

# THE NLRB and SOCIAL MEDIA: BFF?

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The ardor may have cooled and the gossip websites have turned their attention elsewhere.<sup>1</sup> However, almost two years after the first of the Facebook cases reached the public consciousness<sup>2</sup> there is no question that the NLRB and Social Media have become “Best Friends Forever” in the sense of being mutually dependent in teasing out new meaning for Section 7 work related speech in the 21<sup>st</sup> century. This paper will address the relationship and its still evolving state. I say evolving as the conversation has been driven so far largely by Lafe Solomon as Acting General Counsel,<sup>3</sup> most notably by the three memoranda<sup>4</sup> where he discusses the myriad social media related cases considered by the Division of Advice.<sup>5</sup> Only a handful of cases have even reached trial with but a few extant administrative law judge<sup>6</sup> decisions, and the Board has yet to opine on any of the emerging issues.<sup>7</sup> Nevertheless, it has been a fascinating opportunity for the practitioner to see the law unfold in such a manner, an opportunity with little precedent.

The purpose here is not to simply summarize the AGC memoranda but to try and draw some broad inferences from the cases on record. It is true that the Board has yet to speak, and it is true that simply relying on General Counsel determinations does not make for the final word.<sup>8</sup> Yet the AGC memoranda, coupled with the ALJ decisions, represent thoughtful consideration of the issues in play and it is well worth taking stock of where the law is now resting, even if its repose will be brief. This case genre, after all, is not going away given the ubiquity of social media, its usage emblematic of a generation. Take this and couple it with what has been termed “the disinhibition effect” or the tendency to self-disclose or act out more intensely on line than one would in person<sup>9</sup> and it is

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<sup>1</sup> As in no more “Facebook Related Firing Sparks Legal Drama!” Welcome to Perez Hilton.com. Celebrity Juice not from Concentrate (November 9, 2010). <http://perezhilton.com>.

<sup>2</sup> Via Agency press release of November 2, 2010 headlined “Complaint alleges Connecticut Company Illegally Fired Employee Over Facebook Comments.” The case in question was American Medical Response of Connecticut, Inc. 34-CA-12576 (Advice Memorandum, October 5, 2010) hereafter “AMR.”

<sup>3</sup> Hereafter “AGC”.

<sup>4</sup> OM-11-74 ( August 18, 2011) ,OM 12-31 ( January 24, 2012) and OM 12-59 (May 30, 2012).

<sup>5</sup> All determinations made the Division of Advice are made on behalf of the General Counsel. For much of 2011 all social media cases were mandatory submissions to Advice, though at this point the Regional Directors retain discretion as what to submit.

<sup>6</sup> Hereafter “ALJ”.

<sup>7</sup> At least as of the date of this paper’s submission.

<sup>8</sup> See, e.g. D.R. Horton, Inc., 357 NLRB No. 184 (2012) where the Board made clear in finding that an employer cannot require employees to waive their right to file class action employment related suits that a General Counsel Memorandum is not binding on the Board. The then General Counsel had laid out a much narrower theory of a violation, a construction that was rejected.

<sup>9</sup> J. Suler, “The Online Disinhibition Effect,” CyberPsychology and Behavior, June 2004; 7(3):321-6. Less scholarly, but also to the point was David Carr, the New York Times media critic , who after a CNN

a heaven sent prescription for testing the limits of Section 7. To put it bluntly these cases will be a steady, if not growing, source of business for the NLRB well into the foreseeable future.

I have followed this subject closely from the first Facebook case forward and what has not changed are the three basic story lines here: Is the subject activity at its core protected; if yes, was it so opprobrious or disparaging as to lose the protection of the statute; and finally, does the Employer's social media policy pass Section 7 muster.<sup>10</sup> When these cases first broke much was made of the "water cooler" analogy<sup>11</sup> and in an article written in the fall of 2011 I noted at that point "the rules of the game appeared unchanged as to how the NLRB will treat social media cases."<sup>12</sup> I also wrote that when "the cases start reaching the Board, the issue of "social media exceptionalism will have to be addressed more directly."<sup>13</sup> As it has developed, by the spring of 2012, and even before we have heard from the Board, there has already been the start of an evolution in the treatment of cyber speech under the Act. While this treatment may be not dramatically different than other cases where arguably protected, concerted activity or employer work rules are in question there has been an unstated recognition that perhaps the water cooler is not the best analogy. How this has played out vis a vis the three core areas will be the principal focus of this paper.

## **ISSUE #1 Protected, Concerted Activity**

Perhaps the greatest contribution of these social media cases has been all the attention paid as to what qualifies as protected, concerted activity, or PCA, and just possibly how the concept may be starting to stretch. After all, the meaning of the Section 7 language giving employees the right to engage in "concerted activities" for purpose of "mutual aid or protection" is hardly self evident. Some, not without reason, have called "Section 7's protection for

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columnist was suspended for a controversial Twitter post, observed "That the great thing about Twitter is that it offers a friction free route to an audience – if it can be thought it can be posted. That's also the bad thing about Twitter." See "Twitter is All Good Fun , Until it Isn't," New York Times, February 13, 2012. Interestingly, as one of his examples Carr made reference to the Arizona Daily Star reporter who was fired for inappropriate tweets, commenting that the discharge was upheld by the NLRB. This case is summarized in OM-11 at p. 12-14.

<sup>10</sup> There are, of course, additional issues implicated by social media such as coercive conduct by a party (See, e.g. Big Ridge, Inc., JD-74-11, December 1, 2011 where a supervisor made implied threats of closing on Facebook during union campaign; also Jimmy Johns, JD-19-12, April 20, 2012 where various managers disparaged a union adherent on anti-union Facebook site) or surveillance ( See Buel, Inc. 11-CA-22936, Advice Memorandum, July 28, 2011 [available to the public at [www.nlr.gov](http://www.nlr.gov) under Advice cases] where supervisor was Facebook "friended" so no violation as he was, in essence, invited to observe). Thus far, these have been subsidiary issues.

<sup>11</sup> At the time the AMR case broke AGC Solomon was quoted as saying "This is a fairly straightforward case under the National Labor Relations Act – whether it takes place on Facebook or the water cooler..." Steven Greenhouse, "Labor Board Says Rights apply on Net," New York Times, November 8, 2010.

<sup>12</sup> Barnett Horowitz, "The National Labor Relations Act Adapts to Social Media: The First Chapter," Labor and Employment Law Journal, (New York State Bar Association). Fall/Winter 2011. p. 15.

<sup>13</sup> *Ibid*, p. 15.

concerted activity unrelated to a formal union the best-kept secret in labor law.”<sup>14</sup> Further, the legislative history is silent on the matter<sup>15</sup> and the concept has evolved, sometime in fits and starts,<sup>16</sup> through standards formulated by the Board and the courts. The plethora of Facebook cases<sup>17</sup> with the attendant publicity has provided an excellent opportunity for the AGC to unlock this labor law “secret” and also to assist the practitioner in getting a better grasp of the subject.

A reading of the OMs provide ample illumination if not a bright line as to what is not PCA, e.g., no evidence that the employee engaged in activity with a goal or preparing for or inducing group action,<sup>18</sup> or because there was no mention of terms and conditions of employment<sup>19</sup> or both.<sup>20</sup>

The complaint authorized cases generally involve more subtlety and the first three to reach trial offer interesting contrast in what constitutes statutory sanctioned behavior. The first, our own Region 3 case, Hispanics United of Buffalo, Inc., JD-55-11 (September 2, 2011) involving an employee who in advance of a meeting with management about working conditions posted to her Facebook page a co-worker’s allegation that employees did not do enough to help the organization’s clients. The posting generated numerous responses from other co-workers speaking out in their defense. This was in the AGC’s judgment “a textbook example of concerted activity, even though it transpired on a social media platform.”<sup>21</sup> The judge agreed and found that complaints about a co-worker were clearly protected.<sup>22</sup> While I am generally hesitant to use the term

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<sup>14</sup> Staughton Lynd and Daniel Gross, Labor Law for the Rank and Filer, PM Press, 2011. p.39. <http://zineLibrary.info/files/LaborLawForTheRankAndFiler.pdf>.

<sup>15</sup> See former Chairman Gould’s dissent in Myth, Inc., 326 NLRB 136 (1998).

<sup>16</sup> Most notably in Meyers Industries, 268 NLRB 493(1984), remanded sub. Nom. Prill v. NLRB, 755 F. 2d. 941 (D.C. Cir. 1985); Meyers Industries, 281 NLRB 882 (1986) affd. Sub nom. Prill v. NLRB, 835 F 2d. 1481 ( D.C. Cir. 1987), also known as Myers I and II, overruling Alleluia Cushion Co. 221 NLRB 999(1975) as to what constituted concerted activity.

<sup>17</sup> As the overwhelming majority of these cases have involved Facebook cases, I will sometimes use this term as shorthand for social media.

<sup>18</sup>See e.g. JT’s Porch Saloon & Eatery, Ltd., 13-CA-46699 ( Advice Memorandum, July 7, 2011), OM 11-74 p. 14-15 (bartender’s complaints about tips while calling customers “rednecks” and hoping they choke on glass as they drove home drunk”); Frito-Lay, 36-CA-10811 (Advice Memorandum, September 19, 2011) OM 12-31 p. 34-35 (complaints about being “just a hair away from setting it off” in regards to complaints about supervisor found to be “just venting”).

<sup>19</sup> See e.g. Rockwood Fired Pizza, 19-CA-32981 (Advice Memorandum, September 19, 2011) OM 12-31 p. 9-11(complaints about fellow bartender passing off “low grade drinks as premium liquor”); Childrens National Medical Center 5-CA-36658 (Advice Memorandum, November 14, 2011) OM 12-31 p. 30-32 (complaint about a fellow employee “sucking his teeth”). Its worth noting that some of these social media cases have fact patterns that strain credulity. To paraphrase the author Tom Wolfe comparing fiction to non fiction, these PCA narratives don’t have to be plausible; they only have to be true.

<sup>20</sup> Martin House, 34-CA-12950 (Advice Memorandum, July 19, 2011) OM 11-74 p. 16-17 (complaints about clients in facility for the homeless).

<sup>21</sup> OM 11-74, p.4.

<sup>22</sup> Citing Jhirmack Enterprises, 283 NLRB 609, 615 (1987); Akal Security, Inc. 355 NLRB 584 (2010) reaffirming 354 NLRB 122 (2009).

“straightforward” it would not be unfair to make that characterization as to Hispanics United.

The other two cases require deeper analyses as the concert is not as immediately apparent. The earlier of these is Knauz BMW, JD (NY) -37-11 (September 28, 2011), Here a car salesman was fired after his dealership promoted a new car model with a customer event that featured bargain brand hot dogs and cheap cookies. Apparently, he and other salesmen had mutual concerns that this sent the wrong message to potential buyers, a circumstance that would impact sales and commissions. The charging party then posted on his Facebook his rather cynical observations about the inadequacy of the food and drink and chiding the employer for “overcooked wieners and stale buns.” He made the posting *without the knowledge of any co-worker and no employee added any comments to the posting*. Nevertheless, per the AGC<sup>23</sup> he was vocalizing the sentiments of his co-workers and continuing the course of concerted activity that began when these employees raised these concerns at a staff meeting. Further, given the nexus between sales and commissions, it was clearly a protected subject. Judge Biblowitz in his decision agreed that “lone act of a single employee is concerted if its ‘stems from’ or ‘logically grew’ out of prior activity.”<sup>24</sup> He also found it protected as it could have an impact on wages.<sup>25</sup> Interestingly, the Respondent has not challenged the concerted finding but argues in its cross-exceptions that the subject matter was not protected as the relationship between the Facebook complaints about the catering quality and compensation was too attenuated.<sup>26</sup>

The last in this trilogy is Triple Play Sports Bar and Grille, JD(NY)-01-12, (January 3, 2012).<sup>27</sup> This case arose after a former employee posted a comment on her Facebook “wall” criticizing the employer’s failure to properly complete tax withholding paperwork causing this ex-employee to owe the state money. One of the charging parties in the case simply clicked the “Like” button under this comment and the other charging party wrote that she owed also and referred to the owner as an “asshole.” Both were fired. It appeared that several employees had discussed this issue previously at work and were concerned about being dunned for back taxes. Judge Esposito found these Facebook postings, which were certainly wage related and otherwise protected, also concerted activity where the Facebook discussion was of an “ongoing collective dialogue”<sup>28</sup> and a “logical outgrowth”<sup>29</sup> of prior concerted activity.

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<sup>23</sup> OM 11-74, p. 8.

<sup>24</sup> Citing NLRB v. Mike Yurosek & Son, Inc., 53 F. 3d 261, 265 ((9<sup>th</sup> Cir. 1995)

<sup>25</sup> While not germane to the subject here, he also found that the discharge of the employee was not unlawful, as the Judge subscribed to the Employer’s position that, under a Wright Line analysis, the employee was fired for another clearly unprotected posting.

<sup>26</sup>“ Respondent’s Brief in support of its Cross Exceptions,” p. 8-9. November 9, 2011. Available at [www.nlr.gov](http://www.nlr.gov) by doing a case search for 13-CA-046452.

<sup>27</sup> OM 11-74, p. 9-12.

<sup>28</sup> Tampa Tribune, 351 NLRB 1324, 1325 (2007).

<sup>29</sup> Circle K Corp., 305 NLRB 932, 933, 934 (1991) enf. 989 F.2d 498 (6<sup>th</sup> Cir. 1993).

Most interesting was the Judge's treatment of the employee who just clicked the "like" button, conduct for which there really is little parallel in the world of the water cooler. The judge held that this was "an assent to the comments being made and a meaningful contribution to the discussion"<sup>30</sup> noting that the Board has never "deemed the protections of Section to be contingent upon their level of engagement or enthusiasm."<sup>31</sup> Respondent, has not excepted to the conclusion that this conduct, or that of the other employee, was fundamentally protected, concerted though is contending to the Board that Facebook postings are of such nature to warrant loss of protection.<sup>32</sup>

The three ALJ cases taken together establish this continuum of PCA, from the clear group activity in Hispanics United to the "logical outgrowth" uninhibited musings of a single employee in Knauz BMW to simply hitting the "like" button in Triple Play. It is not a continuum that breaks new ground, however, when defining the core concept of protected, concerted activity.<sup>33</sup> Where the concept may be gaining elasticity, as I alluded to earlier, is in the application of two recent Board decisions to social media cases. In both instances, concert no longer becomes a sine qua non for Section 7 protection.

The first case is Parexel, 356 NLRB No. 82 (2011) where an employee complained to her supervisor that the employer was favoring a certain class of employees by giving them a raise.<sup>34</sup> This employee was then called to the human resource office and accused of spreading rumors as to the others receiving preferred treatment. She was fired a few days later. The administrative law judge while concluding that the Employer discharged the Charging Party to prevent her from talking to other employees about wages, found no concert and felt compelled to dismiss the complaint. The Board reversed relying on the preemptive strike theory to find a violation as her discharge restricted her ability to have further protected discussions of wages and also had effect of keeping employees in the dark. In the view of the Board majority, the employer here had sought to erect "a dam at the source of supply" of potential, protected activity, thereby interfering with employees' exercise of their Section 7 rights.<sup>35</sup>

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<sup>30</sup> Triple Play Sports Bar, slip op. p. 9.

<sup>31</sup> Ibid. slip op. p. 9.

<sup>32</sup> The exceptions and the brief in support have not yet been made public.

<sup>33</sup> One union side attorney and former associate general counsel to UNITE HERE, Jessica Drangel Ochs, commented that finding an employee protected for simply using the "like" button was an "exciting first step" in analyzing on-line communication. Laurence Dube, "Workers Like Facebook, Other Social Media," Daily Labor Report, February 28, 2012. It may be exciting but I would argue that the decision was more novelty than path breaking.

<sup>34</sup> For those so inclined an animated version of this case is available at <http://www.youtube.com/watch?v=cT5hljA3WCU>

<sup>35</sup> 356 NLRB , slip. op. p. 5. Member Hayes dissented from the decision of members Liebman and Becker on procedural grounds but also held that "finding a sec. 8(a)(1) motivational discharge violation in the absence of any actual concerted activity is unprecedented, and, at the very least, in tension with Meyers Industries ,268 NLRB 493 (1984)." See Parexel at fn. 16.

The Board's decision has been viewed, on the one hand, as erosion of the requirement that activity must be concerted in order to be protected<sup>36</sup> and on the other as "disinfecting sunlight" and a "good start at recovering from the self inflicted institutional trauma of the Meyers decision."<sup>37</sup> Certainly, it has great application to social media cases where what starts as random musings can about wages, hours or working conditions can easily touch an employer nerve and result in a nip in the bud response. In fact in OM 12-31 , p. 18-20, the AGC citing Parexel reaches precisely that conclusion, i.e., that the Employer discharged an employee for her Facebook postings as a preemptive strike. In the two subsequent cases summarized at OM 12-31, starting at p. 20 and 22 respectively, the underlying Advice memoranda also make reference to Parexel.<sup>38</sup> This clearly is a significant case with implications for the rights of the unorganized and social media usage.

The other case is Continental Group, Inc., 357 NLRB No. 39 (2011) where Chairman Liebman and Member Becker clarified the Double Eagle rule<sup>39</sup> - discipline imposed pursuant to an overbroad rule is unlawful - stating that such discipline is unlawful where an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Continental Group is expressly cited in three of the first four cases treated in OM 12-31 for this principle, and in an additional case, beginning at p. 20 the OM makes clear that without regard to a finding of concert employees were unlawfully fired under Section 8(a)(1) per Continental given the overly broad social media policy. Perhaps not as far reaching as Parexel, but in view of the close scrutiny of social media policies by the AGC, Continental Group should also have impact on how the concerted requirement is viewed in cyber space in the interests of expanding the freedom of association, particularly in the non-Union work place.

## **ISSUE # 2 Loss of Protection**

One of the obvious conclusions to be drawn from the AGC Memoranda is that social media makes a fecund platform for unfiltered and coarse, if not vulgar, speech. This leads in almost all cases where the activity is otherwise protected, concerted to the question of whether it has exceeded the permissible Section 7 boundaries. Tracking the issue through the OMs what is interesting as to the loss of protection issue, more so than with any other sub-topic, is how the AGC's thinking has evolved taking into account the DNA of social media.

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<sup>36</sup> Michael Eastman (U.S. Chamber of Commerce), NLRB Insight ,February 15, 2011 <http://www.nlrbinsight.com/2011/02/parexel-international/>

<sup>37</sup> Michael Duff, "New Nip in the Bud: Does the Obama Board's Preemptive Strike Doctrine Enhance Tactical Employment Law Strategies?"(February 2, 2012) Employee Rights and Employment Policy Journal, Vol. 16 No. 1. 2012. Available at <http://ssrn.com/abstract=1998385>.

<sup>38</sup> Cases not available at this time to the public.

<sup>39</sup> Double Eagle Hotel & Casino, 341 NLRB 112 (2004).

By way of background, and in very summary fashion, the Board has judged employee conduct in matters of this sort by two standards; whether it was so opprobrious under Atlantic Steel<sup>40</sup> or demonstrated “such detrimental disloyalty” under Jefferson Standard.<sup>41</sup> I have thought of the application of these standards as being determined by whether the communication in question was “inside the family”, i.e. between employee and employer or between co-workers complaining about their employer, or “outside the family” by employee(s) disparaging the employer to a third party. For the former, Atlantic Steel would apply with its focus on whether the communications would disrupt or undermine shop discipline.<sup>42</sup> For the latter the “the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.”<sup>43</sup>

In OM 11-74 the AGC briefly dispatched the loss of protection issue in the first four cases, all of which involved complaint authorized discharges – Hispanics United, AMR, Knauz and Triple Play.<sup>44</sup> In Knauz he found the conduct protected either under Atlantic Steel or Jefferson Standard; in the other three only an Atlantic Steel analysis was used with no loss of protection in any of the cases. In these early cases the AGC had applied a traditional approach as to these issues. In my aforementioned article I surmised that Employers were going to press hard on this issue and argue for social media accommodations to extant legal theory.<sup>45</sup> This has, in fact, happened resulting in a modification of the AGC’s approach.

In OM 12-31 at p. 24-25, the AGC expressly considered whether Atlantic Steel or Jefferson Standard is the more appropriate standard by which to judge loss or protection in the social media context. In the opinion of his immediate predecessor, Ronald Meisburg, the AGC for the first time “seems to be taking into account the possibility that the kinds of things you might say around the water cooler can have a very different and adverse effect on an employer when they are put out for public viewing on the internet.”<sup>46</sup>

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<sup>40</sup> 245 NLRB 814 (1979).

<sup>41</sup> NLRB v. IBEW Local No. 129 (Jefferson Standard), 346 U.S. 464, 472 (1953)

<sup>42</sup> This approach calls for balancing four factors in making the determination: the place of the “discussion”; the subject matter of the discussion; the nature of the employee’s outburst; and whether the outburst was, in any way, provoked by an employer’s unfair labor practice. 245 NLRB at 816.

<sup>43</sup> Mountain Shadows Golf Resort, 330 NLRB 1238, 1240 (2000). Statements are maliciously untrue and unprotected, “if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. See, e.g., TNT Logistics North America, Inc., 347 NLRB 568, 569 (2006), revd. sub nom. Jolliff v. NLRB, 513 F.3d 600 (6th Cir. 2008).

<sup>44</sup> At p. 4, p. 6, p. 8-9 and p.10 respectively.

<sup>45</sup> “The NLRB adapts to Social Media”, at p. 13.

<sup>46</sup> Ben James, “Strict Social Media Policies Won’t Curry NLRB’s Favor”, Law360 (January 25, 2012). [http://www.morganlewis.com/pubs/Law360\\_StrictSocialMediaPoliciesNLRB\\_25jan12.pdf](http://www.morganlewis.com/pubs/Law360_StrictSocialMediaPoliciesNLRB_25jan12.pdf).

In doing this accounting the AGC found the Jefferson Standard application imperfect in assessing the Facebook conduct under consideration. These cases did not, after all, entail a direct appeal to the public in an attempt to enmesh them in a labor dispute; rather, the third party was in the position of a bystander who overheard a conversation between employees. Atlantic Steel was the better fit but not entirely acknowledging that disparaging remarks made on Facebook can reach an audience beyond employer-employee. For this reason a modified Atlantic Steel was necessary where the analysis moves beyond just workplace disruption to consider “the alleged disparagement of the employer’s products and services.”<sup>47</sup> In the case being reviewed it was found that while the Facebook posting was critical of management<sup>48</sup> was no so defamatory or otherwise disparaging as to lose the Act.<sup>49</sup>

This modified approach had not been developed at the time complaints were authorized in the three cases that have produced ALJ decisions so the reception this analysis will receive is uncertain.<sup>50</sup> In these cases there were three distinct treatments of the loss of protection issue. In Hispanics United Judge Amchan did a straight Atlantic Steel to conclude that the five discriminatees did not engage in conduct that forfeiture of statutory protection.<sup>51</sup> He also had to address an additional issue as the unique characteristic of this case was that it rested upon on-line complaints by the five discriminatees about a co-worker. The Employer characterized this as harassment leading to the co-worker’s subsequent hospitalization. The judge dismisses this without much comment other than to state that this was an allegation without rational basis. In its exceptions to the Board,<sup>52</sup> the Employer presses its case that the discharges were a response to harassment that resulted in the employee being “hospitalized, humiliated and embarrassed.”<sup>53</sup> Without expressly stating it, the Employer is making a case for cyber-bullying and while the quality of the evidence here may allow the Board to finesse this issue in Hispanics it is certain to rise again.

In Knauz BMW Judge Biblowitz uses neither Atlantic Steel or Jefferson Standard in finding that the tone of the salesman’s Facebook posting did not rise to the level of disparagement necessary to deprive his conduct of protection.

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<sup>47</sup> OM 12 at p. 24.

<sup>48</sup> The Operations Manager has been accused of having created “a lot of drama” and was the one “who made it so bad” at the plant.

<sup>49</sup> The postings had easily met the Atlantic Steel test particularly as they were quite tepid by the standards of these cases.

<sup>50</sup> Interestingly, in a non social media but somewhat parallel context, the Second Circuit recently also called for a modification of Atlantic Steel when “bystanders” or customers overheard remarks. See NLRB v. Starbucks Corporation, 679 F. 3d. 20 (2d Cir., May ) which remanded the case to the Board holding Atlantic Steel inapplicable where obscenities used in the presence of customers.

<sup>51</sup> Hispanics United, slip op. p. 9-10.

<sup>52</sup> Available at [www.nlrb.gov](http://www.nlrb.gov). by performing Case search for 03-CA-027872.

<sup>53</sup> Exceptions at p. 45.

Citing from Pontiac Osteopathic Hospital, 284 NLRB 442, 452 (1987) the judge makes the point that the “literary techniques of satire and irony” would not disqualify conduct from the Section 7 protection it would otherwise be entitled to.<sup>54</sup> The Employer, having prevailed as to its discharge of the salesmen on other grounds, did not except to the loss of protection holdings.

Finally, in Triple Play Sports Bar, Judge Esposito responding to the defense of the Employer, applied her own version of a modified Atlantic Steel melding it with Jefferson Standard. As discussed above, this was a case where employees were Facebooking about the Employer’s deficient accounting with one of the employees referring to one of the owners as an asshole. The judge found nothing here so egregious as to warrant loss of protection of the Act. Under the first Atlantic Steel category,<sup>55</sup> the place of discussion, she observed that the post did not occur at work, so obviously there was no possibility it could have disrupted the place of business. What distinguished her treatment of this element was that the judge considered that two customers took part in the Facebook dialogue. However, as it took place off premises, there was clearly no evidence of disruption in the workplace or there was otherwise evidence of harm. Lacking such evidence the PCA would not be rendered unprotected.<sup>56</sup>

At first, the Judge treats the third factor, the nature of the outburst, by traditional Atlantic Steel criteria. As there were no threats, no intimidation, and only a single use of the word “asshole”, the “outbursts” were insufficient to divest the conduct of statutory protection. In response to the Employer’s claim that the overall conduct of the two discriminatees was additionally disparaging and disloyal, the Judge then folded in a Jefferson Standard breakdown into the third Atlantic Steel factor as just another way to consider the “nature of the outburst” question. She found the statements were not defamatory nor maliciously false and while perhaps hyperbolic, were factually grounded. Further, there was no evidence that they were directed to the public as part of a campaign to raise awareness of the labor dispute. After all, the posting here was limited to the friends of the former employee and were not intended for more public consumption. Neither did they attack the Employer’s product but rather focused on the tax treatment of employee earnings.

The Employer in its exceptions tries to broaden the field of play by holding the two discriminatees liable for the more provocative comments made by the

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<sup>54</sup> As Judge Biblowitz noted sarcasm also falls in that category. New River Industries, 299 NLRB 773 (1990), enf. denied on other grounds, 945 F. 2d 1290 (4<sup>th</sup> Cir 1991).

<sup>55</sup> The second factor, as to whether it was a protected subject, clearly yes, and the fourth factor, whether there was provocation by unfair labor practice, clearly no, lack contention and do not really contribute to this conversation.

<sup>56</sup> Citing Crowne Plaza LaGuardia , 357 NLRB No. 95 (2011); Goya Foods of Florida, 347 NLRB 1118 (2006) enf. 525 F. 3d 1117 (11<sup>th</sup> Cir 2008). In these cases the customer presence was on premises making for even a stronger argument in Triple Play that the conduct was protected.

former employee on whose Facebook page the conversation had arisen.<sup>57</sup> From that premise the Employer argues that as it readily could have been seen by customers and employees “there was a high likelihood the business environment would be disrupted.”<sup>58</sup> When taken as a whole, the Employer would find these comments disruptive as well as egregious. I would take the position that the comments made by the former employee even if they had been totally adopted by the discriminatees did not transverse the line. However, it does raise the question endemic in social media cases where multiple parties participate as to whether one can be held accountable for the purple prose of another. Or to put in the form of a puzzler, what are you liking when you click the “like” button as doesn’t concert mean, by definition, all for one and one for all. The Board may not have to address it here, but it will come up again.

Is there a takeaway from these few trial level holdings as to the loss of protection issue? I would offer several. First, given the “cognitive disconnect” between the preparation of the social media message and the potential risk of consequences,<sup>59</sup> almost every discharge case in this field where PCA otherwise exists area will implicate loss of protection. Secondly, while it may be an overstatement to hold that the AGC is “relatively unconcerned with the use of profanity or derogatory language”<sup>60</sup> as a practical matter the bar is set fairly high to when it comes to disqualifying conduct for the using a crude vocabulary.<sup>61</sup> Finally, given the above, the case will be made that “the hook for arguing that protected statements have lost their protection, therefore, may lie in whether they can be cast as especially disloyal.”<sup>62</sup> This was one of the arguments advanced, though perhaps not persuasively, by the Employer in Triple Play. Given the characteristics of social media with its expansive theoretical reach employers will naturally look to the disloyal/disparaging line of defense as a potential safe haven though for the reasons discussed by the Judge Esposito and by the AGC at OM 12-31, p. 23, I would not be particularly sanguine about such a defense.

### **ISSUE # 3 Social Media Policy**

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<sup>57</sup> Statements like “They can’t even do the tax paperwork correctly!!!Now I OWE money. WTF!!!”; “Ralph[the owner] fucked up the paperwork...as per usual.”; “Hahahahah he’s such a shady ;little man. He prolly[sic] pocketed it all from our paychecks.”

<sup>58</sup> Exceptions, p. 14.

<sup>59</sup> See William Herbert, “Workplace Consequences of Electronic Exhibitionism and Voyeurism.” Technology and Society Magazine, Fall 2011. The author is Deputy Chair and Counsel of the NeEw York State Public Employee Relations Board.

<sup>60</sup> Amy Zdravecky, et al., “Why Don’t We Get Drunk and Post? When May Employers Discipline for Employees’s Postings Without Running Afoul of the National Labor Relations Act,” American Bar Association Midwinter Meeting, February 26-29, 2012. Published paper. p. 21.

<sup>61</sup> There has been some recent pushback in the Courts. See Plaza Auto Center, Inc. v. NLRB, 664 F. 3d 286 (9<sup>th</sup> Cir. 2011) remanding a case where it disagreed with the Board’s holding that an obscene, denigrating and insubordinate outburst did not cause loss of protection as it was brief and without physical menace.

<sup>62</sup> “Why Don’t We Get Drunk and Post”, supra, p. 21.

If not the most interesting sub-topic than the crafting of social media policies that withstand Section 7 scrutiny is unquestionably the one with the broadest implications given their ubiquity.<sup>63</sup> It is an area that has certainly perplexed employers, and perhaps their counsel as well, given the inherent tension between the need to protect their reputation and control the message versus the right of their employees to enjoy Section 7 protected speech. The ability to find the sweet spot I can only assume is more difficult where the Board's pronouncements have not yet issued and the AGC has had mixed results at the trial level.

The AGC memos, particularly OM-12-59 which dealt solely with this issue, have been well vetted in the labor law blogosphere, at least on the management side,<sup>64</sup> and for this reason I will pay most of my attention on the ALJ decisions that have issued to date on social media policy. Before getting into any analysis of cases, the discussion has to be placed within the framework of Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) as to the Board's policies on work rules in general. In Lutheran Heritage Village, the Board addressed Employer rules prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse." Taking their cue from Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F. 3d 52 (DC Cir. 1999),<sup>65</sup> the Board majority, consisting of members Battista, Meisburg and Schaumber, developed a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act only upon a showing that: (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. In determining how an employee would reasonably construe the rule, particular phrases should not be read in isolation, but rather, considered in context.

In Lutheran Heritage Village the majority concluded that with regard to the rules in question as there was no explicit restriction on Section 7 activity and as only criteria (1) was otherwise applicable, "reasonable employees would infer that that the Respondent's purpose in promulgating the challenged rules was to ensure a "civil and decent" workplace, not to restrict Section 7 activity."<sup>66</sup> In dissent members Liebman and Walsh without expressly disagreeing with the construct took issue with the conclusion given their belief that these rules could

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<sup>63</sup> A Society for Human Resource Management (SHRM) study released earlier this year showed that approximately 40% of SHRM members surveyed indicated that their organization had a social media policy. Bill Leonard, "SHRM Survey Shows HR Has Active Role in Social Media Policies," January 12, 2012. <http://www.shrm.org/hrdisciplines/technology/Articles/Pages/SocialMediaRole.aspx>.

<sup>64</sup> One of the better examples, as it offers insight as opposed to just summarization, was written by management attorney Philip Gordon entitled "NLRB Report Challenges Validity of Many Commonly Used Social Media Policies," ASAP (January 2012). [www.littler.com](http://www.littler.com).

<sup>65</sup> An employer violates Section 7 when it maintains a work rule that reasonably tends to chill employees in the exercise of Section 7 rights.

<sup>66</sup> Lutheran Heritage Village at 648.

be subject to a reasonable interpretation that would chill protected activity. Interestingly, the Board, despite its changing composition and predictions to the contrary,<sup>67</sup> has not moved away from the Lutheran Heritage Village analysis.<sup>68</sup> Perhaps it is because the “reasonably construe” principal is elastic enough to fit the needs of whoever holds the majority. Regardless the reason, Lutheran Heritage Village the template by which social media policy is judged.

Turning to the ALJ decisions, Knauz BMW was the first social media case where the policy issues were addressed, albeit not expressly directed to social media. However, because at least two of the provisions at issue arguably could have extended to social media conversations I will discuss them for purposes of illustrating how talmudic the inquiries can be. One provision was entitled “Bad Attitude: Employees should display a positive attitude toward their job. A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers”<sup>69</sup> was found permissible. The judge believed this would be construed as governing the employee-customer relationship and not meant as a Section 7 intrusion. No exceptions were filed this ruling.

The only Knauz social media policy provision pending before the Board is this one:

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

Judge Biblowitz concluded that particularly it was term “disrespectful” which caused offense citing University Medical Center, 335 NLRB 1318, 1321 (2001) (“Defining due respect, in the context of union activity, seems inherently subjective.”) The Employer in its exceptions<sup>70</sup> emphasized that this aspect of University Medical Center was not enforced by the D.C. Court at 335 F. 3d 1079 (D.C. Cir 2003). There the Court held the term “disrespectful conduct” when read in context referred to insubordination and incivility, not to union organizing and to hold otherwise was implausible.<sup>71</sup> The Employer also cites a second case, Adtranz ABB Daimler Benz Transportation N.A., Inc., 253 F. 3d 19(D.C. Cir 2001) where the Court reversed the Board as to an abusive language policy rebuking the Board noting “that in the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising other statutory rights under the NLRA without resort to abusive or threatening language.” 253

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<sup>67</sup> See Paul Galligan, “Top NLRB Precedents in Jeopardy Under an Obama Labor Board.” New York Law Journal. January 13, 2009. Lutheran Heritage Village made the list of Galligan’s “top ten” precedents at risk.

<sup>68</sup> See e.g. Medco Health Solutions of Las Vegas, Inc., 357 NLRB No. 25 (2011).

<sup>69</sup> Knauz BMW at p. 11.

<sup>70</sup> See Reply Brief in Support of Cross Exceptions at p. 10-13.

<sup>71</sup> 335 F. 3d. at 1088.

F.3d. at 26.<sup>72</sup> The Employer in Knauz makes the point use of the word “disrespectful” should not construed in isolation but rather has to be taken as part of the phrase that enjoins profanity, ergo making it clear the purpose was not to interfere with employee rights.

In its reply brief,<sup>73</sup> the Counsel for the AGC notes that the rule’s taint stems not just from a prohibition that extends to “disrespectful” language but also to “any other language which injures the image or reputation of the dealer.” Counsel for the AGC argues that this is evidence of a policy that is expansive and clearly encompasses protected, concerted activity.

Stepping back from this dispute it is hard to believe this simple paragraph about “Courtesy” could generate such a difference of opinion. It is more, however, than just arguing over angels dancing on heads of pins but rather signifies the important push-pull between text and context, between legitimate employer prerogative and employee free speech per Section 7. This plays out in the Triple Play Sports Bar case as well.

In Triple Play the complaint had alleged as unlawful an “Internet/Blogging Policy” which stated:

The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, *or engaging in inappropriate discussions about the company management, and/or co-workers*, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

On brief Counsel for General Counsel lased in on the phrase “inappropriate discussions” which, without more, would exclude employees from engaging in Section 7 activity.<sup>74</sup> The Judge, however, placed a lawful imprimatur on the policy finding it similar to other policies that the Board approved. See e.g. Tradesmen International, 338 NLRB 460, 462-463 (2002) (rule prohibiting “verbal or other statements which are slanderous or detrimental to the company or any

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<sup>72</sup> In a very recent ALJ decision, Rio All Suites Hotel and Casino, (JD(SF) 11-12 (March 22, 2012), Judge Schmidt in a similar vein found a rule lawful that precluded employees from wearing clothing which displays profanity, vulgarity of any kind, obscene or offensive words or pictures.” Relevant to this discussion he observed “Given the favorable discussion in the Board’s Lutheran Heritage Village decision of that circuit’s rationale in Adtranz, supra, a case similar to University Medical Center, I find the continued vitality of the two Board cases cited by the Acting General Counsel [Adtranz and University Medical Center] very questionable.” Slip op. at p. 4.

<sup>73</sup> See Answering Brief to Cross Exceptions at p. 10-12.

<sup>74</sup> Brief to ALJ at p. 34.

of the company's employees" and "any conduct which is disloyal, disruptive, competitive, or damaging to the company" permissible). " Ark Las Vegas Restaurant Corp., 335 NLRB 1284, fn. 2, 1291-1292 (2001) (rules prohibiting "any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company," and "conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company" not unlawful); Flamingo Hilton-Laughlin, 330 NLRB 287, 288-289 (1999) (rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel" did not violate Section 8(a)(1)).

Judge Esposito also contextualized the phrase and found the Employer had emphasized that "it supported the free exchange of information" and had linked in the same sentence "inappropriate discussions" with a ban on revealing "confidential and proprietary information." By doing so it reinforced that an employee would take away the inference that the policy would not impinge on their Section 7 rights.

In its exceptions the Counsel for the Acting General Counsel adheres to the view that, in essence, the term inappropriate would tend to restrain Section 7 activity<sup>75</sup> and too broad without saving context. The phrase is "inherently subjective"<sup>76</sup> especially without example of what would be tolerated. As noted in the exceptions one critical distinction from the cases cited by the Judge was that in Triple Play two employees had been found to have been unlawfully discharged for Facebook comments. Such behavior which would naturally cause the remaining staff to interpret the Employer's policy as putting them at risk should they choose to speak out about wages, hours and/or working conditions.

A recent ALJ holding resulting in another AGC reversal is G4S Secure Solutions (USA) Inc., JD(SF)-14-12 (March 29, 2012) involving a clause proscribing the placement on social media sites of "photographs, images and videos" of employees in uniform without permission. These "no-depiction" restrictions have repeatedly been held to be overly broad by the AGC going back to the AMR case on the theory that this could, for example, inhibit an employee from posting pictures of carrying a picket sign bearing the company name or wearing t-shirts with the company logo as part of a protest. Judge Eleanor Laws in G4S, however, relied on Flagstaff Medical Center, Inc., 357 NLRB No. 65 (2011) to reach a different conclusion. In Flagstaff the hospital had a rule banning the taking of pictures of "patients and/or hospital equipment, property or facilities" and the Board concluded that the hospital had legitimate reasons to protect patient privacy. Judge Laws likewise felt that the Employer in G4S, a large national security company, had clients who would have privacy or legal concerns. To read the ban on posting images on social media as a prohibition of Section 7 activity struck the Judge as "a stretch" and not "an unreasonable impediment to

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<sup>75</sup> See also case reviewed at OM 12 at p. 7-8.

<sup>76</sup> University Medical Center, 335 NLRB at 1321-1322.

self-organization” citing Republic Aviation Corp v. NLRB, 324 U.S. 793,803 (1945).

In another recent case General Motors, LLC, JD-27-12 (May 30, 2012) the ALJ parted way from the AGC analysis in several critical respects. The prohibition against incorporating GM logos, trademarks or other assets” in any posts was upheld where it applied to all employees and was not motivated by anti-union animus. The ALJ also found privileged the policy instruction to “Treat everyone with respect...offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline...” This was not viewed as Section 7 interference where the Judge believed employees would simply view the rule as an expectation they conduct themselves with “general notions of civility.” Finally the ALJ Judge also was of a different mind as to GM’s policy asking employees “to think carefully about friending co-workers” and that “communications that would be inappropriate in the workplace are also inappropriate online.” While ambiguous the Judge noted this section appeared to rise only to the level of suggestion with no discipline attaching and for that reason was permissible. Finally, the ALJ examined the section of policy which required the employees “to report any unusual or inappropriate social activity to the system administrator.” As the policy was a general one and not linked to PCA Judge Sandron found no violation

To date, there is one other interesting ALJ case in this area,<sup>77</sup> though technically not one dealing with social media policy. Hills and Dales General Hospital, JD-09-12( February 17, 2012 had come to my attention because the Division of Advice had originally treated the social media aspect of the charge. However, where the policy was rescinded no complaint was authorized as to this portion of the case. Complaint, however, was authorized by Advice as to the three provisions of the Employer’s behavior policy listed below, elements of which could easily be grafted onto social media restrictions:

- We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.
- We will represent Hills & Dales in the community in a positive and professional manner in every opportunity.
- We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

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<sup>77</sup> Also speaking technically, there is one other ALJ decision on social media policy before the Board, DirectTV U.S. Holdings, LLC, JD-(SF)-48-11 (December 13, 2011). The fact that the judge, with little discussion found the policy unlawful (employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a matter of public record”) is not at the heart of the Employer exceptions. Rather, the principal question is whether the amendment of this policy was adequate under Passavant Memorial Area Hospital, 237 NLRB 138,899 (1978) to cure the violation.

The negative comment rule was struck down by the ALJ. His rationale was that it implicitly banned complaints about management which arguably could impact working conditions citing Claremont Resort & Spa, 344 NLRB 832 (2005) (work rule that prohibited “negative conversations” about employees and managers unlawful where it could reasonably be construed to bar complaints between co-workers about their managers). The last rule about “negativity and gossip” was struck down as well, again the legal emphasis being on “negativity with the Judge finding the term “so patently ambiguous, imprecise and overbroad that a reasonable employee would construe it as prohibiting protected discussion...”<sup>78</sup>

The Employer in its exceptions faults the ALJ for failing to take into account the entire document as well as the circumstances under which the policy was created, i.e. a hospital where the interpersonal relationship had deteriorated in terms of civility.<sup>79</sup> Only through unwarranted parsing could an unlawful cast be placed on these words.

In contrast to the first and third rule the second, about representing the Employer positively and professionally in the community, was found lawful similar to a provision in Tradesmen International, 338 NLRB 461-462 (employees were expected to represent the company in a positive and ethical manner”). Per the ALJ, placed in the context of a hospital trying to improve its reputation the rationale behind the restriction is clear and serves a lawful purpose. Here the Counsel for the General Counsel has filed exceptions making a context argument with a different twist that tries to hoist the Employer on its own petard. Counsel for the AGC will argue that, yes, the Employer correctly states that it was trying to improve its community reputation as this had suffered. Why, however did it suffer – it was due to poor workplace atmosphere, which included protected employee complaints; ergo, the representation in the community rule was designed to chill Section 7 speech. Hills and Dales becomes a case, therefore, where context is important not just within the four corners of the policy but outside it as well.

Just from these limited examples it should be evident that the picture is still somewhat opaque if one was looking for guidance in drafting social media rules. In fact, I would submit, that the OMs have been invaluable for framing the social media policy issue and have been an important part of a process in trying to provide guidance.<sup>80</sup> Given the infinite variations,<sup>81</sup> however, questions abound

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<sup>78</sup> Slip op. at p. 6. The word gossip, alone, would not have the same proscribed connotation according to the Judge relying on Hyundai American Shipping Agency, 357 NLRB No. 80 (2011) (“harmful gossip” proscription just “chatty talk” and legitimate where did not preclude discussion about management).

<sup>79</sup> The Employer would also have the Board look not just to the reason for the creation of the policy but to its enforcement where the only discipline to date was the result of one employee’s use of the word “douche bag.”

<sup>80</sup> One clarification without being expressly stated as such came in reconciling the position to dismiss an allegation in one of the earliest policy cases which prohibited disparagement, Sears Holdings, 18-CA-19081, (Advice Mem. December 4, 2009) while authorizing complaint on a disparagement clause in AMR shortly thereafter with any reference to Sears. At OM-12 p.16, the AGC makes the point that broad terms,

and will have to await Board determination. The intersection between social media policy and the NLRA is still under construction.

## CONCLUSION

In the Hispanics United Advice Memorandum, the AGC references the underlying conduct as being a textbook example of concerted activity. There is no question that the textbook can have the same application in virtual space as it does on the factory floor. It is also true, however, that social media cases can entail adaptation to the special characteristics of the medium, as when dealing with a loss of protection defense, and also are compelling a re-examination as to how protected, concerted activity is defined in the first instance or what does it mean to reasonable construe a policy directed at employee behavior. As noted at the outset, we are far from hearing the final words spoken on the subject. But courtesy of the AGC, we have had in the OMs, the legal floorboards ripped off providing allowing all to witness the crafting of social media NLRA doctrine from the ground up. IMHO<sup>82</sup> that is a considerable contribution in and of itself recognizing that the debate over the final contours will be carried on for years to come.

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in that case the word in question being “defamatory”, can be appropriately applied when they appear in a list of plainly egregious and proscribed behaviors, such as no hostility on account of race, age, sex, etc. This was the case in Sears. See also Flagler Hospital, 12-CA-27031 (Ad. Mem. May 10, 2011), at fn 7.

<sup>81</sup> For example, Major League Baseball’s new social media policy apparently prohibits criticism of umpires privileged raising the question of whether “the integrity of the game” trumps Section 7. See Eric Mayer, “Baseball has a New Social Media Policy. And it May be Unlawful,” The Employer Handbook ( March 16, 2012). <http://www.theemployerhandbook.com/2012/03/baseball-has-a-new-social-medi.html>.

<sup>82</sup> In my humble opinion.