁵³ *Id.* at 2–4.

⁵⁴ *Id.* at 1 (quoting Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)).

⁵⁵ *Id.* at 6.

⁵⁶ *Id.* at 2–4, 5.

⁵⁷ *Id.* at 4–5.

⁵⁸ *Id.* at 3.

employees would not reasonably construe the rules to prohibit protected Section 7 activity.⁵⁹ This Advice Memorandum regarding an endorsement of the revised Walmart SMP is particularly noteworthy because on the same date it was issued, the NLRB promulgated a system-wide integration of the policies outlined in the Advice Memorandum.⁶⁰

1. Construing Rules Reasonably

The Third Report provided further insight into how the NLRB will construe future challenges to employer SMPs—by specifically relying on the reasonable employee standard.⁶¹ Pursuant to this standard,

[r]ules that are ambiguous . . . and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly . . . unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.⁶²

The Third Report referenced one Walmart clause entitled, *Be Respectful*, for the proposition that, “[i]n certain contexts, the rule’s exhortation to be respectful . . . could be overly broad.”⁶³ The Walmart clause, however, “provide[d] sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct.”⁶⁴ The Third Report cited a number of other examples in Walmart’s SMP to establish the principle that employers may enact workplace rules to the extent that

⁵⁹ *Id.* at 2–3.

⁶⁰ The Office of General Counsel’s Division of Operations-Management released Memorandum OM 12-59, “Report of the Acting General Counsel Concerning Social Media Cases,” its third report on social media, which notably singled out Walmart’s revised SMP for approval, appending the entire policy to the report while stating that the “[e]mployer’s entire revised social media policy, as attached in full, is lawful.” See AGC’s Third Report, *supra* note 13, at 19. There was some media scrutiny regarding AGC Lafe Solomon’s participation in the meeting that led to settlement of this Walmart charge in light of the conflict of interest existing—that at the time of the meeting, he owned some shares in Walmart that he had inherited from his mother. See Sam Hananel, *IG says NLRB Lawyer Violated Code of Ethics*, WASH. TIMES (Sept. 17, 2012), <http://www.washingtontimes.com/news/2012/sep/17/ig-says-nlrb-lawyer-violated-code-of-ethics/>.

⁶¹ See *Waco, Inc.*, 273 N.L.R.B. 746, 748 (1984); see also *infra* Part II.E (discussing reasonable employee standard).

⁶² AGC’s Third Report, *supra* note 13, at 20.

⁶³ *Id.*

⁶⁴ *Id.*

they are carefully crafted to ensure employees will not reasonably construe them as limiting protected concerted activity.

C. Costco—NLRB Decision Rules Employer Must Revise SMP

The *Costco* case makes the top ten because it is the first NLRB decision to consider an SMP that it found problematic. This case also clearly outlines the method for testing employer restrictions under the NLRA. In the NLRB's *Costco* decision, the Board analyzed provisions of Costco's Employee Agreement to determine if they violated section 8(a)(1) of the NLRA.⁶⁵ The Board reviewed the provisions that listed causes for termination.⁶⁶ Causes for termination included “[u]nauthorized collection, disclosure or misuse of confidential information relating to Costco, its members, employees, suppliers or agents including, but not limited to . . . unauthorized removal of confidential information from Company premises . . . unauthorized posting, distribution, removal, or alteration of any material on Company property [and] leaving Company premises during working shift without permission of management.”⁶⁷ The rules also outlined a privacy policy that mandated:

[a]ll [personal employee] information must be held strictly confidential and cannot be disclosed to any third party for any reason, unless (1) we have the person's prior consent or (2) a special exception is allowed that has been approved by the legal department . . . All Costco employees shall refrain from discussing private matters of member and other employees . . . includ[ing] . . . sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' comp injuries, personal health information, etc.⁶⁸

Finally, the challenged rules included an “Electronic Communications and Technology Policy” stipulating that employees must “communicat[e] with appropriate business decorum” in all electronic media, ensure that all information relating to Costco be kept confidential, refrain from posting any statements “that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement,”

⁶⁵ Costco Wholesale Corp., 358 N.L.R.B. No. 106, 2012 WL 3903806, at *1 (Sept. 7, 2012).

⁶⁶ *Id.* at *7.

⁶⁷ *Id.*

⁶⁸ *Id.*

and refrain from storing or sharing any “[s]ensitive information” including payroll and membership data.⁶⁹

1. Testing a Rule—Apply a Standard of Reasonableness

In evaluating these rules, the NLRB first noted that the key inquiry in determining whether a work rule violates Section 8(a)(1) is “whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.”⁷⁰ Clearly, a rule is unlawful if its language expressly limits Section 7 rights. If the rule does not contain explicit language, however, the appropriate consideration becomes whether “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”⁷¹

The Board adopted the ALJ’s decision that the following rules violated Section 8(a)(1):

- (a) “unauthorized posting, distribution, removal or alteration of any material on Company property” is prohibited; (b) employees are prohibited from discussing “private matters of members and other employees . . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers’ compensation injuries, personal health information, etc.”;
- (c) “[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval”; and (d) employees are prohibited from sharing “confidential” information such as employees’ names, addresses, telephone numbers, and email addresses.⁷²

The ALJ found the rule violated Section 8(a)(1) because it was overbroad and could lead employees to reasonably believe that the rules restrict protected activity in non-working areas during non-working time.⁷³ The ALJ pointed out that when such rules are presumptively unlawful on their face, the employer bears the burden of proving that they were communicated to employees in such a way

⁶⁹ *Id.* at *7–8.

⁷⁰ *Id.* at *2 (citing *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)).

⁷¹ *Id.* (citing *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646, 647 (2004)).

⁷² *Id.* at *1.

⁷³ *Id.* at *9.

as to make clear that protected activity is exempt.⁷⁴ Costco was remiss in that it included no such language in the Employee Agreement.

The Board also found that Costco's rule, prohibiting statements (including any stored or posted electronically) that damage the company or any person's reputation, violated Section 8(a)(1), because "employees would reasonably construe this rule as one that prohibits Section 7 activity."⁷⁵ Despite the ALJ's initial opinion that employees would reasonably believe that the purpose of the rule was to promote a "civil and decent workplace," the Board determined that such a broadly defined rule would unlawfully "encompass[] concerted communications protesting [Costco's] treatment of its employees," especially since the rule included no language specifically excluding protected communications from its purview.⁷⁶

With regard to Costco's rule mandating that employees maintain "appropriate business decorum" in their communications with others, the Board agreed with the ALJ's assessment that it did not violate Section 8(a)(1).⁷⁷ Costco argued that an employer was entitled to promote a civil working environment.⁷⁸ The General Counsel, however, contended that the rule was overbroad because it *could* be interpreted to restrict Section 7 conduct.⁷⁹ The ALJ noted that current law in this situation places the burden on the General Counsel to show that the rule would be reasonably understood to restrict such activity, not that it could be understood to restrict protected activity.⁸⁰ The ALJ observed that "where the rules in question on their face are clearly intended to promote 'a civil and decent workplace,' even though in some circumstances protected conduct might be restricted, reasonable employees *would* not infer that the rules restrict Section 7 activity."⁸¹ The ALJ then adopted the reasoning of *Lutheran Heritage Village-Livonia*.⁸² Specifically,

[w]here . . . the rule does not refer to Section 7 activities, we will not conclude that a reasonable employee would read the rule to

⁷⁴ *Id.*

⁷⁵ *Id.* at *1–2.

⁷⁶ *Id.* at *2.

⁷⁷ *Id.* at *1.

⁷⁸ *Id.* at *2, 13.

⁷⁹ *Id.* at *13.

⁸⁰ *Id.* at *13–14.

⁸¹ *Id.* at *14 (emphasis added).

⁸² *Id.* (citing *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646, 650 (2004)).

apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach, would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity.⁸³

Finally, the Board concluded that the rule prohibiting employees from leaving the premises did not violate Section 8(a)(1).⁸⁴ The ALJ determined that this rule “inhibits the employees’ rights to engage in Section 7 activity (i.e., strike).”⁸⁵ The Board, however, noted that the language of the rule would not be reasonably understood by employees to prohibit strikes or “walk outs” protected under Section 7.⁸⁶ Rather, the rule prohibits leaving Costco premises during working shifts without permission.⁸⁷ Therefore, the Board reasoned that employees would reasonably understand the rule to apply only to leaving one’s post during work time for matters unrelated to protected concerted activity.⁸⁸ In light of the decision in this case, it seems plain that employers must specifically include unambiguous language excluding protected Section 7 activities from the restrictions outlined in employee rulebooks and agreements. If an employer fails to do this, the policy may well run afoul of Section 8(a)(1) where a reasonable employee would conclude that the rule prohibits Section 7 activity.

D. Knauz BMW—Discharge Upheld Because of Unprotected Activity on Social Media but SMP Must Be Revised

The *Knauz BMW* case makes the top ten because it is the first actual NLRB decision concerning a Facebook firing and, like *AMR*, it made for good press. The case resulted in a Solomon-like decision where the employee was not reinstated but the employer was required to revise the SMP. In *Karl Knauz Motors, Inc.*,⁸⁹ a car salesman was terminated for his Facebook posts.⁹⁰ Some of the salesman’s posts related to the inadequacy of food provided at a BMW 5 Series vehicle

⁸³ *Id.* at *13.

⁸⁴ *Id.* at *1.

⁸⁵ *Id.* at *2.

⁸⁶ *Id.* at *3.

⁸⁷ *Id.* at *2.

⁸⁸ *Id.* at *3.

⁸⁹ Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 2012 WL 4482841 (Sept. 28, 2012).

⁹⁰ *Id.* at *7–10. Robert Becker was not a member of a union.

event at the dealership where he worked.⁹¹ The concerns related to his ability to sell cars and gain commissions.⁹² The salesman posted pictures of the food at the BMW event on his Facebook page along with pictures taken of a mishap that occurred at the adjacent Land Rover dealership that was also owned by his employer.⁹³ At the Land Rover dealership, a customer's thirteen-year-old son sat in the driver's seat of a vehicle and stepped on the gas, which propelled the vehicle and the salesperson into an adjacent pond.⁹⁴ The ALJ and the NLRB did not order that the salesman be reinstated because his postings regarding the Land Rover accident amounted to an independent and unprotected cause for termination.⁹⁵ However, in a two-to-one ruling the Board ordered the employer to rewrite the employee handbook rules to prevent a violation of the NLRA.⁹⁶ The rule in question regarded courtesy and read as follows:

Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.⁹⁷

1. Rules That Reasonably Tend to Chill Employees' Section 7 Rights

The Board majority in *Knauz BMW* found that the rule reasonably tended to chill employees in the exercise of their Section 7 rights.⁹⁸ This was so because of the rule's broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership."⁹⁹ Both of these prohibitions encompass protected concerted activity, such as statements that object to working conditions and seek support in improving them.¹⁰⁰ The Board noted that the language of the rule did not suggest that activities protected

⁹¹ The salesman was upset at the offering of a hot dog cart and small bottles of water at an event that was to launch a new model in a luxury line of automobiles. *Id.* at *6–7.

⁹² As the ALJ noted in the facts of the case, three elements contribute to the salespersons' pay: a percentage of profit on sales, the volume of sales, and a customer satisfaction index based upon customer survey. *Id.*

⁹³ *Id.* at *7–8.

⁹⁴ *Id.* at *7.

⁹⁵ *Id.* at *11.

⁹⁶ *Id.* at *1.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

by Section 7 were excluded.¹⁰¹ Further, the Board explained that statements in protest or criticism would reasonably be assumed to fall under the “disrespectful” or tending to “injure[] the image or reputation of the Dealership” prohibitions.¹⁰²

The Board cited its decision in *Costco* for the proposition that it is unlawful for a company to maintain rules that prohibit posting statements electronically that damage the reputation of the company or damage any person’s reputation.¹⁰³ The Board further stated that ambiguous employer rules that could be read to prohibit protected activities are construed against the employer.¹⁰⁴ One of the Board’s members, Member Hayes, dissented in part regarding the Board’s ruling on the handbook policy.¹⁰⁵ Member Hayes found only that the Courtesy Rule “could be read to include protected communications, and it lacks limiting language.”¹⁰⁶ He did not find enough evidence to conclude that employees “reasonably would do so.”¹⁰⁷ Member Hayes expressed concern that the majority reached its finding that the Courtesy Rule violated the law because they read the words and phrases in isolation.¹⁰⁸ Thus, he believed that their analysis departed from the *Lutheran Heritage Village-Livonia* precedent that the rule should be given a “reasonable reading” in its interpretation.¹⁰⁹

E. EchoStar—Board Finds Employer Rules Must Be Revised

EchoStar is an important case because the SMP at issue exemplified all the ways in which an SMP can go awry in terms of the NLRA. The case also illustrates how the NLRB requires evaluation and revision of such policies, if they reasonably tend to chill NLRA-protected conduct. Policies regarding disparagement, not contacting media without prior authorization, restricting access to government agencies, and overbroad confidentiality policies all tend to create NLRA violations unless extremely narrow and carefully

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at *1 (citing Costco Wholesale Corp., 358 N.L.R.B. No. 106, 2012 WL 3903806, at *1 (Sept. 7, 2012)).

¹⁰⁴ *Id.* at *2 (citing Flex Frac Logistics, L.L.C., 358 N.L.R.B. No. 127, 2012 WL 3993589, at *2 (Sept. 11, 2012)).

¹⁰⁵ *Id.* at *3 (Member Hayes dissenting).

¹⁰⁶ *Id.* at *3–4.

¹⁰⁷ *Id.* at *3.

¹⁰⁸ *Id.* at *4.

¹⁰⁹ *Id.* (citing *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646, 646 (2004)).

crafted. The NLRB adopted the ALJ's decision and order requiring revisions to the SMP in *EchoStar Techs., L.L.C.*¹¹⁰ The employee alleged EchoStar maintained rules that directly interfered with Section 7 rights in violation of Section 8(a)(1) of the NLRA.¹¹¹ The employee challenged six provisions impacting social media use:

1. Complaint Paragraph 4(a) [non-disparagement, non-defamation, and not on company time or resources rule]:

(i) You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment; and
(ii) Unless you are specifically authorized to do so, you may not: Participate in these activities with EchoStar resources and/or on Company time . . .¹¹²

2. Complaint Paragraph 4(b) [contact with the media rule]:

The Corporate Communications Department is responsible for any disclosure of information to the media regarding EchoStar . . . you must . . . obtain . . . written authorization . . . before engaging in public communications regarding EchoStar. You may not engage in any of the following activities unless you have prior authorization: . . . all public communications including . . . print . . . broadcast . . . web sites. Certain blogs, forums and message boards are also considered media.¹¹³

3. Complaint Paragraph 4(c) [employer ban on its disclosure of employee information]:

[E]mployee information . . . You must not discuss it with or disclose it to outsiders without the prior written authorization . . . both during and after employment . . . you must not discuss it with or disclose it to another employee unless he or she has a specific need to know and only when you are authorized to discuss or disclose it . . .¹¹⁴

4. Complaint Paragraph 4(d) [contact with government agencies rule]:

¹¹⁰ *EchoStar Techs., L.L.C.*, No. 27-CA-066726, 2012 WL 4321039 (N.L.R.B. Div. of Judges Sept. 20, 2012), *aff'd*, (Nov. 1, 2012).

¹¹¹ *Id.* at *1. Section 8(a)(1) provides: "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1) (2012).

¹¹² *EchoStar Techs., L.L.C.*, 2012 WL 4321039, at *2, 15.

¹¹³ *Id.* at *2–3, 21–22.

¹¹⁴ *Id.* at *3–4, 25.

The General Counsel must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities. The correspondence should not be responded to . . . do not engage in any further discussion . . .¹¹⁵ Immediately following the conversation, notify a supervisor . . .¹¹⁶

5. Complaint Paragraph 4(e) [confidentiality in investigations rule]:

“EchoStar has the right, at any time, to investigate matters involving suspected or alleged violations of EchoStar policies . . . You are expected to cooperate fully . . . You are also expected to maintain confidentiality . . .”¹¹⁶

6. Complaint Paragraph 4(f) [disciplinary action rule]:

“Examples of conduct that is unacceptable and subject to disciplinary action . . . include . . . Insubordination (The refusal to follow a reasonable work directive or undermining the Company, management or employees).”¹¹⁷

1. Rules that Reasonably Tend to Chill Employees’ Section 7 Rights

ALJ Clifford Anderson first considered Board law on employer conduct rules.¹¹⁸ The Judge cited the court’s analysis in *Lafayette Park Hotel*¹¹⁹ as “the proper standard for addressing such issues.”¹²⁰ He noted that “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice.”¹²¹

The determination of a chilling effect is an objectively reasonable one and does not turn on subjective impact evidence from individual employees. The ALJ, therefore, considered whether reasonable employees in similar circumstances would construe that their Section 7 rights are chilled.¹²² The “chilling effect” is defined as the point at

¹¹⁵ *Id.* at *28.

¹¹⁶ *Id.* at *30–31.

¹¹⁷ *Id.* at *33.

¹¹⁸ *Id.* at *10–11.

¹¹⁹ 326 N.L.R.B. 824, 825, 827 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

¹²⁰ *EchoStar Techs., L.L.C.*, 2012 WL 4321039, at *11.

¹²¹ *Id.* (citing *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)).

¹²² *Id.*

which employees' Section 7 rights have suffered a reduction or inhibition, which would be in contrast to, for example, rights that have stopped, or ended.¹²³

After establishing the analytical framework, the ALJ in *EchoStar* turned to resolving each complaint allegation.¹²⁴ As to Complaint Paragraph 4(a)'s first rule prohibiting disparaging and defamatory comments, the ALJ concluded that the non-disparagement clause was impermissibly overbroad in violation of the NLRA.¹²⁵ The blanket prohibition on disparaging comments failed to make exception for comments that, although critical or harsh, are nevertheless protected by the NLRA.¹²⁶ Therefore, reasonable employees would find that their Section 7 rights were chilled.¹²⁷ “[T]he term ‘disparaging’ like the term ‘derogatory’ . . . goes beyond proper employer prohibition and intrudes on employees Section 7 activities.”¹²⁸

As to Complaint Paragraph 4(a)'s second rule prohibiting social media use on company resources or time, the employee argued that this rule impacted the right to use social media during breaks and after work in non-work areas.¹²⁹ The ALJ disagreed, noting that the handbook only banned social media use during “working time” on company resources.¹³⁰ Consequently, he found the ban to be a permissible restriction “since an employee should only be using EchoStar’s equipment if he or she is performing work for the company.”¹³¹

As to Complaint Paragraph 4(b)'s ban on contact with media,¹³² the ALJ concluded that “[t]he stark prohibition of communication with the media by employees is impermissible.”¹³³ The ALJ rejected EchoStar's contention that the rule was confined to information regarding EchoStar's business activities.¹³⁴ Instead, the ALJ found that a reasonable employee would not construe the rule to be limited

¹²³ *Id.* at *12–13.

¹²⁴ *Id.* at *14–36.

¹²⁵ *Id.* at *19–20.

¹²⁶ *Id.* at *17–18.

¹²⁷ *Id.*

¹²⁸ *Id.* at *19–20.

¹²⁹ *Id.* at *18.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at *21.

¹³³ *Id.* at *24.

¹³⁴ *Id.*

just to official communications.¹³⁵ The rule covered a vast amount of protected communications and, therefore, the rule was likely to chill Section 7 rights in violation of the NLRA.¹³⁶

As to Complaint Paragraph 4(c)'s ban on discussion of employee information, the ALJ upheld the rule because "when read by a reasonable employee in the context and circumstances described. . . [it] does not chill employees Section 7 rights."¹³⁷ The clear purpose and focus of the rule addresses proprietary and confidential information.¹³⁸ Accordingly, reasonable employees would understand that the rule was designed to protect information, rather than prohibit discussion of protected communications.¹³⁹

As to Complaint Paragraph 4(d)'s rule concerning contact with government agencies, the ALJ concluded that it violated the NLRA.¹⁴⁰ Reasonable employees reading the entire rule would be left in doubt, and that chills employees' exercise of Section 7 rights.¹⁴¹ Employers may limit workplace communications in certain respects, but these limitations were impermissibly overbroad.¹⁴² The ALJ suggested that a different outcome might have been possible if the rules were more "defined or limited by explanation or example."¹⁴³

As to Complaint Paragraph 4(e)'s rule requiring employee confidentiality in investigations, the ALJ concluded that the rule chills employees' Section 7 rights, by improperly restricting protected communications.¹⁴⁴ The confidentiality policy contained no limiting language.¹⁴⁵ Therefore, it applied to every investigation, ongoing and even closed ones.¹⁴⁶ The ALJ found that employees would reasonably understand this rule to be a complete prohibition, including prohibiting communications that would otherwise be protected.¹⁴⁷

¹³⁵ *Id.*

¹³⁶ *Id.* at *23.

¹³⁷ *Id.* at *27–28.

¹³⁸ *Id.* at *27.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at *30.

¹⁴¹ *Id.* at *28–30.

¹⁴² *Id.* at *30.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *33.

¹⁴⁵ *Id.* at *31.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

As to Complaint Paragraph 4(f)'s disciplinary action rule, the ALJ concluded that it chilled employees' Section 7 rights,¹⁴⁸ finding that reasonable employees reading the rule would construe it as explicitly prohibiting all "undermining activities."¹⁴⁹ The ALJ rejected EchoStar's contention that the rule was lawful, because it merely prohibited insubordinate conduct.¹⁵⁰ The ALJ wrote:

The rule in its parenthetical definition of the term 'insubordination' broadens the term beyond its meaning . . . by adding the [extra language]. The Respondent [EchoStar], the rule's creator, has created a Frankenstein definition within the rule that creates a new word form perhaps, but that parenthetically expanded form retains the violative [sic] overreach of the grafted term 'undermining.'¹⁵¹

The ALJ issued, and the Board adopted, conclusions of law, a cease and desist order, and a directive for EchoStar to effectuate the policies of the NLRA.¹⁵²

F. Hispanics United of Buffalo (HUB)—NLRB Reinstates Five Employees Discharged for Engaging in Protected Concerted Activity on Social Media

Hispanics United of Buffalo, Inc. (*HUB*)¹⁵³ makes the top ten list of Facebook firing and social media policy cases because it is the first instance where an NLRB decision required reinstatement of employees who were fired for Facebook postings that fell within the protection of Section 7. The *HUB* case is also important because it demonstrates that union membership is not a prerequisite for NLRA protection. In *HUB*, a social worker at a nonprofit organization sounded off about how much more she was doing for the victims of domestic violence than her coworkers.¹⁵⁴ Lydia Cruz-Moore's criticism of her fellow workers included a weekend text message to a coworker, Marianna Cole-Rivera.¹⁵⁵ In the text message, Cruz-Moore indicated that she intended to discuss her concerns regarding employee performance with the agency's executive director.¹⁵⁶ Cole-

¹⁴⁸ *Id.* at *35–36.

¹⁴⁹ *Id.* at *35.

¹⁵⁰ *Id.* at *34.

¹⁵¹ *Id.* at *35.

¹⁵² *Id.* at *36–39.

¹⁵³ *Hispanics United of Buffalo, Inc. (HUB)*, 359 N.L.R.B. No. 37, 2012 WL 6800769 (Dec. 14, 2012).

¹⁵⁴ *Id.* at *1–2.

¹⁵⁵ *Id.* at *2.

¹⁵⁶ *Id.* at *1.

Rivera replied first with a text and later with a message posted on her Facebook page that asked coworkers how they felt about Cruz-Moore's criticisms of their work, while indicating that she had "about had it!"¹⁵⁷ Four other off-duty coworkers responded objecting to Cruz-Moore's assertion that their work was not up to par.¹⁵⁸ One wrote "What the f. . . . Try doing my job I have 5 programs."¹⁵⁹ Another wrote "What the Hell, we don't have a life as is."¹⁶⁰

A member of the Board of Directors of HUB weighed in on the employees' Facebook exchange asking who Cruz-Moore was.¹⁶¹ The secretary to the executive director also posted a comment.¹⁶² Cruz-Moore responded to Cole-Rivera "stop with ur lies about me."¹⁶³ She then brought the entire Facebook exchange to the executive director's attention.¹⁶⁴ Five employees were discharged for "bullying and harassment" of Cruz-Moore in violation of the employer's "zero-tolerance" policy.¹⁶⁵ The executive director explained in each employee's termination interview that Cruz-Moore had suffered a heart attack as a result of the harassment, and that HUB would be obligated to compensate her.¹⁶⁶ The NLRB ruled that HUB violated the NLRA by discharging the five employees, because the employees were engaged in protected concerted activities for the "purpose of mutual aid or protection" under Section 7.¹⁶⁷ The Board found that the discharges were motivated by the employees' protected concerted activity, affirming the ALJ's order for the employer to reinstate the employees with back pay.¹⁶⁸

HUB was the NLRB's second major social media decision in 2012 that caught the attention of the news media. It likely drew attention because the employees, all non-unionized professional licensed social workers who engaged in protected concerted activity on Facebook, were reinstated, unlike in *Knauz* and *AMR*. Because these HUB social

¹⁵⁷ *Id.* at *2.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *7; see also *Greenhouse*, *supra* note 2.

¹⁶⁰ *HUB*, 2012 WL 6800769, at *7.

¹⁶¹ *Id.* at *8.

¹⁶² *Id.*

¹⁶³ *Id.* at *2.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *8.

¹⁶⁷ *Id.* at *2.

¹⁶⁸ *Id.* at *10.

workers were not unionized, the case underscores how the NLRA protects private-sector employees who engage in self-organization and other protected concerted activity. In this case, the protected concerted activity stemmed from the individual employees who “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”¹⁶⁹ The Board noted that the activities of an individual such as Cole-Rivera in “enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.”¹⁷⁰ The decision explained that the action of an individual is concerted if its object is to induce group action.¹⁷¹ In contrast to the employees in *Knauz*, the HUB employees engaged in protected concerted activity. Additionally, HUB did not appear to have any legitimate business reason for discharging its employees, unlike in *AMR* where the EMT was responding to patient complaints, which could have provided a legitimate business reason for discharge. HUB’s attempt to cite a violation of its “zero tolerance harassment” policy did not let it off the unfair-labor-practice hook. The ALJ in *HUB* found, and the Board agreed, that there was no evidence that the employees harassed Cruz-Moore in violation of a policy that referenced “race, color, sex, religion, national origin, age, disability, veteran status, or other prohibited basis.”¹⁷² *HUB* reinforced the concept that the NLRB regulates concerted communication on social media. It also reemphasized that employers are accountable for unfair labor practices surrounding the use of social media, and that overbroad policies infringe upon employees’ Section 7 rights.

G. DirecTV—Board Finds Employer Policies Must Be Revised and Employee Reinstated

DirecTV makes the top ten because it illustrates the most likely areas for SMPs to conflict with the NLRA, and it highlights that employers must clearly convey that only certain conduct is restricted, not conduct that is protected by Section 7 of the Act. The decision also illustrates that employees should not have to guess at what constitutes prohibited behavior and that employers must cooperate with the NLRB in a timely fashion if they wish to avoid an unfair

¹⁶⁹ *Id.* at *8 (quoting Myers Industries (Myers I), 268 N.L.R.B. 493 (1984); Myers Industries (Myers II), 281 N.L.R.B. 882 (1986)).

¹⁷⁰ *Id.* at *9.

¹⁷¹ *Id.*

¹⁷² *Id.* at *4 & n.13.

labor practice finding.¹⁷³ In *DirecTV*, a union was organizing and an employee who “spoke up forcefully in favor of unions at a mandatory employee meeting” was discharged.¹⁷⁴ Just after the employee made the statements, the operations manager threatened to impose quality-control inspections on the employee’s installations.¹⁷⁵ Beyond this threat of retaliation, further testimony established the presence of anti-union animus in speeches made by the vice president at the mandatory meeting.¹⁷⁶ The vice president indicated that the company would not allow the union, stating “[w]e’re going to shut it down.”¹⁷⁷ Testimony also established that the same vice president interrogated employees regarding the identity of union supporters.¹⁷⁸ Accordingly, a unanimous three-member panel of the NLRB ordered DirecTV to reinstate the employee and revise its rules.¹⁷⁹

The rules to be revised included those restricting employees from contacting the media, which clearly inhibited employee discussion of labor matters in violation of the Act.¹⁸⁰ These rules did not distinguish unprotected communications, such as those that are maliciously false, from protected communications and thus were overbroad and unlawful.¹⁸¹ In addition, the corporate policy requiring prior approval by management before contacting or commenting to the media also chilled Section 7 rights.¹⁸² Restrictions on employee communications with law enforcement in the employee handbook could be construed to include communications with NLRB agents.¹⁸³ Thus, where the rule instructed employees that the company’s security people would handle contact instead of employees, this also violated Section 8(a)(4), which protects employees who file unfair labor practice charges or provide information to the Board in the

¹⁷³ This case contrasts sharply with the NLRB’s finding of no unfair labor practice with respect to Walmart’s promptly revised and implemented SMP. *See supra* notes 29–61 and accompanying text (discussing Advice Memorandum from the Office of the Gen. Counsel, Walmart, No. 11-CA-067171 (N.L.R.B. May 30, 2012)).

¹⁷⁴ DirectTV U.S. Direct TV Holdings, L.L.C., 359 N.L.R.B. No. 54, 2013 WL 314390, at *4 (Jan. 25, 2013).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at *4–5.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *6–7.

¹⁸⁰ *Id.* at *1.

¹⁸¹ *Id.* at *1–2.

¹⁸² *Id.* at *2.

¹⁸³ *Id.*

course of an investigation.¹⁸⁴ The Board noted that any ambiguity in the rules is construed against the employer.¹⁸⁵ Further, other rules regarding confidentiality of company information, including employee records, could be construed to restrict discussion of wages, terms, and conditions of employment.¹⁸⁶ Because the rule did not exempt protected communications with unions, Board agents, and other government agencies, employees would “reasonably interpret the rule as prohibiting such communications,” rendering the rule unlawful.¹⁸⁷

DirecTV’s intranet contained a company policy on the use of social media, which stated that “[e]mployees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”¹⁸⁸ Because the handbook defined “company information” to include employee records, the Board found that the intranet policy prohibited disclosure of information from employee records, such as information regarding wages, discipline, and performance.¹⁸⁹ The Board found that the scope of the intranet policy was ambiguous in light of the handbook provision.¹⁹⁰ Because employees were forced to decipher what information or conduct was prohibited, the Board found the employer’s maintenance of the policy to be unlawful.¹⁹¹ The employer’s attempts to repudiate its unlawful policies were futile and untimely.¹⁹² Because the employer waited until the complaint issued, engaged in other unfair labor practices including anti-union statements, discharged employees for union activities, and failed to acknowledge its unlawful conduct, it was unable to avoid a finding of unfair labor practices.¹⁹³ The Board required the employer to rescind the unlawful rules on a nationwide basis and to post a notice to that effect.¹⁹⁴ The Board also required reinstatement of the discharged

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *3.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at *3–4.

¹⁹¹ *Id.*

¹⁹² *Id.* at *4.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at *5; see also Lawrence E. Dubé, *Board Rules DirectTV Handbook Policies Interfered With Employees’ NLRA Rights*, Daily Lab. Rep. (BNA) No. 18, at AA-1 (Jan. 25, 2013) (analyzing holding of the Board in the *DirectTV* case).

employee with back pay.¹⁹⁵ The company's rule regarding employee use of the company's systems, equipment, and resources was deemed lawful under the Board's decision in *The Register-Guard*.¹⁹⁶

H. Jones & Carter—Board Upholds Reinstatement of Discharged Employee Who Discussed Salaries and Requires Revision of Rule Prohibiting Discussion of Salaries

Jones & Carter makes the top ten because it clearly states that employees are entitled to discuss their wages with each other because of Section 7 of the NLRA. This right applies whether or not the conduct is on social media, and whether or not employees are in a union. In *Jones & Carter*, the Board affirmed an ALJ decision that found the company had engaged in unfair labor practices.¹⁹⁷ Specifically, the company had unlawfully maintained a rule in its employee handbook that prohibited discussion among employees about their salaries.¹⁹⁸ *Jones & Carter* terminated employee Lynda Teare because she engaged in protected concerted activity by discussing salaries with other employees in violation of workplace rules.¹⁹⁹ When Teare applied for unemployment compensation, the company replied to her claim that she was terminated for discussing confidential information regarding an employee's salary.²⁰⁰ The employer maintained that its confidentiality rule prohibited salary

¹⁹⁵ *DirecTV U.S.*, 2013 WL 314390, at *6.

¹⁹⁶ While Chairman Pearce and Member Griffin questioned whether that case was correctly decided, they declined to address the question in the instant case. *Id.* at 1 & n.2 (citing *The Guard Publ'g Co. d/b/a The Register Guard*, 351 N.L.R.B. 1110 (2007), *enforcement granted in part and denied in part*, 571 F.3d 53 (D.C. Cir. 2009)); see also Christine Neylon O'Brien, *Employer E-Mail Policies and the National Labor Relations Act: D.C. Circuit Bounces Register-Guard Back to the Obama Board on Discriminatory Enforcement Issue*, 61 LAB. L. J. 5 (2010); Christine Neylon O'Brien, *Employees on Guard: Employer Policies Restrict NLRA-Protected Concerted Activities on E-mail*, 88 OR. L. REV. 195, 206–21 (2009) (discussing how these decisions concern employer rules regarding use of company equipment and systems); Christine Neylon O'Brien, *The Impact of Employer E-Mail Policies on Concerted Activities under the National Labor Relations Act*, 106 DICK. L. REV. 573–89 (2002) (discussing earlier rulings of NLRB on employer e-mail policies).

¹⁹⁷ *Jones & Carter, Inc.*, No. 16-CA-027969, 2012 WL 5941221 (N.L.R.B. A.L.J. Nov. 26, 2012), *aff'd*, (N.L.R.B. Feb. 8, 2013), available at <http://www.nlrb.gov/case/16-CA-027969>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at *1, 9.

²⁰⁰ *Id.* at *12.

discussion.²⁰¹ Later, at the NLRB hearing, Jones & Carter's witnesses focused on Teare's harassment of a new employee, Janik, regarding Janik's salary rather than on violation of the confidentiality rule.²⁰² The ALJ found that the employer's shifting reasons for Teare's discharge were indicative of a discriminatory motive.²⁰³ The employer was ordered to cease from maintaining the policy prohibiting employees from discussing salaries, and to offer Teare her job back, provide back pay with interest, and post a notice.²⁰⁴ While the employee discussions in *Jones & Carter* took place face-to-face, the same rules apply whether the protected concerted activities are conducted face-to-face or on social media. Thus, this case highlights that rules inhibiting discussion of salaries unlawfully restrict Section 7 activities, regardless of the mode of communication.

*I. Design Technology Group L.L.C. d/b/a Bettie Page Clothing—
Board Finds Facebook Firings and Wage and Salary Disclosure Rule
in Handbook Unlawful*

Bettie Page Clothing illustrates that the NLRB remains serious about enforcing employee rights to engage in discussions on social media regarding wages, hours and working conditions, as well as the right to engage in discussions for mutual aid or protection. The Board will order reinstatement of employees discharged because of such protected conduct. In *Bettie Page Clothing*, the Board held that employees who complained about work related concerns on Facebook as well as offline were entitled to the protection of Section 7 of the Act.²⁰⁵ The employees worked in sales at a Bettie Page Clothing store in Haight-Ashbury, San Francisco.²⁰⁶ The employees' complaints related to the store manager's treatment of employees and employee safety.²⁰⁷ Employees were concerned about safety because they left the store at 8:00 p.m. when adjacent businesses closed at 7:00 p.m.²⁰⁸ One of the employees brought this issue to the store owner, who then

²⁰¹ *Id.* at *13.

²⁰² *Id.* at *14.

²⁰³ *Id.*

²⁰⁴ *Id.* at *21.

²⁰⁵ Design Tech. Grp., L.L.C., d/b/a Bettie Page Clothing, 359 N.L.R.B. No. 96, 2013 WL 1753561, at *1 & n.4 (Apr. 19, 2013).

²⁰⁶ *Id.* at *6.

²⁰⁷ *Id.* at *7.

²⁰⁸ *Id.*

allowed the store to close at 7:00 p.m.²⁰⁹ Some evidence suggests that the manager was upset that the employee went over her head and spoke to the owner.²¹⁰

The communications at issue were complaints among employees about the conduct of their supervisor as well as about terms and conditions of employment and state law rights of workers in California.²¹¹ The ALJ and the Board discounted the employer's contention that the employees schemed to entrap the employer into firing them based upon one employee's post-discharge Facebook posting that included the jest: "Muahahahaha!!! So they've fallen into my crutches," which was a quote from a vintage comedy television show, "The Monkees."²¹² The Board ordered the three employees reinstated and required that the employer cease "[m]aintaining a rule that forbids employees from disclosing wages and compensation to each other or to any third party."²¹³

On the same day that the Board decided the *Bettie Page Clothing* case, an ALJ issued an opinion in the *UPMC* case.²¹⁴ In *UPMC*, the ALJ overruled the employer's email and social media use policies, because the policies were overbroad and ambiguous.²¹⁵ Once again, Section 7 clearly covered the employees' protected concerted activities and required the employer to revise work rules including the company's SMP.

²⁰⁹ *Id.*

²¹⁰ Lawrence E. Dubé, *NLRB Finds Firings for Facebook Use Illegal, Rejects Clothing Firm's Entrapment Defense*, Daily Lab. Rep. (BNA), No. 79, at A-1 (Apr. 24, 2013).

²¹¹ *Bettie Page Clothing*, 2013 WL 1753561, at *1.

²¹² *Id.* at *1 & n. 4.

²¹³ *Id.* at *4.

²¹⁴ See *UPMC*, No. 6-CA-81896, WL 1741918, at *4–7 (N.L.R.B. Div. of Judges Apr. 19, 2013).

²¹⁵ In *UPMC*, several hospitals that were subsidiaries of a health care holding company UPMC were found to have violated the NLRA by maintaining overly broad and ambiguous employment policies: prohibiting solicitation in work, patient care, or treatment areas, and on employer electronic messaging systems or e-mail, and restricting use of information technology resources to authorized activities and prohibiting disparaging or misleading statements regarding the company. *See also* Lawrence E. Dubé, *ALJ Finds Email and Computer Rules Illegal, Citing Nonwork Use, Ambiguous Restrictions*, Daily Lab. Rep. (BNA) No. 82, at A-4 (Apr. 29, 2013) (describing unfair labor practices found in UPMC policies).

J. Dish Network—Board Finds Employer Policies Must Be Revised

Dish Network makes the top ten as the second of two recent Board decisions that instruct on SMPs. It sums up the Board's view on SMPs, citing back to *Costco* and *Knauz* concerning the problem with rules regarding disparagement and restrictions on company time that exceed those permitted by the NLRA.²¹⁶ *Dish Network* reinforces the danger of impermissibly overbroad rules that restrict employee contact with the media or law enforcement and interfere with NLRA-protected activity.²¹⁷ While the Board affirmed the ALJ's determination that Dish Network's rules needed revision, it did not find that the termination of an employee for safety violations was an unfair labor practice.²¹⁸ Just as in *Knauz*, when an employee engages in unprotected conduct, the conduct is an independent lawful basis for termination and out of the purview of Board control.

The employee handbook in *Dish Network* included a rule prohibiting employees from making "disparaging or defamatory comments about DISH Network" and prohibited posting negative commentary electronically during "[c]ompany time."²¹⁹ The Board construed this rule as overbroad.²²⁰ Specifically, it chilled speech protected by Section 7, and it did not clarify that employees could solicit during breaks and other non-working hours while at work.²²¹ In addition, the contact-with-the-media policy unduly interfered with Section 7 rights, because it prohibited employees from speaking about Dish without prior authorization from management.²²² Similarly, the employer's contact-with-government-agencies policy banned contact without authorization and was unlawful because it inhibited employee contact with the Board.²²³ The ALJ in *Dish Network* cited the NLRB's 2012 statements on SMPs in *Costco* and *Knauz*, and noted

²¹⁶ Dish Network Corp., 359 N.L.R.B. No. 108, 2013 WL 1952196 (Apr. 30, 2013).

²¹⁷ *Id.* at *7–8.

²¹⁸ *Id.* at *1.

²¹⁹ *Id.* at *7.

²²⁰ *Id.* at *7–8 (citing Costco Wholesale Corp., 358 N.L.R.B. No. 106, 2012 WL 3903806, at *2 (2012); Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 2012 WL 4482841 (Sept. 28, 2012)).

²²¹ *Id.* at *8 (citing Costco Wholesale Corp., 2012 WL 3903806, at *2); *Karl Knauz Motors*, 2012 WL 4482841).

²²² *Id.*

²²³ *Id.* (citing *Karl Knauz Motors*, 2012 WL 4482841).

that non-disparagement rules place electronic limitations on negative commentary in violation of the Act.²²⁴

III

ANALYSIS AND RECOMMENDATIONS—THE TAKEAWAY FROM THE TOP TEN

The NLRB cases on social media started off slowly, but the news buzz—from the *AMR* case, and then from the ALJ decisions in *Knauz* and *HUB*—attracted more complaints. Accordingly, the NLRB has decided quite a few cases involving social media and employee rules since 2012. In the spring of 2013, the NLRB issued two important decisions on SMPs, and thereafter the Division of Advice issued another advice memorandum on a Facebook discharge case.²²⁵ In this environment, it is increasingly important for businesses in the private sector to understand how the NLRA works, as well as its coverage and applicability. If businesses ignore this Act, they could end up being a respondent in one of the next cases. It is clear that employers should train their managers on the labor law surrounding NLRA Section 7 rights because the statute protects employees who are nonunion as well as union members.²²⁶

The NLRB is not stating that employers *should* promulgate SMPs. Yet, the Board is clearly aware that many employers will fashion policies to protect their companies and set rules of conduct for employees to follow. The Board has stated that if a company does have an SMP, it should abide by the May 2012 guidance available in the AGC’s Third Report.²²⁷ In addition to adopting the revised Walmart SMP as a role model of legality, the AGC focused on NLRA violations embodied in overbroad company rules. Such potential violations include those relating to social media use; confidentiality;

²²⁴ *Id.* (citing Costco Wholesale Corp., 2012 WL 3903806, at *2; *Karl Knauz Motors*, 2012 WL 4482841).

²²⁵ See Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Dennis Walsh, Reg’l Dir., Region 4, on Tasker Healthcare Group, d/b/a Skinsmart Dermatology, No. 04-CA-094222 (May 8, 2013) [hereinafter Skinsmart Advice Memo], available at <http://www.employmentlawmatters.net/uploads/file/5-8-13%20Personal%20comments%20support%20firing.pdf>.

²²⁶ HIRSCH, *supra* note 3, at 80 (noting NLRA Section 7 protects speech for nonunion employees in private sector).

²²⁷ The entire Walmart SMP is appended to the AGC’s Third Report. See AGC’s Third Report, *supra* note 13, at 22–24. For a reprinted version of Walmart’s SMP, see *infra* Appendix p. 377.

privacy; online tone; prior permission for contacting media, law enforcement, or government agencies; and prohibitions on commenting on legal matters where employees would reasonably interpret these as limiting their exercise of Section 7 rights.²²⁸ “Savings clauses” that attempt to cure violations of the NLRA by merely mentioning that a policy will not be construed or applied to improperly interfere with rights under the Act will not suffice to cure an overly broad policy.²²⁹ The rights that are protected by the NLRA should be specifically enumerated in an SMP such that a reasonable employee would not feel that Section 7 rights were prohibited by the policy or rule. Employer rules prohibiting online bullying and harassment are permitted, but policies prohibiting harming the image of the company are not.²³⁰

The AGC’s Third Report outlined the Board’s test for establishing a Section 8(a)(1) violation from its decision in *Lutheran Heritage Village-Livonia*: it is a violation where an employer maintains a work rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights.”²³¹ The two-step inquiry assesses first whether the rule “explicitly restricts Section 7 protected activities.”²³² If it does not, the next step assesses whether “employees would reasonably construe the language to prohibit Section 7 activity” or was “promulgated in response to union activity” or “applied to restrict the exercise of Section 7 rights.”²³³ Absent one of the above situations, a rule is then tested to determine if it is ambiguous and does not contain “limiting language or context” to clarify that it “does not restrict Section 7 rights.”²³⁴ Thus, any rules that are overbroad and potentially restrict Section 7 rights must clarify specifically that these rights are not proscribed, and ambiguity is construed against the creator of the rules, the employer.²³⁵

The top ten cases illustrate the types of policies that will not survive the scrutiny of the Board:

1. In *AMR*, the employer was required to revise its SMP nationwide with respect to: its blogging and internet posting policy,

²²⁸ AGC’s Third Report, *supra* note 13, at 3–11.

²²⁹ *Id.* at 12.

²³⁰ *Id.* at 12–13.

²³¹ *Id.* at 3 (citing *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646, 647 (2004)).

²³² *Id.* at 3.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *See id.*

its standards of conduct rules, and its solicitation and distribution policy, because they were improperly restrictive of the employees' right to engage in Section 7 activities.²³⁶

2. In *Walmart*, the revised policy became the model for a Board-approved SMP.²³⁷

3. *Costco* set out the Board's *Lutheran Heritage Village-Livonia* test for evaluating employer rules and policies.²³⁸ The Board required that policies that interfered with employee discussion of wages, hours, and terms and conditions of employment must be revised to avoid improperly restricting the exercise of Section 7 rights.²³⁹ The Board noted that it was important for an SMP to say what employees *can do* with respect to Section 7 activities and exclude this from the prohibitions on an overbroad policy.²⁴⁰ For example, the employer should say that employees are able to engage in the above-mentioned Section 7 activities on non-work time and areas while at work.

4. In *Knauz*, the Board required the employer to revise its SMP because it reasonably tended to chill the exercise of Section 7 rights.²⁴¹ The Board, citing to *Costco*, noted that the SMP should say what is excluded from the restrictions, namely Section 7 activities.²⁴² This was so because *Knauz*'s courtesy rule and reference to disrespect and damage to the image or reputation of the company would reasonably be construed as overbroad and restrictive of protected concerted activities.²⁴³

5. In *EchoStar*, the Board also required the employer to revise its SMP regarding overbroad policies on: disparagement and restrictions on contacting the media without written authorization, no disclosure of employee information, and no contact with government agencies without contacting the company's general counsel.²⁴⁴ All of these exceeded permitted restriction on Section 7 activities.²⁴⁵

²³⁶ See *supra* notes 25–27 and accompanying text.

²³⁷ See *supra* note 28.

²³⁸ See *supra* notes 70–71, 229–32 and accompanying text.

²³⁹ See *supra* notes 72–88.

²⁴⁰ See *supra* notes 73–76.

²⁴¹ 358 N.L.R.B. No. 164, 2012 WL 4482841, at *1–3.

²⁴² *Id.* at *1 (citing *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2012 WL 3903806 (2012)).

²⁴³ *Id.* at *1–3; see *supra* notes 73–77 and accompanying text.

²⁴⁴ See *supra* notes 110–15 and accompanying text.

²⁴⁵ See *supra* notes 110–15 and accompanying text.

6. In *Hispanics United of Buffalo (HUB)*, the Board focused on the reinstatement of the discharged Facebook users. But, it was clear that the employer's alleged reliance on its zero-tolerance bullying policy was an insufficient defense, when the conduct that led to the discharges was clearly protected by Section 7.²⁴⁶ The takeaway from *HUB* is that the Board will see through pretextual reasons when protected activities were the real reason for the adverse employment action.

7. The Board in *DirectTV* required revision of provisions in an SMP regarding rules that required prior approval before an employee could contact the media, which prevented employee contact with government agencies.²⁴⁷ Federal statutes give employees the right to contact the NLRB, DOL, OSHA, and other agencies.²⁴⁸ Employers who have policies that interfere with these rights do so at their peril. Specifically, an employer violates Section 8(a)(4) of the NLRA when it discriminates against employees who take part in NLRB processes.²⁴⁹ It is lawful for an SMP to prohibit false statements, but a restrictive policy should give valid examples of prohibited conduct, rather than leaving employees guessing about whether an action is prohibited.²⁵⁰ Additionally, policies that restrict "company information" must clarify that employees have the right to discuss wages, hours, and working conditions under the NLRA.²⁵¹

8. In *Jones & Carter*, the ALJ and NLRB reinforced that employees' discussion of wages should not be the basis for discipline or discharge.²⁵²

9. In *Bettie Page Clothing*, like in *HUB*, the Board's emphasis was on reinstating the employees who were discharged because of their Facebook comments rather than on revision of an SMP.²⁵³ However, the Board made clear that conversations on social media are protected by Section 7 in the same manner as face-to-face conversations, and employers should not discriminate against

²⁴⁶ See *supra* notes 167–72 and accompanying text.

²⁴⁷ See *supra* notes 180–87 and accompanying text.

²⁴⁸ See *supra* notes 183–84 and accompanying text.

²⁴⁹ See *supra* notes 183–84 and accompanying text.

²⁵⁰ See *supra* notes 181, 187, 191 and accompanying text.

²⁵¹ See *supra* note 189 and accompanying text.

²⁵² See *supra* notes 197–98 and accompanying text.

²⁵³ See *supra* notes 205–13 and accompanying text.

employees who engage in protected discussions about their working conditions.²⁵⁴

10. *Dish Network* summarizes the Board's view on SMPs, citing back to *Costco* and *Knauz* with respect to how employers should craft a lawful policy.²⁵⁵ Provisions prohibiting disparagement should be narrow, with all policies phrased in a manner that protects Section 7 activities, and note that protected activities are permitted during non-working time and areas within the workday.²⁵⁶ *Dish Network* also included unlawful restrictions on contacting the media and law enforcement, similar to those found in *EchoStar* and *DirecTV*.²⁵⁷ The lesson from *Dish Network*, *EchoStar*, and *DirecTV* is that if there are any such provisions that restrict contact with the media, law enforcement, or government agencies, the rules must be narrow and provide examples of Section 7 activities that are not prohibited.

In the social media cases, the NLRB is not saying that employers cannot adopt SMPs or other rules regulating employee conduct. It is merely stating that such rules may not unnecessarily infringe upon Section 7 rights. If an employee is afraid to engage in protected concerted activities because of an overbroad or ambiguous employer policy, the policy will be a target for revision. If an employee is disciplined or discharged for engaging in protected activities and there is no other independent legitimate basis for the adverse employment action, the employer will be ordered to reverse its action and place the employee back in the position he or she would have been in absent the discrimination. The employer will also be ordered to post a notice stating that it will not commit further unfair labor practices. The Board follows a specific test on dual motive discipline and discharge cases, requiring that the general counsel make a prima facie case that the protected conduct was a motivating factor in the employer's decision.²⁵⁸ The burden then shifts to the employer to establish that the employee would have been disciplined or

²⁵⁴ See *supra* note 205 and accompanying text.

²⁵⁵ See *supra* note 216 and accompanying text.

²⁵⁶ See *supra* notes 216, 219–21 and accompanying text.

²⁵⁷ See *supra* notes 217, 222–23 and accompanying text.

²⁵⁸ See *Wright Line*, 251 N.L.R.B. 1083, 1087 (1980).

discharged for legitimate business reasons absent the protected conduct.²⁵⁹

An employee will not be reinstated if he or she is discharged for social media activity that is not protected because it does not involve “shared employee concerns over terms and conditions of employment,” or when the activity is not in concert because it is not “engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself.”²⁶⁰ Individual or personal griping is not a protected activity because it lacks shared concern.²⁶¹ Accordingly, if the comments are “all about me” and not “all about us,” in terms of working conditions or other Section 7 matters, the conversation is not protected by the NLRA. It is critical that employees understand the limits on NLRA protection or they too may hit a career tripwire, which could happen if they act upon the belief that comments on social media are protected just because they relate to work, but the comments do not rise to the level of a shared concern.

CONCLUSION

The NLRB has been in the news more in the past three years than it has in quite some time because of the press generated by its first Facebook firing case in fall 2010 and the subsequent wave of similar cases involving employer policies that restricted employee rights under Section 7 of the National Labor Relations Act. The NLRB has now decided a number of these cases involving social media conduct, policies, and related rules that infringe upon protected communication that could take place on social media or face-to-face. The Board has also decided cases concerning employee discharges that were alleged to involve unfair labor practices related to the above policies or rules. In each of these cases, the Board took the position that if the employer had an overly broad SMP that infringed, or had the potential to infringe, employee rights, the SMP must be revised. In

²⁵⁹ *Id.*; see also NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983) (upholding the Board’s *Wright Line* test); TWOMEY, *supra* note 4, at 157 & n.34 (discussing the *Wright Line* case).

²⁶⁰ See Skinsmart Advice Memo, *supra* note 225, at 2–3 (quoting Meyers Industries, 281 N.L.R.B. 882, 885 (1986) (Meyers II)); see also Lawrence E. Dubé, *Slamming Firm on Facebook Not Protected; NLRB Memo Says No Talk of Shared Concern*, Daily Lab. Rep. (BNA) No. 98, at A-1 (May 21, 2013) (discussing the Skinsmart Advice Memo).

²⁶¹ See Skinsmart Advice Memo, *supra* note 225, at 3 (citing Tampa Tribune, 346 N.L.R.B. 369, 371–72 (2006)).

addition, when employees were disciplined or discharged for protected activity whether on social media or not, employers were ordered to reinstate the employees, to post a notice of employee rights under Section 7, and to pledge not to commit unfair labor practices in the future.

There was nothing new in the NLRB's rulings in the social media cases. The Board was simply following the same rules that it has always followed with respect to protecting employees' Section 7 rights. What was new was the medium, and "in the medium is the message."²⁶² This is so because news items mentioning the words "Facebook" and "social media" got people to listen to the Board's message. The Board's Acting General Counsel, Lafe Solomon, focused the public's attention on the NLRB by scrutinizing both employer SMPs and the NLRA's impact on employer rules and employee rights. The media coverage was favorable to the Board because it publicized what is protected concerted activity under the NLRA. It also encouraged the filing of unfair labor practice complaints that triggered the agency's investigation and review of SMPs. However, this publicity seems to have brought the Board's political foes to the forefront. Once there, they worked successfully to foil the Board's rulemaking on workplace rights posters and judicial enforcement of its decisions. Only time will tell just what the cost of publicly enforcing the NLRA will have on the NLRB.

However, what is clear now is that employers and employees must understand the NLRA in order to avoid unfair labor practices and unprotected activity. The NLRB's Facebook firing and social media cases have had an excellent educational effect on the public. Presenting these top ten cases is a meaningful way to instruct employers and employees on the legality of both workplace social media policies and adverse employment actions. Furthermore, this research highlights the extent to which the NLRA matters as the Board continues to apply it when the Board scrutinizes these cases. Notably, the Act applies to union and nonunion employees. Responding to the new environment of ubiquitous use of social media on every conceivable topic and person, the Board concerned itself with then-emerging cases alleging adverse employer actions and policies. Based on the analysis herein, NLRB case law establishes

²⁶² MARSHALL McLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 8–9, 12 (1964) (introducing the concept of "the medium is the message").

that employer SMPs are legitimate to the extent they are not so overly broad as to infringe—or potentially infringe—employees’ rights to engage in protected concerted activity. Furthermore, adverse employment actions will be examined for evidence of this same negative impact on the right to engage in protected concerted activity. The full range of remedial orders is used for cases in which employees’ rights are violated.

The takeaway for employers is that they should seek legal guidance on writing their social media policies so that their interests are protected, and their employees’ interests are not unlawfully impinged. Furthermore, they should seek expert guidance when determining whether the employees’ posts constitute protected concerted activity. When the recess appointments case resolves, the full scope of the case law established by these ten cases will be clarified.

APPENDIX: WALMART'S SOCIAL MEDIA POLICY²⁶³

At Walmart, we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for Wal-Mart Stores, Inc., or one of its subsidiary companies in the United States (Walmart).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with Walmart, as well as any other form of electronic communication.

The same principles and guidelines found in Walmart policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of Walmart or Walmart's legitimate business interests may result in disciplinary action up to and including termination.

²⁶³ This is Walmart's SMP reprinted (updated May 4, 2012). The entire Walmart SMP is appended to the AGC's Third Report. See AGC's Third Report, *supra* note 13, at 22–24.

Know and follow the rules

Carefully read these guidelines, the Walmart Statement of Ethics Policy, the Walmart Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Walmart. Also, keep in mind that you are more likely to resolve [sic] work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about Walmart, fellow associates, members, customers, suppliers, people working on behalf of Walmart or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of Walmart trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

- Respect financial disclosure laws. It is illegal to communicate or give a “tip” on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a Walmart website without identifying yourself as a Walmart associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for Walmart. If Walmart is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of Walmart, fellow associates, members, customers, suppliers or people working on behalf of Walmart. If you do publish a blog or post online related to the work you do or subjects associated with Walmart, make it clear that you are not speaking on behalf of Walmart. It is best to include a disclaimer such as “The postings on this site are my own and do not necessarily reflect the views of Walmart.”

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use Walmart email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

Walmart prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on Walmart’s behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.

