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Social Media – Facebook Firings:
The NLRB's Do's and Don'ts

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Facebook Firings: The NLRB's Do's and Don'ts

I. INTRODUCTION

In the rapidly developing area of work-related conversations conducted on social media, the National Labor Relations Board (NLRB) has been paying close attention to employers' attempts to regulate employees' postings and comments. Facebook firings—discharges of employees for complaining about work, supervisors and co-workers in social media posts—are the focus of a series of advice memoranda and decisions issued by the NLRB since 2011. The NLRB has identified key factors to assess whether an employer's Social Media Policy (SMP) and discipline pursuant to that policy, violates protected concerted rights under the National Labor Relations Act (NLRA).

While the NLRA does not apply to public sector employers, whose labor relations standards are instead governed by state law, in California the Public Employee Relations Board (PERB) and state courts interpreting these statutes often look to federal authorities for general guidance. It is therefore worthwhile for local government agencies to be aware of the NLRB's decisions and positions that may affect employees' abilities to criticize their workplace, supervisors and co-workers, or to complain about pay, workplace safety issues, or workplace operations on social media. In addition, these rulings are useful to public agency employers because NLRB has been very active in identifying how such online actions implicate protected employee rights, although there are few court decisions addressing these issues.

This paper summarizes significant recent NLRB social media discharge cases and presents key issues[1] from the NLRB's analysis of SMPs, including considerations for employers drafting social media use policies.

II. BACKGROUND

The NLRB's focus in its scrutiny of social media firings has been whether the reason for the termination constituted an interference with the rights of employees to act together to address conditions at work, guaranteed by Section 7 of the NLRA.[2] An employer violates Section 8(A)(1) of the Act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel v National Labor*

[1] The NLRB has also released three (3) Reports of the Acting General Counsel to address enforcement actions, and in response to requests from employers for guidance in this area. The memos, released by the Acting General Counsel in 2011 and 2012, detail the results of investigations in dozens of social media cases. Practitioners investigating employees' use of social media generally, or drafting SMPs which address a broader scope of issues such as employees' use of social media on work time, confidentiality issues, and employee organizing, should also review these NLRB Reports, (Memorandum OM-74 issued August 18, 2011, Memorandum OM-12-31 issued January 24, 2012 and Memorandum OM 12-59 issued May 30, 2012) for summaries of all the NLRB's positions taken on social media cases.

[2] Section 7 guarantees employee rights to "engage in… concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Relations Board, 326 NLRB 824, 825 (1998) enfd. 203 F.3d 52 (D.C. Cir. 1999); 29 USC §158(a)(1)(2012).

The Board has developed a two-step test to determine if a work rule would have such an effect. *Lutheran Heritage Village-Livonia* 343 NLRB 646, 647 (2004). First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict Section 7 activities, it will violate the Act only upon a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; and 2) the rule was promulgated in response to union activity or the rule has been applied to restrict the exercise of Section 7 rights. *Id*. With respect to SMPs, the NLRB has generally focused on whether a reasonable employee would understand the subject policies to prohibit or prevent critical discussion of the terms and conditions of employment.[3]

III. NLRB CASES INVOLVING DISCHARGES BASED ON SOCIAL MEDIA CONDUCT

A. *American Medical Response of Connecticut*

In its first case involving a discharge of an employee for social media posts, the NLRB's Hartford, Connecticut regional office issued an unfair labor practice complaint against an ambulance service company (*AMR*) that terminated an employee for, among other things, complaining about her supervisor on her Facebook page. In *AMR*[4], the employee, a paramedic, was the subject of a complaint by a member of the public. The employee was directed by her supervisors to complete an incident report regarding the events involving the complaint. She requested and was denied representation by a union representative while she completed the report.

After filing the report, the employee posted comments on her Facebook page concerning her confrontation with her supervisor, in which she referred to the supervisor as a psychiatric patient, a "dick" and a "scumbag."[5] The employee was terminated for, among other things, "post[ing] derogatory remarks" about her supervisor on the social network. *Id*.

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[3] The NLRB has also watched other social media issues for Section 7 implications, such as whether employees are restricted from accessing personal devices during work hours or using the employer's computers and electronic systems. This paper, however, concentrates on discipline imposed based on an employee's participation in social media websites.

[4]Advice Memorandum, Office of the Gen. Counsel, American Medical Response, No. 34-CA-12576 (N.L.R.B. October 5, 2010.

[5] The employee posted: "Looks like I'm getting some time off. Love how the company allows a 17 [AMR Code for a psychiatric patient] to be a supervisor."

An AMR supervisor responded "What happened?" followed by a co-worker's response, "What now?" The employee answered, "[Supervisor] being a dick." A former AMR employee responded, "I'm so glad I left there." A current AMR employee responded, "Ohhh, he's back, huh?" The employee replied, "Yep, he's a scumbag as usual." The thread ended with a co-worker telling the employee to "[C]hin up!" AMR, p. 3-4.

In its analysis of the Employer's "Standards of Conduct"[6] policy, which prohibited "rude and discourteous" behavior, and its "Blogging and Internet Posting policy," which prohibited "disparaging" and "derogatory" comments about the company, supervisors, co-workers and competitors, the NLRB argued that both rules unlawfully restricted Section 7 rights. The prohibitions against rude, discourteous, disparaging and derogatory remarks, whether on the internet or not, were overbroad, ambiguous and included a "broad spectrum of conduct" with no limiting language or context, "that would clarify to employees that the [prohibition against disparagement] did not restrict employees concerted activity rights."[7]

The NLRB's analysis indicates that an employer's SMP can be unlawful based solely on the potential that employees could have reasonably believed the policy prevented protected concerted activity, regardless of whether they actually believed this, and even where the employee's posting is admittedly vulgar or derogatory. The *AMR* case is the NLRB's first recognition of social media as the new "water cooler" or gathering place for employees to reach out and exchange information about the terms and conditions of their employment. The case highlights the need for SMPs to include adequate savings clauses exempting Section 7 rights and to avoid generic prohibitions against rudeness, discourtesy and disparaging remarks.[8]

B. *Walmart*

The *Walmart* case[9] is significant in that it is often cited as the NLRB-approved example of a SMP that regulates properly without treading on employees' protected concerted activity rights under the NLRA.[10] This case also applied well-established principles that have been often repeated in the NLRB's analysis of Facebook firings: "venting," and "griping" by individual employees—posting inappropriate comments without engaging in dialogue about working conditions with other employees—are not protected by the Act and employees who engage in this conduct may be disciplined or terminated. This case was submitted for advice on whether Walmart's SMP was unlawfully overbroad, and whether its discharge of the employee for his Facebook comments was an unfair labor practice. Like *AMR*, the parties privately settled the underlying case before the hearing. In contrast to *AMR*, however, the NLRB declined to rule on whether Walmart's pre-existing polices were overly broad and determined that Walmart's

[6] The Standards of Conduct Policy prohibited "[r]ude or discourteous behavior to a client or co-worker." Advice Memorandum, Office of the Gen. Counsel, American Medical Response, No. 34-CA-12576 (N.L.R.B. October 5, 2010) at 5.

[7] 34-CA-12576 at p. 13, citing University Medical Center, 335 NLRB 1318,1320, (2001) *enf denied in pertinent part*, 335 F.3d 1079 Id. at 13. (D.C. Cir. 2003).

[8] However, because AMR was resolved by a private settlement on the eve of trial, the NLRB never issued a decision on the merits of the case.

[9] Advice Memorandum, Office of the Gen. Counsel, Walmart, No. 11-CA-067171 N.L.R.B. May 30, 2012).

[10] O'Brien, Christine Neylon, The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies (June 11, 2013). Forthcoming Oregon Law Review, Vol. 92, Issue 2, 2014. Available at SSRN: http://ssrn.com/abstract=2277900.

revisions to the policy cured the defect and that the employee's postings were simply inappropriate conduct that did not involve protected concerted activity.[11]

The facts were as follows: in 2011, the Charging Party worked as a Walmart Greeter. On his personal Facebook page, he identified himself as a Walmart employee. The employee posted a series of critical comments about work and Walmart's customers on his Facebook wall. Many who read the comments found them derogatory, discriminatory and possibly threatening.[12] The employee admitted that his posted comments were in "bad taste." Walmart fired the employee for the comments.

In finding that the discharge was not unlawful because the charging party's comments were personal views that "did not implicate Section 7 concerns," the NLRB repeated its *AMR* analysis that "Rules that are ambiguous … and contain no limiting language that the rule does not restrict Section 7 rights are unlawful (citation omitted). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct such that they could not be reasonably construed to cover protected activity, are not unlawful."[13] The context of clearly identified examples of "egregious misconduct" was critical, the NLRB reasoned, to determining whether employees could reasonably believe that the prohibited behavior implicated protected activity. The Board noted that a policy found to restrict Section 7 rights prohibited "negative conversations" about managers *with no further clarification or example.* The restriction was unlawful because of its potential chilling effect on protected activity. *Claremont Resort and Spa*, 344 N.L.R.B. 832, 836 (2005). On the other hand, the Board found a rule forbidding "statements which are slanderous and detrimental to the company" which appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity. *Tradesmen International*; 338 N.L.R.B. at 462. In that context, "employees would not reasonably believe that the…rule applies to statements protected by the Act, *because it was listed alongside examples of egregious misconduct*." *Id*. p. 3.

The NLRB applied these principles to Walmart's SMP and found it was not ambiguous because it provided sufficient examples of prohibited conduct such that, in context, employees would not reasonably construe the rules to prohibit Section 7 activity. *Id*. The Board further found that the

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[11] Advice Memorandum, Office of the Gen. Counsel, Walmart, No. 11-CA-067171 (N.L.R.B. May 30, 2012), at 4. A customer complained to Walmart that she was frightened by the comments and did not want to return to the store in light of a shooting which had occurred a year before in the same store. *Id*.

[12] Specifically the employee posted: "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*** home!!!!."

[13] *Tradesmen Int.l*, 338 NLRB 460, 460-62 (2002) [prohibition against "disloyal, disruptive, competitive or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity). *See also* Advice Memorandum, Office of the Gen. Counsel, Sears Holdings, No. 18-CA-19081 (N.L.R.B. December 4, 2009), (lone reference to 'disparagement' was made in the context of prohibition against serious misconduct such as use of obscenity, illegal drugs and discriminatory language).

employer's rule against "inappropriate remarks that may include discriminatory remarks, harassment and threats of violence or similar or inappropriate or unlawful conduct" was not unlawful, because these examples target plainly egregious conduct, and there was no evidence that the rule had been applied to discipline employees for Section 7 activity.
Finally, the Board found that the portion of the employer's SMP entitled "Be Respectful" was also not unlawful, even while acknowledging that in certain contexts, the rules requirement to be respectful, "fair and courteous" in the posting of comments, complaints, photographs and videos, could be overly broad. Again, the employer's rule provided sufficient evidence of plainly egregious conduct[14] such that employees could not reasonably construe the rule to restrict Section 7 conduct. The NLRB found that an employer had a legitimate basis to prohibit such workplace communications, and had done so without burdening protected communications about the terms and conditions of employment. *Id*.

C. *Costco Wholesale Corp.*

The *Costco*[15] case was the first NLRB decision to consider a SMP with numerous provisions that it found problematic, and it clearly outlines the agency's method for testing social media restrictions under the NLRA.[16] The Board's decision analyzed several provisions of Costco's Employee Agreement to determine if they violated Section 8(a)(1) of the NLRA. With respect to the relevant SMP issue here, the Board considered Costco's "Electronic Communications and Technology Policy," which required that employees must "communicate[e] with appropriate business decorum" in all electronic media, and refrain from posting any statements that "damage the company, defame any individual or damage any person's reputation."

The NLRB reiterated that the key inquiry was "whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights." The NLRB found that the prohibition of posts that damage reputation was unlawful under Section 8(a)(1) because "employees would reasonably construe this rule as one that prohibits Section 7 activity."[17] The Board determined

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[14] For example, the rule counseled employees to avoid posts that could be viewed as " malicious, obscene, threatening or intimidating." The rule also exempted "harassing or bullying posts" by defining these as "offensive posts meant to intentionally harm someone's reputation" or that "could contribute to a hostile work environment on the basis of race, sex, disability, religion or some other status protected by law or company policy." *Id.* p. 3.

[15] *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (September 7, 2012).

[16] For example, the Board reviewed the rules in Costco's Employee Agreement that listed causes for terminations, such as "Unauthorized collection, disclosure or misuse of confidential information relating 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." The rules also outlined a privacy policy that mandates that "[a]ll [personal employee] information must be held strictly confidential and cannot be disclosed to any third party for any reason." See, O'Brien, Christine Neylon, The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies (June 11, 2013). Forthcoming Oregon Law Review, Vol. 92, Issue 2, 2014. Available at SSRN: http://ssrn.com/abstract=2277900.

[17] The Board's finding overruled the ALJ's initial opinion that employees would reasonably believe that the purpose of the rule was to promote a "civil and decent work-place." 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). Costco argued that an employer was entitled to promote a civil
(footnote continued)

that such a broadly defined rule would "encompass concerted communications protesting [Costco's] treatment of its employees," especially since the rule included no limiting language specifically excluding protected communications.[18]

D. *Karl Knauz Motors, Inc.*

In *Knauz*,[19] an Administrative Law Judge ("ALJ") upheld the employee's discharge and the Board adopted the ALJ's finding that the termination was lawful, despite the Board's finding that the employee had engaged in both protected and unprotected conduct with respect to his criticism of his employer's operations and co-workers. The employee was a BMW sales representative for the employer, a luxury car dealership. The employee was terminated a week after he posted comments and unflattering pictures on Facebook of two work-related incidents. The first was a sales event in which the dealership served hot dogs, chips and bottled water to customers. The employee's post mocked the dealership for serving cheap, poor quality food at a luxury car launch, which he believed could offend customers and result in lost wages and commissions.[20] In the second incident, that same day, the employee posted pictures and comments about an accident at an adjacent Land Rover dealership. In that example, another sales representative allowed a customer's teenage son to drive the Land Rover, which ended up in a pond. The employee's post included a sarcastic caption under the photo of the partially submerged vehicle and the comment, "OOOPS!"[21] The Employer terminated the employee for multiple reasons, including violating the employer's "courtesy policy," which stated that "[e]veryone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees," and that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." 358 N.L.R.B. No. 164, at *1.

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working environment. The General Counsel, however, contended that the rule was overbroad because it *could* be interpreted to restrict Section 7 conduct. The ALJ noted that current law in this situation places the burden on the General Counsel to show not that the rule *could* be understood to restrict protected activity, but that it *would* be reasonably understood to restrict such activity. 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." The ALJ then adopted the reasoning of *Lutheran Heritage Village-Livonia* that "[w]here…the rule does not refer to Section 7 activities, we will not conclude that a reasonable employee would read the rule to 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." *Id*. (citing *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004).

[18] *Id*. at *2.

[19] 358 N.L.R.B. No. 164 (Sept. 28, 2012)

[20] The employee posted on Facebook: "I was happy to see that Knauz went 'All Out' for the most important launch of a new BMW in years."

[21] With the accident pictures, the employee wrote, "This is your car: This is your car on drugs." The employee also commented: "This is what happens when a sales Person…allows a 13 year old boy to get behind the wheel of a 6,000 lb truck built and designed to pretty much drive over anything…into the pond in all about 4 seconds destroys a $50,000 truck. OOOPS!" 358 N.L.R.B. No. 164 at *8.

The NLRB found that the employee's Facebook posts as to the poor quality food were protected concerted activity because before the employee went online, he and other sales agents had expressed concerns that the food choice the employer served at the event would send the wrong message to customers and hurt sales and commissions for the employees. Relying on its reasoning in *Costco*, the NLRB found the dealer's "courtesy" rule unlawful because employees could "reasonably construe its broad prohibition against disrespectful" conduct and "language which injures the image or reputation of the Dealership" as encompassing Section 7 activity, such as employees' protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the Respondent—that object to their working conditions and seek the support of others in improving them. 358 N.L.R.B. No. 164, at *1.

However, notwithstanding this determination, the Board upheld the employee's discharge, because the termination was "primarily" based on the photos and comments about the Land Rover accident. The Board concluded that the employee's comments and pictures about this event were "neither protected nor concerted activities" and were an individual's inappropriate complaints which "had nothing to do with his conditions of employment." Knauz confirmed that the Board continues to look at the employee's intent to determine whether the conduct was protected concerted activity regarding terms and conditions of employment, or an indulgence of an individual's personal concerns.

E. *EchoStar Technologies LLC*

In *EchoStar*,[22] an ALJ applied the *Costco* decision to invalidate several social media policies on the grounds that they violated employees' Section 7 rights. In addition, the ALJ found the company's savings clause to be ineffective. The facts of the case were as follows: The employer had recently revised its employee handbook to include a Social Media policy. The new policy prohibited EchoStar employees from making "disparaging or defamatory comments" about the company or "undermining" the company in social media.[23] The Charging Party alleged EchoStar maintained rules that directly interfered with Section 7 rights in violation of Section 8(a)(1) of the National Labor Relations Act. Consistent with *Costco*, the ALJ found that the prohibitions violated the NLRA. The ALJ rejected EchoStar's reliance on the handbook's reminders that employees should "[r]emember to use good judgment" or ask human resources if they have any questions, because he found they did not change the fact that employees would reasonably understand "disparaging or defamatory" to be overbroad and encompass workplace conversations about the terms and conditions of employment. The ALJ accepted the NLRB General Counsel's argument that the handbook's "blanket" prohibition of employee "disparaging comments"…"fails to make exception for statements and comments that, although critical or harsh, may enjoy the' [NLRA]'s protection." The ALJ, however, expressed that a policy could

[22] *EchoStar Tech., L.L.C.*, N.L.R.B., Case No. 27-CA-066726 (A.L.J., Sept. 20, 2012).

[23] The company's Rules Prohibiting Disparagement and Defamation, provided: **"**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."

prohibit "malicious gossip" or "malicious statements." The ALJ's order invalidated numerous employer policies[24] on the grounds that they unlawfully restricted employees' Section 7 rights.

In addition, the ALJ found that the employer's general savings clause was ineffective to protect the unlawful rules. While the EchoStar handbook did not contain a Section 7 specific clause, it did include a provision that deferred to applicable laws whenever the handbook's policies conflicted with them. The subject disclaimer in EchoStar's Handbook stated: "Should you have questions about the Handbook, please contact the Human Resources Department," and "[o]ne or more of the policies set forth in this Handbook may be affected by the application of law. Should a conflict arise between an EchoStar policy and the law, *the appropriate law shall be applied and interpreted so as to make the policy lawful* in that particular jurisdiction."

The ALJ held that language asserting that a document should be applied and interpreted in a manner that complies with the law did not in fact "save" "any of the policies he concluded to be unlawful," stating (1) the employee should not be required to "voice his or her fears and trepidations" to human resources if they have questions about a policy's possible reach; and (2) a general clause asserting that a policy should be applied and interpreted lawfully does not "save" an otherwise invalid rule.

F. *Hispanics United of Buffalo, Inc. [HUB]*

In *Hispanics United of Buffalo, Inc.* ("*HUB*"),[25] the NLRB issued its first decision that required reinstatement of employees who had been fired for Facebook posts that fell within the protection of Section 7. The case is also important because the ALJ found, and the Board agreed, that merely characterizing an employee's social media behavior as "egregious misconduct"—in this case, harassment and bullying—is insufficient to overcome Section 7 rights unless the record convincingly shows that the misconduct occurred. In *HUB*, a social worker who worked with victims of domestic violence told a co-worker that she believed their other co-workers weren't working hard enough and that she intended to tell the Executive Director. That co-worker subsequently posted the social worker's views on her Facebook page, inviting the co-workers to respond to the accusation: "[Employee], a coworker feels that we don't help our clients enough at [Employer]. I have about had it! My fellow coworkers how do u feel?"

The HUB employees responded, posting numerous comments objecting to the assertion that their work performance was substandard and criticizing the social worker who made the statement in expletive-laced language.[26] The social worker who was the subject of the online discussion found out about it and posted her own response, accusing the employee who initiated the Facebook post of "lying." *HUB*, 359 N.L.R.B. No. 37, at 4-5.

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[24] Other challenged policies, including rules prohibiting employee use of social media on company time and using company resources, employee contact with the media without authorization, and prohibiting disclosure of confidential information, are not discussed here.

[25] 359 N.L.R.B. No. 37 (2012).

[26] One wrote "What the f...Try doing my job I have five programs," while another commented, "What the Hell, we don't have a life as it is." Another employee responded that the complaining social worker "can do [my] f***ing job." *Id.* at *4-5.

The social worker reported the posts to the employer's Executive Director—who had her print out the online discussion. The Executive Director immediately discharged all of the employees involved in the online posts for violating the agency's "zero tolerance" policies prohibiting bullying and harassment. The Executive Director told each of the terminated employees that the social worker had suffered a heart attack as a result of the harassment and that HUB would be obligated to compensate her.

The ALJ invalidated the terminations and the NLRB upheld the order. In its decision, the NLRB ruled that the five discharges were unlawful because the coworkers were engaged in concerted activities for the "purpose of mutual aid or protection" under Section 7 of the Act, and 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.[27]

In determining that the five co-workers were involved in self-organization and other protected concerted activity in their online discussion, in this case stemming 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,'" The Board noted that the activities of an individual in "enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity."[28]

HUB is also significant because it further blurs the distinction between "venting" and "griping" which is generally not protected concerted activity. In order for activity to be protected under Section 7, "it must be both concerted, and engaged in for the purpose of 'mutual aid and protection.' These are related but separate elements that must be established to show a violation of Section 8(a)(1)." *Hollings Press, Inc.*, 343 N.L.R.B. 301, 302 (2004); HUB 359 N.L.R.B. supra at 4. In *HUB*, however, it was unclear whether the employees were actually undertaking their online conversation for mutual aid and protection, because they did not know that the social worker intended to report their alleged substandard work performance to the Executive Director, only that she was critical of them. This suggests that employers should exercise caution where social media conversations consist of "group griping" or sharing of common viewpoints on some aspect of employment, as these situations may be seen by the NLRB as joining a common cause for mutual aid and protection.

Finally, the ALJ's dismissal of HUB's defense that the employees' posts violated their "zero tolerance harassment" policy—including a provision prohibiting bullying or non-protective class harassment—suggests that employers must carefully investigate and ensure that the record supports a misconduct finding. The ALJ found, and the Board agreed, that there was "no evidence" that the employees harassed the social worker in violation of a policy that referenced

[27] *Id*. at *2.

[28] O'Brien, Christine Neylon, The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies (June 11, 2013). Forthcoming Oregon Law Review, Vol. 92, Issue 2, 2014. Available at SSRN: http://ssrn.com/abstract=2277900.

"race, color, sex, religion, national origin, age, disability, veteran status, or other prohibited basis."[29]

G. *Design Technology Group LLC d/b/a Bettie Page Clothing*

In *Design Tech. Grp. LLC d/b/a Bettie Page Clothing,*[30] employees of a San Francisco clothing company were determined to have been improperly terminated based on comments they made on Facebook. A sales employee at the store filed an unfair labor practice complaint after she complained to her supervisor, as well as expressed concerns about safety. The employee wanted the store, located in the Haight-Ashbury neighborhood, to close earlier because neighboring stores closed an hour earlier and the area was deserted and unsafe.

When the employee's request, along with other suggestions, were ignored, she went above the supervisor, to the general manager of the store. Then she and a co-worker discussed their concerns on Facebook. The conversation that resulted in their dismissal actually included a reference to a Section 8 violation.[31] The ALJ found, and the NLRB agreed, that the employer had violated the Act and that the employees had been engaged in concerted activity under the Act. The Facebook posts constituted "classic concerted protected activity" because the employees were discussing their efforts to convince management to close the store down early based on concerns of working late in an unsafe neighborhood. The NLRB ordered the store to reinstate all three of the terminated employees.

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[29] O'Brien, Christine Neylon, The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies (June 11, 2013). Forthcoming Oregon Law Review, Vol. 92, Issue 2, 2014. Available at SSRN: http://ssrn.com/abstract=2277900.

[30] *Design Tech. Group, d/b/a/Bettie Page Clothing*, 359 N.L.R.B. No. 96 (April 19, 2013).

[31] *See Design Tech.*, N.L.R.B. Case No. 20-CA-035511 at 5. According to the ALJ's ruling, which was appealed to the NLRB, workers at Bettie Page Clothing engaged in the following exchange on Facebook:

Employee 1: "needs a new job. I'm physically and mentally sickened.

Employee 2: It's pretty obvious that my manager is as immature as a person can be and she proved that this evening even more so. I'm am [sic] unbelievably stressed out and I can't believe NO ONE is doing anything about it! The way she treats us in [sic] NOT okay but no one cares because every time we try to solve conflicts NOTHING GETS DONE!!

Employee 1: [b]ettie page would roll over in her grave.

Employee 2 : She already is girl!

Employee 1: 800 miles away yet she's still continues our lives miserable. Phenomenal!

Employee 2: And no one's doing anything about it! Big surprise!

Employee 3: I've been thinking the same thing for quite some time.

Employee 2: hey dudes it's totally cool, tomorrow I'm bringing a California Worker's Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that's going on that's in violation 8) see you tomorrow!"

IV. CONSIDERATIONS FOR DRAFTING AN ACCEPTABLE SMP FOR LOCAL PUBLIC AGENCIES

Based on the cases above, employers drafting social media policies or investigating employees for posting negative comments about the workplace should consider the following:

- **Does your SMP contain generic or ambiguous prohibitions of the 4-Ds—discourteous, disrespectful, defamatory or derogatory remarks?** If so, it's likely to be found unlawful standing alone because such remarks frequently overlap with workplace related conversations that constitute protected concerted activity.

- **Definitions of prohibited conduct should be as specific as possible.** Examples of prohibited conduct should be clear and include clearly egregious misconduct so that employees would not reasonably conclude that these restrictions prohibit protected conduct.

- **Analyze each factual situation with attention to the employee's intent—rather than focusing on derogatory or insulting language towards others.** If the employee's intention was to reach out to similarly situated employees or to take collective action, his or her conduct may be viewed as protected regardless of the level of offensiveness. If the employee's conduct was "venting" without intent to organize others, the conduct is more likely to be viewed as unprotected.

- **Savings clauses and limiting language are recommended.** These disclaimers should specifically exempt protected concerted activity, although employers should be careful not to require employees to vet their social media posts or comments through supervisors of other departments.

- **Employers are entitled to enforce important workplace policies even in the face of social media.** Employers retain the right to prevent and prohibit sexual harassment, workplace violence, threats, sabotage and abusive or malicious activity. But bear in mind that if employees can show that they were acting as part of a concerted activity, the employer will have a high burden to show that these violations actually occurred.

V. CONCLUSION

Significantly, in all of the Facebook Firing cases decided so far, the NLRB has taken the position that if the employer had an overbroad SMP that violated or had the potential to violate Section 7 rights, it was unlawful. When employees were disciplined or discharged because of protected activity, whether on social media or not, employers were ordered to reinstate the employees. There was nothing new in this approach in recognition of social media—the NLRB was following the

same precedents it always has with respect to Section 7 rights.[32] What's new is the Board's vigorous application of these rules to the constantly developing area of social media. Going forward, employers are on notice that the Board's precedents will carefully scrutinize restrictive social media rules, and employers must respond with comprehensive SMPs to deal with their employees' ever increasing use of social media that avoid overbroad, generic and ambiguous rules, are as specific as possible, provide examples of prohibited conduct and do not require employees to ask the employer's permission before posting and commenting about work-related matters.

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[32] O'Brien, Christine Neylon, The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies (June 11, 2013). Forthcoming Oregon Law Review, Vol. 92, Issue 2, 2014. Available at SSRN: http://ssrn.com/abstract=2277900.