FROM PEORIA TO PERU: NLRB DOCTRINE IN A SOCIAL MEDIA WORLD

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INTRODUCTION

The National Labor Relations Board's (the "NLRB" or "Board") interest in social media issues has surprised many practitioners. Over a nine-month period spanning the end of 2011 and beginning of 2012, the Board's Acting General Counsel ("AGC") issued three reports, totaling eighty-three pages, analyzing dozens of potential cases involving social media matters. Some of the cases involved sensational facts—for example, the ambulance company employee who called her supervisor a "scumbag" and compared him to a psychiatric patient on Facebook, or the auto dealership employee who lambasted his employer online over the "less than luxurious" food and drink offered to customers at a company event, or the bartender who complained on Facebook about the bar's customers, calling them "rednecks" and hoping they choked on glass as they drove home drunk. Other cases analyzed by the AGC dealt with more mundane matters, such as whether an employer's social media policy was drafted in a manner that could potentially restrict an employee's right to engage in protected concerted activity under the National Labor Relations Act ("NLRA" or the "Act").

Given the dramatic rise in social media use in the United States, it is not surprising that the Board has expressed a strong interest in analyzing its use in light of established Board law. By its nature, social media is the perfect vehicle both for "protected, concerted activity" and immeasurably idiotic and flippant statements.

The Board, like any adjudicative body, applies its established legal precedent to the facts at hand. Nevertheless, law is a fluid principle. This Article advances a theory that the Board's application of its established "brick and mortar" case law in matters involving social media fails to appropriately acknowledge the very nature of social media. Rather than merely apply old standards, the Board should make a creative effort to develop new standards that recognize an employer's legitimate need to control employee outbursts in a digital age where "going viral" can dramatically alter public perception overnight. Despite the Board's attempt to fit these discussions into the traditional and comfortable box of "water cooler" discussions, the simple fact is that these are not "water cooler" discussions. These are words and images that travel from Peoria to Peru in the proverbial nanosecond, capable of being stored and captured on a digital timeline forever. The Board must respond to this reality or remain what former NLRB Chairwoman Wilma Liebman famously described as the "Rip Van Winkle" of administrative agencies.

Part I of the Article provides an overview of various social media platforms. Part II outlines the traditional framework within which the Board has evaluated protected concerted activity, while Part III explains how the Board, Administrative Law Judges ("ALJs"), and the NLRB's Division of Advice and AGC have attempted to apply these traditional tests to social media activity. Part IV highlights the limitations of this approach and provides suggestions for a new applicable legal standard that properly acknowledges the risks associated with employee misuse of social media and distances itself from the ill-fitting "water cooler" analogy.

I. OVERVIEW OF SOCIAL MEDIA

Unlike the NLRB, the social media landscape is evolving at breakneck speed, with innovative computer engineers creating new social media platforms in attempts to rival and/or supplement the existing platforms at unprecedented rates. Every month it seems a new platform is marketed to the world as the "new Facebook." With names such as "MyYearbook," "Classmates," "Netlog," "Tagged," "Badoo," and "Tumblr," the social media market has been flooded (though many platforms are quickly washed away) with new ways for people to connect digitally.

Social media includes publishing platforms for bloggers such as WordPress, Google's Blogger, and Tumblr; social networking sites such as Facebook, Twitter, YouTube, and LinkedIn; and even location-based sites where users can let the world know their exact location, such as Foursquare and Yelp. Withholding judgment on the usefulness of such platforms, this Article focuses on the social media juggernauts, Facebook and Twitter.

As of October 2012, Facebook eclipsed one billion active users.[1] Facebook allows users to register on the site and create a personal profile where users can post their photos, personal interests, contact information, employment information, relationship status, and other personal information.[2] Once registered, users may communicate with "friends" and other Facebook users through messages posted on the

1. Aaron Smith et al., *Facebook Reaches One Billion Users*, CNN MONEY (Oct. 4, 2012), http://money.cnn.com/2012/10/04/technology/facebook-billion-users/index.html.

2. *Facebook Help Center*, http://www.facebook.com/help/ (last visited Dec. 10, 2012).

user's Facebook wall or through private messages.[3] Facebook "friending," as it is commonly called, consists of sending a request to an individual to be friends; the recipient is then free to accept or reject this request.[4] As for privacy, Facebook users have a wide range of control. For example, users can make their entire profile and Facebook wall visible to all other Facebook users, they may limit their profile to be only visible to "friends," or they may choose a hybrid of the two and choose who can see specific parts of their profile.[5] Advanced privacy controls allow Facebook users to further control who amongst their Facebook friends is able to see certain posts, photos, or other information.[6] For example, a Facebook user has the ability to create limited access to photos and other information for all or certain co-workers accepted as Facebook friends.[7]

Twitter is a social media platform that allows its users to send and read text-based messages of up to 140 characters.[8] Twitter posts may include other content such as photos, videos, and links to sites of interest.[9] As of October 2012, Twitter claims to have over 140 million active users.[10] These messages, or "Tweets," are, by default, available to anyone interested in reading them, regardless of membership.[11] However, Twitter users can alter this default setting and restrict messages to just their "followers." Users may subscribe to other users' Tweets, and this is known as "following."[12] Followers receive notifications whenever a user they are following has tweeted, and they may also send direct private messages to the user they are following.[13]

3. *Id.*

4. *Id.*

5. *Id.* For purposes of this Article, when the authors refer to a Facebook page, they are referring to an individual's personal Facebook page. While acknowledging that issues and postings under Fan or Business Facebook Pages may raise slightly different issues, this Article addresses issues relating to personal Facebook pages unless otherwise noted.

6. *Id.*

7. *Facebook Help Center*, *supra* note 2.

8. *What is Twitter?*, TWITTER, https://business.twitter.com/basics/what-is-twitter/ (last visited Dec. 11, 2012).

9. *Id.*

10. *Id.*

11. *About Public and Protected Tweets*, TWITTER, https://support.twitter.com/articles/14016-about-public-and-protected-tweets# (last visited Dec. 11, 2012).

12. *Id.*

13. *FAQs About Following*, TWITTER, https://support.twitter.com/articles/14019-faqs-about-following# (last visited Dec. 11, 2012).

With the sheer number and growing popularity of these platforms, it is not surprising that these forums have become places where individuals go to express their frustrations and vent regarding all aspects of life, including their jobs. Also, not surprisingly, when informed of these expressions of frustration, a number of employers have reacted with disciplinary action against the frustrated employee.[14] In response, the NLRB, the federal agency responsible for bringing complaints on behalf of workers for alleged violations of the NLRA, has seen its cases involving social media grow from zero to more than 100 over the past five years.[15]

II. THE ESTABLISHED LEGAL STANDARDS

As noted and classified above as "the mundane," the NLRB's Division of Advice and the NLRB's AGC (through his memoranda describing opinions issued by the Division of Advice), NLRB ALJs, and the Board itself have attempted to detail the contours of a lawfully drafted social media policy.[16] In fact, the final installment of the AGC's memoranda dealt solely with the lawfulness of such policies.[17] While the drafting and revising of social media policies is a practical necessity in light of this newly-issued authority, this Article primarily focuses on what it means for employees to be engaged in protected and concerted activity and when that activity should be deemed to lose its protected status.

14. *See generally* Memorandum from the Office of the Gen. Counsel Representative Div. of Operations-Mgmt., OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Aug. 18, 2011) [hereinafter AGC Memorandum I]; Memorandum from the Office of the Gen. Counsel Representative Div. of Operations-Mgmt., OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASE (Jan. 24, 2012) [hereinafter AGC Memorandum II].

15. Justin Jouvenal, *A Facebook Court Battle: Is 'Liking' Something Protected Free Speech?*, WASH. POST, Aug. 8, 2012, http://www.washingtonpost.com/local/crime/a-facebook-court-battle-is-liking-something-protected-free-speech/2012/08/08/538314fe-e179-11e1-ae7f-d2a13e249eb2_story.html.

16. The NLRB's procedure for review and evaluation of social media cases and the relationship between the Division of Advice, the AGC, ALJs, and the NLRB, along with the precedential authority of opinions issued by each is discussed *infra* at Part III.B.

17. Memorandum from the Office of the Gen. Counsel Representative Div. of Operations-Mgmt., OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (May 30, 2012) [hereinafter AGC Memorandum III]; *see also* Costco Wholesale Corp., 34-CA-012421, 358 N.L.R.B. 106 (Sept. 7, 2012).

A. What It Means to Be "Concerted" and "Protected"

Section 7 of the NLRA provides employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"[18] while section 8 of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in [section 7]."[19] Accordingly, any adverse employment action taken in response to an employee's protected concerted conduct constitutes an unfair labor practice under section 8.

The right to engage in protected concerted activity is shared by nearly all private sector employees, including non-unionized employees, a fact that current NLRB Chairman Mark Gaston Pearce recently called "one of the best kept secrets of the National Labor Relations Act."[20] In the same press release, the NLRB noted that more than 5% of the agency's recent caseload is related to non-union concerted activity,[21] a number that is likely to rise as the NLRB continues to aggressively monitor employer discipline imposed for social media use by the non-union workforce. With just 7% of private sector workers belonging to a union in the United States,[22] it appears the NLRB is increasingly focusing its enforcement efforts on non-union employees to remain relevant.

Whether an activity is deemed concerted is analyzed under the *Meyers* cases.[23] In these cases, the Board established that, "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[24] In *Meyers II*, the Board further clarified that concerted activity encompasses "those

18. National Labor Relations Act, 29 U.S.C. § 157 (2006).

19. *Id.* § 158.

20. *NLRB Launches Webpage Describing Protected Concerted Activity*, N.L.R.B. (June 18, 2012), http://www.nlrb.gov/news/nlrb-launches-webpage-describing-protected-concerted-activity (internal quotation marks omitted).

21. *Id.*

22. *Union Members Summary*, U.S. BUREAU OF LABOR STATISTICS (Jan. 27, 2012, 10:00 AM), http://www.bls.gov/news.release/union2.nr0.htm.

23. *See generally* Meyers Indus., Inc. (*Meyers I*), 7-CA-17207, 268 N.L.R.B. 493 (Jan. 6, 1984), *rev'd sub nom*, Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *on remand*, Meyers Indus., Inc. (*Meyers II*), 7-CA-17207, 281 N.L.R.B. 882 (Sept. 30, 1986), *aff'd. sub nom*, Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

24. *Meyers I*, 268 N.L.R.B. at 497.

circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[25] More specifically, where an individual employee seeks to improve terms and conditions of employment, his actions will be considered concerted under the Act if he intends to induce group activity or acts as a representative of at least one other employee.[26]

Section 7 of the NLRA requires that such concerted activity be for the purpose of "collective bargaining or mutual aid or protection."[27] The "mutual aid or protection" clause of section 7 has been construed to protect employees who "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship."[28] The conditions of employment that employees may seek to improve include "wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like."[29] The Board has extended the reach of this "mutual aid or protection" clause by protecting discussions about terms and conditions of employment; accordingly, the object of inducing group action need not be express or clearly stated in order for discussions to be deemed protected.[30]

B. When Does an Activity Lose Its Protection Under the Act: Application of Atlantic Steel *and* Jefferson Standard

Even when engaging in otherwise protected activities, there are circumstances in which an employee may lose the protection of the Act by engaging in "opprobrious conduct."[31] In *Atlantic Steel Co.*, the Board developed a four-factor test to evaluate whether an employee's opprobrious or egregious conduct may result in the loss of protected status.[32] The four *Atlantic Steel* criteria are intended to allow "some

25. *Meyers II*, 281 N.L.R.B. at 887.

26. NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 831 (1984) (citation omitted).

27. National Labor Relations Act, 29 U.S.C. § 157 (2006).

28. Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978).

29. New River Indus., Inc. v. NLRB, 945 F.2d 1290, 1294 (4th Cir. 1991).

30. *See, e.g.*, Timekeeping Sys., Inc., 8-CA-27999, 323 N.L.R.B. 244, 247 (Feb. 27, 1997); *see also*, Bowling Transp., Inc., 25-CA-26896, 336 N.L.R.B. 393, 394 (Sept. 28, 2001) (finding employer unlawfully discharged employee for complaining about bonuses because the employee discussed bonuses with co-workers on several occasions).

31. Atl. Steel Co., 10-CA-13634, 245 N.L.R.B. 814, 816 (Sept. 28, 1979).

32. *Id.*

latitude for impulsive conduct by employees" during protected concerted activity, while acknowledging the employer's "legitimate need to maintain order."[33] The four factors are: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[34] Applying these criteria, the Board generally distinguishes those situations where obscenities are used during grievance processing or are provoked by an employer's unfair labor practices from those incidents where such language is used in an atmosphere with other co-workers present and/or such language is directed at a supervisor.[35] The use of opprobrious, profane, defamatory, threatening, or malicious language is likely to be unprotected where such use is unprovoked.[36] The *Atlantic Steel* factors have generally been applied within the context of workplace disputes at the employer's facility.

The Board typically applies a separate test when an employee's conduct is openly disloyal so as to negatively impact the business itself. Commonly referred to as the "employee disloyalty exception," it was first articulated in *Jefferson Standard*.[37] In that case, the Supreme Court upheld the discharge of striking employees who distributed handbills on the picket line that criticized their employer's business practices and disparaged the quality of its television programming.[38] According to the Court, this conduct was so disloyal as to fall outside the protective scope of section 7.[39] Generally, under the *Jefferson Standard* analysis, the Board will consider whether the communications constitute a "sharp, public, disparaging attack upon the quality of a company's product and its business policies, in a manner reasonably calculated to

33. Plaza Auto Ctr. Inc., 28-CA-22256, 2010 WL 3246659, at *4 (N.L.R.B. Aug. 16, 2010), *enforced in part*, 664 F.3d 286 (9th Cir. 2011).

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

35. *See* 1 N. PETER LAREAU, LABOR AND UNEMPLOYMENT LAW: THE NATIONAL LABOR RELATIONS ACT § 4.04[3][b] (2012).

36. *See* Honda of Am. Mfg., Inc., 8-CA-28313, 334 N.L.R.B. 746, 748-49 (July 23, 2001) (distinguishing cases where obscenities were based on impulsive reactions and found to not lose protection in finding that the use of obscenities in literature distributed by employees lost its protection under the Act).

37. NLRB v. Local 1229, Int'l Bhd. Of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 472 (1953).

38. *Id.* at 465, 468.

39. *Id.* at 477-78.

harm the company's reputation and reduce its income."[40] Following *Jefferson Standard*, the Board has applied a two-part test to determine whether disloyal employee communications are protected under section 7. Specifically, these communications are protected only when (1) the communication relates to an ongoing labor dispute, and (2) the communication is not so egregiously disloyal, reckless, or maliciously untrue as to lose the Act's protection.[41] The term "ongoing labor dispute" requires only that there be a "controversy concerning terms, tenure, or conditions of employment."[42]

III. TRADITIONAL STANDARDS APPLIED TO SOCIAL MEDIA

A. Parexel*: The NLRB Finds Concerted Activity in the Absence of Concerted Activity*

Before addressing the Board's developing analysis of discipline for social media activity, it is necessary to discuss the Board's recent expansion of the definition of "concerted activity" in *Parexel International, LLC*.[43] Although *Parexel* did not involve social media, the AGC has adopted and applied this newly expanded definition in evaluating social media activity.[44] The Board in *Parexel* significantly lowered the bar for determining when the concerted activity threshold has been met.[45] Specifically, the Board rejected any requirement that actual concerted activity take place prior to finding a violation of section 8.[46]

The charging party in *Parexel* discussed with her South African co-worker a raise the co-worker claimed to have received from management after he had left and then returned to work for the company.[47] During the discussion, the co-worker indicated that management was giving preferential wage treatment to South

40. *Id.* at 471.

41. *See, e.g.*, Five Star Transp., Inc., 1-CA-41158, 349 N.L.R.B. 42, 45 (Jan. 22, 2007) (citations omitted).

42. *See* Emarco, Inc., 4-CA-10265-1, 4-CA-10265-2284, 284 N.L.R.B. 832, 833 (June 30, 1987).

43. *See generally* 5-CA-33245, 2011 WL 288784 (N.L.R.B. Jan. 28, 2011).

44. AGC Memorandum II, *supra* note 14, at 20, 22.

45. *Parexel Int'l*, 2011 WL 288784, at *4.

46. *Id.* at *5.

47. *Id.* at *1.

Africans.[48] The charging party told her immediate supervisor about the conversation and suggested that her whole unit should quit to attempt to force management into raising their wages.[49] The supervisor then told management, and management met with the charging party to discuss her concerns.[50] At the meeting, the charging party expressed her belief that the company was favoring South Africans when it came to wages.[51] When questioned, the charging party stated that she had not spoken to any of her co-workers regarding her concerns.[52] Six days later, she was terminated.[53]

As set forth above, section 8 protects employees from being terminated for discussing wage issues with other employees.[54] Here, however, the charging party had not discussed the matter with other employees, and therefore, she had not yet engaged in any concerted activity.[55] While the ALJ found the charging party's termination was likely a pre-emptive strike by the employer to prevent her from engaging in concerted activity, the ALJ could find no precedent to support an unfair labor practice on these grounds.[56] On appeal, the Board expanded the scope of concerted activity to support a finding of an unfair labor practice in this situation, holding that employers may not "nip [protected concerted activity] in the bud."[57] The Board found that the employee's discharge was a violation of section 8(a)(1), despite the fact that the conversations with her South African co-worker and supervisor were not concerted activity, and she had not engaged in conversations with any other employees.[58] As a result of this decision, an employer may now be liable where the Board determines that an employer's fear that an employee may potentially engage in protected concerted activity at some point in the undetermined future played a role in the employee's termination.[59]

48. *Id.*
49. *Id.*
50. *Parexel Int'l*, 2011 WL 288784, at *1.
51. *Id.*
52. *Id.* at *2.
53. *Id.*
54. *Id.* at *4 (citation omitted).
55. *Parexel Int'l*, 2011 WL 288784, at *5.
56. Parexel Int'l, LLC, 5-CA-33245, 2007 WL 4370366 (N.L.R.B. Dec. 11, 2007).
57. *Parexel Int'l*, 2011 WL 288784, at *5.
58. *Id.* at *6.
59. *Id.* at *5-6.

B. Protected Concerted Activity and Its Application to Social Media

In light of this expanded notion of concerted activity, the remaining sections in this Part detail how the traditional "brick and mortar" framework has been applied to determine whether social media activity constitutes protected concerted activity.

First, a brief overview of the Board's procedures for processing and adjudicating unfair labor practice complaints is warranted. When an employee or union representing a group of employees alleges an unfair labor practice in violation of the NLRA, the employee or union files a complaint with the Regional Director of the NLRB at the NLRB's nearest regional office.[60] Each charge is then investigated by Board agents, and the findings of the Board agents are typically reviewed by the Regional Director in determining whether the charge has merit.[61] However, for matters involving a lack of precedent or for matters that the NLRB's General Counsel has identified as priorities, Regional Offices are required to submit all charges to the Board's Division of Advice in Washington, D.C.[62] The Division of Advice is an office of the General Counsel, and provides opinions on whether a charge has merit.[63] Since April 12, 2011, all cases involving "employer rules prohibiting or discipline for engaging in protected concerted activity using social media" are required to be submitted to the Division of Advice.[64] The three memoranda discussed above issued by the AGC constitute a summary of the reasoning and determinations made by the General Counsel's Division of Advice in deciding whether cases submitted to it by the Regional Offices have merit.[65] Neither the Division of Advice opinions nor the AGC's memoranda constitute formal adjudications or binding precedent.

If the Division of Advice or the Regional Office determines that a case has merit, efforts are made to facilitate a settlement between the

60. *Investigate Charges*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/what-we-do/investigate-charges, (last visited Dec. 10, 2012) (the NLRB has twenty-eight regional offices and is headquartered in Washington, D.C.).

61. *Id.*

62. *Id.*

63. *Id.*

64. *See* Memorandum from the NLRB Office of the Gen. Counsel to All Regional Directors, Officers-in-Charge, and Resident Officers, Mandatory Submissions to Advice, No. GC 11-11, A.9 (Apr. 12, 2011) (on file with authors).

65. *See generally* AGC Memorandum I, *supra* note 14; AGC Memorandum II, *supra* note 14; AGC Memorandum III; *supra* note 17.

parties.[66] If no settlement is reached, the agency issues a complaint, which leads to a formal hearing before an ALJ.[67] The NLRB's Office of the General Counsel represents the charging party throughout this process.[68] After evaluating the evidence at the hearing and any post-hearing submissions, the ALJ issues an initial decision, which is subject to review by the Board.[69] ALJ decisions are not binding precedent; however, decisions appealed to and decided by the Board become binding legal precedent.[70] The significance of the decisions below should be evaluated in light of this structure.

1. Triple Play Sports Bar *and the* Jefferson Standard/Atlantic Steel *Hybrid Analysis*

In *Triple Play Sports Bar & Grille*, without extended discussion, an ALJ held that in evaluating protected activity, the specific medium in which the discussion takes place is irrelevant to its protected nature.[71] The ALJ relied upon a fifteen-year-old NLRB decision in finding the medium to be irrelevant.[72] In that dated decision, the Board found that an employer unlawfully terminated an employee after the employee had circulated an e-mail critical of a proposed change in the company's vacation policy—a proposed change for which the company had specifically asked for comments and feedback.[73] Unlike typical social media communications, the circulation of the email was limited only to employees.[74]

The case involved two employees who were terminated after posting information about their employer, the Triple Play Sports Bar and Grille, on Facebook.[75] After employees and former employees

66. *Investigate Charges*, *supra* note 60.

67. *Id.*

68. *Id.*

69. *Decide Cases*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/what-we-do/decide-cases (last visited Dec. 10, 2012).

70. *Administrative Law Judge Decisions*, NAT'L LABOR RELATIONS BD., https://www.nlrb.gov/cases-decisions/administrative-law-judge-decisions (last visited Dec. 10, 2012).

71. Three D, LLC (*Triple Play Sports Bar & Grille*), 34-CA-12915, 2012 WL 76862 (N.L.R.B. Jan. 3, 2012).

72. *Id.* at *2 ("[E]-mail regarding vacation policy sent by employees to fellow employees and to management [considered] concerted activity." (citing Timekeeping Sys., Inc., 8-CA-27999, 323 N.L.R.B. 244, 247 (Feb. 27, 1995))).

73. *Timekeeping Sys*., 323 N.L.R.B. at 245-47, 250.

74. *Id.* at 246.

75. *Triple Play Sports Bar*, 2012 WL 76862, at *2, *4.

discovered they owed additional state income taxes because of Triple Play Sports Bar and Grille's withholding practices, a former employee took to Facebook to express her frustration.[76] The former employee posted, "[m]aybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!!"[77] A firestorm of Facebook activity on the former employee's wall ensued, including a post from a current employee stating, "I FUCKING OWE MONEY TOO!" and a customer of the employer posting, "that's fucked up."[78]

In the same conversation thread, the former employee eventually blamed one of the employer's owners for the mistake and said that he still owed her about $2,000 in paychecks.[79] The thread was littered with expletives and included an accusation by a current employee that the employer's owner was "such an asshole."[80] One employee who was terminated clicked the "Like" button under the former employee's initial comment that maybe the owners should sell the company, while the other was terminated for calling the owner an asshole.[81]

After declaring the medium to be irrelevant in defining protected activity, the ALJ went on to find that an employee's selection of the "Like" option constituted a meaningful contribution to the conversation sufficient to constitute "concerted activity" under the Act.[82] While we take issue with this finding in Part IV below, here, we address the ALJ's analysis of whether the comments lost their protected status under *Atlantic Steel* or *Jefferson Standard*.

In finding that the comments did not lose their protection under *Atlantic Steel*, the ALJ stated that because the comments were on Facebook during non-working time and not at the workplace itself, there was no possibility that the discussion would disrupt the employer's work environment.[83] In so finding, the ALJ compared the Facebook discussions to an outburst during a meeting in the employee break room.[84] Additionally, the ALJ went so far as to say that because the

76. *Id.* at *2.
77. *Id.* at *2-3.
78. *Id.* at *3.
79. *Id.*
80. *Triple Play Sports Bar*, 2012 WL 76862, at *3.
81. *Id.* at *3-4.
82. *Id.* at *7.
83. *Id.* at *8.
84. *Id.* (citing Datwyler Rubber & Plastics, Inc., 11-CA-21185, 350 N.L.R.B. 669,

managerial employees who were being criticized, and in particular the owner who was referred to as both a "shady little man" and an "asshole," were not actually present, there could be no direct confrontational challenge to their managerial authority.[85] The ALJ refused to place any significance on the two customers participating in the Facebook conversation, conclusively stating that a customer overseeing a discussion on Facebook is materially different from a customer overhearing profane or confrontational language while at the employer's establishment, and that there was insufficient evidence to show that the employees' comments resulted in some form of harm to the employer's business.[86]

In applying the remaining *Atlantic Steel* factors, the ALJ found that the employees' general discussion of the calculation of taxes on their earnings constituted protected concerted activity under the second factor.[87] As for the third factor, the ALJ found that the use of the word "asshole" was not sufficient to divest the discussion of the Act's protection.[88]

The ALJ then analyzed the posts under the *Jefferson Standard* test, creating a hybrid application of the two tests.[89] Applying *Jefferson Standard*, the ALJ found that the postings did not constitute the type or level of disparagement or disloyalty that would forfeit the protection of section 7 under *Jefferson Standard*¸ even if those statements referring to the owner as a "shady little man" and stating that he probably pocketed the employees' paychecks could be attributed to the employees.[90] Specifically, the ALJ distinguished this situation from *Jefferson Standard* because the statements were directed only to Facebook friends, not the general public.[91] Additionally, the ALJ found that the statements naturally flowed from events and discussions of terms and conditions of employment, and there was no indication that they were

669-70 (Aug. 13, 2007)).

85. *Triple Play Sports Bar*, 2012 WL 76862, at *8.

86. *Id.* at *9.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Triple Play Sports Bar*, 2012 WL 76862 at *8, *10 (the ALJ noted that these statements were not attributable to the current employees because they were actually posted by the former employee and that liking the post was not sufficient to find the post attributable to the current employee).

91. *Id.* at *11.

timed to injure the employer.[92]

The ALJ's primary analysis in *Triple Play Sports Bar* appears to have been conducted under the *Atlantic Steel* framework. While paying lip service to *Jefferson Standard* and noting this standard as one factor under the *Atlantic Steel* framework, the ALJ focused on the semi-private nature of Facebook communications, concluding that the postings were not "intentionally" directed at the public.[93] Unfortunately, this destroyed any meaningful analysis that may have arisen under *Jefferson Standard*.

The AGC has similarly applied a hybrid *Atlantic Steel* analysis that considers "not only disruption to workplace discipline, but that also borrows from *Jefferson Standard* to analyze the alleged disparagement of the employer's products and services."[94] In highlighting the priority given to the *Atlantic Steel* factors, however, the AGC stated that a Facebook discussion is more "analogous to a conversation among employees that is overheard by third parties than to an intentional dissemination of employer information to the public seeking their support," and thus *Atlantic Steel* is the appropriate, underlying standard.[95]

The AGC applied this hybrid test in a case in which an employee made a Facebook post stating that there had been "so much drama at the plant."[96] When prompted by a second employee for details, the first employee posted a follow-up comment stating "she heard another employee had gotten written up for being 'a smart ass.'"[97] The second employee replied that the disciplined employee probably was not "a happy camper" and complained about the employer's management style.[98] A third employee added that "she hated the place and couldn't wait to get out of there" because she did not agree with the supervisor's management style.[99] The first employee then added that "she wished she could get another job."[100] The employer terminated the first

92. *Triple Play Sports Bar*, 2012 WL 76862, at *10.
93. *Id.* at *11.
94. AGC Memorandum II, *supra* note 14, at 24.
95. *Id.*
96. *Id.* at 22.
97. *Id.*
98. *Id.* at 23.
99. AGC Memorandum II, *supra* note 14, at 23.
100. *Id.*

employee for her comments shortly thereafter.[101]

The AGC found that while the first employee's comments were critical of the employer, they were not so defamatory or disparaging as to lose the Act's protection.[102] The fact that no unfair labor practice provoked the discussion did not change the communications' protected nature.[103]

This was the only potential charge discussed in the AGC's memoranda that applied this hybrid analysis. Therefore, how or when the Board will apply this approach is unclear. What this case and the cases below *do* make clear is that the Board's existing standards for protected concerted activity are ill-suited for analyzing social media communications because they are unlike "water cooler" discussions or even e-mails sent through an employer-provided network.

The remaining sections of this Part summarize social media discussions that have been found to be protected and unprotected, including the Board's first decision addressing discipline for social media activity and the questions that decision left unanswered.

C. Cases Finding Protected Concerted Social Media Activity

In applying the traditional standards discussed above to social media cases, the AGC found social media activities to be protected and concerted under the following circumstances. In a case reported in the AGC's First Memorandum, a paramedic employed by American Medical Response of Connecticut was told by her supervisor to prepare an incident report concerning a customer complaint that had been made regarding the employee's performance.[104] The employee requested a union representative while she prepared the report, but was not provided with one.[105] Later that night, the employee vented about the incident on her Facebook wall.[106] While the AGC's Memorandum mentions only that she referred to the supervisor as a scumbag, the underlying Advice Memorandum also indicates that the employee called her supervisor a "17," which is the employer's code for a psychiatric patient, and a "dick."[107] In addition to the employee, the Facebook thread included a

101. *Id.*
102. *Id.* at 25.
103. *Id.*
104. AGC Memorandum I, *supra* note 14.
105. *Id.*
106. *Id.*
107. *Id.*; Advice Memorandum from the Office of the Gen. Counsel, NLRB, 34-CA-

supervisor that was not involved in the incident inquiring as to what happened and another co-worker telling the employee to "keep her chin up."[108]

Despite calling her supervisor a scumbag, dick, and psychiatric patient, the AGC applied *Atlantic Steel* and found that the employee had not lost the protection of the Act.[109] Once again, the AGC found that the posting could not interrupt the work of any employee because it occurred outside the workplace, and the activity was protected because she was discussing supervisory actions with her co-workers in her post.[110] The AGC further found that the name calling was not accompanied by any verbal or physical threats, and therefore did not lose its protection.[111] Finally, the AGC found the fourth factor weighed strongly in favor of finding that the conduct was protected because the postings were provoked by the failure to provide a union representative.[112] The AGC applied only the *Atlantic Steel* test in determining that the statements remained protected, and a settlement between the employer and employee was subsequently reached.[113]

In a case discussed in the AGC's Second Memorandum, an employee made a Facebook post that criticized her employer, a veterinary hospital, for promoting what she deemed to be an unqualified candidate to a managerial position.[114] The post came after the employee had discussed the promotion with two separate co-workers at the workplace, indicating her dissatisfaction with the employee selected and the way in which the position had been filled.[115] The employee's Facebook post indicated that she felt the promotion basically told her that what "she had been doing wasn't worth anything."[116] Three co-workers, who were also Facebook friends, responded to the employee's

12576, AM. MED. RESPONSE OF CONN., INC. 3 (Oct. 5, 2010) [hereinafter Advice Memorandum I]; *see also* Complaint & Notice of Hearing, Am. Med. Response of Conn., Inc., 34-CA-12576 (N.L.R.B. Oct. 27, 2010).

108. AGC Memorandum I, *supra* note 14; Advice Memorandum I, *supra* 107, at 3; *see also* Complaint & Notice of Hearing, Am. Med. Response of Conn., Inc., 34-CA-12576.

109. Advice Memorandum I, *supra* note 107, at 9; AGC Memorandum I, *supra* note 14.

110. Advice Memorandum I, *supra* note 107, at 9-10.

111. *Id.* at 10.

112. *Id.*

113. *Id.* (citations omitted).

114. AGC Memorandum II, *supra* note 14, at 20.

115. *Id.*

116. *Id.* at 20-21.

initial post that resulted in an extended conversation where they complained about the woman who had gotten the promotion and general mismanagement within the veterinary hospital.[117] The initial poster noted that she had not received a raise in three years, "that the promoted individual did not do any work, and that the employer didn't know how to tell people when they [were doing] a good job."[118] One co-worker commented that it would be pretty funny if all the good employees quit, and the initial poster expressed appreciation for the support, and stated that "this wasn't over by a long shot, and that her days at the employer were limited."[119]

Two of the workers who participated in the Facebook conversation were fired, while the other two were disciplined for their posts.[120] In finding that the four employees were engaged in protected concerted activity, the AGC noted that while the concerted aspect of their discussions may have been preliminary in nature, "the movement toward concerted action was halted by the Employer's pre-emptive discharge and discipline of all the employees involved in the Facebook posts."[121] In finding a violation, the AGC found that the "the Employer unlawfully prevented the fruition of the employees' protected concerted activity."[122]

In a separate case in the same AGC Memorandum, the AGC cited to the above-mentioned case, *Parexel*, in finding that an employee was unlawfully terminated for making a series of Facebook posts complaining that she had been reprimanded for becoming involved in her fellow employees' work-related problems.[123] These comments elicited sympathetic responses from two non-employee Facebook friends.[124] The employee responded to these sympathetic responses by stating that "it was a very bad day, that one of her friends had been fired because he had asked for help, and that she had been scolded for caring."[125] Later that afternoon, she was terminated.[126]

117. *Id.* at 21.
118. *Id.*
119. AGC Memorandum II, *supra* note 14, at 21.
120. *Id.*
121. *Id.* at 22.
122. *Id.*
123. *Id.* at 18-20.
124. AGC Memorandum II, *supra* note 14, at 19.
125. *Id.*
126. *Id.*

Notably, no co-workers had posted on the employee's Facebook post, yet the AGC found that the President of the company knew that fellow employees often had discussions with this particular employee about terms and conditions of employment and that her Facebook postings "precipitated her discharge because the Employer perceived that she would not comply with [the President's] oral warning not to engage in protected conversations with her fellow employees about their working conditions."[127] This was in essence a pre-emptive strike, as articulated in *Parexel*, and despite the fact that there was no proof of concerted activity, the termination was deemed unlawful.[128]

D. Cases Finding Social Media Activity Unprotected

In determining whether social media activity is protected, the various NLRB authorities have attempted to distinguish between protected concerted activity and "mere individual gripes." While this distinction has yet to be meaningfully delineated, the cases below provide examples where the employee's activities were not protected and termination or discipline was upheld. Some cases involve unprotected individual gripes, while others involve employee activity that lost protection based on its opprobrious or disparaging nature.

The first involved social media postings by a disgruntled Walmart employee. The employee, frustrated with his assistant manager, posted on his Facebook account, "Wuck Falmart!" and accused the assistant manager of tyranny.[129] When other employees responded to the post, expressing concern and sympathy, the employee commented that the manager was being a "super mega puta" and that if things didn't change "[W]almart [could] kiss [his] royal white ass!"[130] Although more than one employee was involved in the online discussion, the Division of Advice found that this was merely "an expression of an individual gripe" because there was no indication that the complaining employee sought to induce group action or that the comments were the "logical outgrowth of prior group activity."[131]

Similarly, in a case submitted to the Division of Advice, an

127. *Id.* at 20.

128. *Id.*

129. Advice Memorandum from the Office of the Gen. Counsel, NLRB, 17-CA-25030 1 (July 19, 2011) [hereinafter Advice Memorandum II]; *see also* AGC Memorandum I, *supra* note 14.

130. Advice Memorandum II, *supra* note 129, at 2.

131. *Id.* at 3-4.

employer dismissed an employee for posting on his Facebook page that due to the treatment by his supervisor, he was "a hair away from setting it off in that BITCH."[132] Here again, although the posting dealt with employment conditions, the Division of Advice found no indication that the employee sought to induce group action or that the discussion was the outgrowth of previous concerted activity.[133] In fact, the employee admitted he was "just venting."[134]

In a unique factual situation, a cross-country truck driver learned as he was nearing his destination that the roads he needed to make his delivery were closed due to snow.[135] He attempted to reach his on-call dispatcher but he was not answering his phone.[136] After talking to several other drivers about his situation, he posted on his Facebook page about his frustration at the road closure, missing his significant other, and his inability to reach the dispatcher.[137] No other employees responded to this post.[138] The Division of Advice found that the truck driver was simply expressing his own frustration and boredom, and was not seeking to induce any sort of group action.[139] Thus, although this social media posting was perhaps less vulgar or offensive than the cases listed previously, the Division of Advice found that it was an individual gripe and could not be considered concerted activity.[140]

Finally, the Division of Advice found that an employer had not engaged in concerted activity by discussing tips and wages on Facebook, where the only evidence regarding discussions with co-workers surrounding the tip policy was a conversation with one co-worker several months before the Facebook posting.[141] The employee's

132. Advice Memorandum from the Office of the Gen. Counsel, NLRB, 36-CA-010882 2 (Sept. 19, 2011) [hereinafter Advice Memorandum III]; *see also* AGC Memorandum II, *supra* note 14, at 34 (employee's statement that he was going to set it off suggested violence so as to lose its protection from the Act).

133. Advice Memorandum III, *supra* note 132, at 2.

134. *Id.*

135. Advice Memorandum from the Office of the Gen. Counsel, NLRB, 11-CA-22936 1 (July 28, 2011) [hereinafter Advice Memorandum IV]; *see also* AGC Memorandum II, *supra* note 14, at 32.

136. *Id.*

137. Advice Memorandum IV, *supra* note 135, at 2.

138. *Id.*

139. *Id.* at 4.

140. *Id.*

141. Advice Memorandum from the Office of the Gen. Counsel, NLRB, 13-CA-46689 3 (July 7, 2011) [hereinafter Advice Memorandum V]; *see also* AGC Memorandum I, *supra* note 14.

step-sister was the only individual who responded to the employee's posts and no co-workers responded to the posting.[142]

E. Knauz BMW*: The Board's First Decision on Social Media Terminations*

Appearing to draw at least in part from the reasoning in the Division of Advice and AGC memoranda, the Board recently issued its first decision addressing discipline for Facebook activity.[143] The Board found that a salesman at a BMW dealership was lawfully terminated for posting photos and comments on Facebook of an incident that occurred at the adjoining Land Rover dealership—a dealership owned by the same employer.[144] The employee captured and posted photos of a Land Rover that had been driven into a pond by a customer's barely teenage son, which included the caption: "[t]his is your car. This is your car on drugs."[145] He went on to write in detail:

> [t]his is what happens when a sales Person sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a $50,000 truck. OOOPS![146]

The Board, affirming the ALJ's decision, concluded that there was nothing protected or concerted about these posts by the employee, nor did they relate to any terms or conditions of employment.[147] Accordingly, the Board found that terminating the employee was lawful.[148]

While the unprotected nature of the employee's Land Rover postings was straight-forward, the more controversial posting, and the posting upon which the Board refused to rule, involved the same employee's posts regarding the food and drink the employer provided at the BMW Ultimate Drive Sales Event ("the Drive Event").[149] The

142. Advice Memorandum V, *supra* note 141, at 3.

143. Karl Knauz Motors, Inc. (*Knauz BMW*), 2012 WL 4482841, at *1 (N.L.R.B. Sept. 28, 2012).

144. *Id.*

145. *Id.* at *12.

146. *Id.*

147. *Id.* at *18.

148. *Knauz BMW*, 2012 WL 4482841, at *1.

149. *Id.* at *11.

dealership provided hot dogs, cookies, and chips for the event, leading two salespeople, including the employee who was terminated, to complain to management that the dealership should offer better food for such an event.[150] During the event itself, the salesman took pictures of the hot dog cart and posted them on Facebook, with sarcastic comments indicating his belief that the choice of cuisine was inappropriate for a luxury car event.[151]

Noting that the food choice could potentially impact the employee's commissions from the event, and relying on the earlier complaints made to management by the employee and his co-worker, the ALJ concluded that the photographs and sarcastic comments on Facebook constituted concerted activity, despite the fact that no co-worker posted or liked the photographs on the employee's Facebook page.[152] The ALJ further found that the sarcastic and mocking tone with which the employee posted his caption was not sufficiently disparaging to the employer to lose its protected status under the Act.[153] Because the Board found that the employee's termination was lawful due to his Land Rover photograph postings, the Board found it unnecessary to rule on whether the Facebook postings related to the Drive Event were protected under the Act,[154] thereby depriving practitioners and employers from any meaningful analysis of where the Board intends to draw the line on protected social media activity.

150. *Id.*

151. *Id.*

152. *See generally* Karl Knauz Motors, Inc., 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Sept. 28, 2011).

153. *Id.*

154. *Knauz BMW*, 2012 WL 4482841, at *1.

IV. EVALUATING PROTECTED CONCERTED ACTIVITY: RECOMMENDATIONS GOING FORWARD[155]

As the Board moves forward, it will inevitably be tasked with deciding close cases, such as the postings made regarding the Drive Event, and in so doing, defining the contours of lawful social media activity. The authors suggest that the Board should: (1) reject, at least in part, the analysis set forth by the Division of Advice, AGC, and ALJs in determining the concerted nature of social media activity; and (2) expand its analysis of when social media activity should be deemed to lose its protection under the Act to account for the unique elements of social media communications.

A. Concerted Activity: Rejecting Parexel *and* Triple Play Sports Bar

As set forth above, the threshold question in determining whether social media discussions will be considered protected is the concerted nature of the activity. It is the authors' contention that the Board overreached in *Parexel* by giving concerted activity that may occur at some point in the future the same protection as concerted activity that is actually underway and as is traditionally understood under the Act.[156] Without clear evidence of actual concerted activity, such an action for unlawful termination or discipline should not lie.

However, recognizing the futility of arguing to completely overturn recently enacted law—particularly under the currently appointed Board—the authors simply suggest that *Parexel* and the pre-emptive strike theory upon which it relies should not be extended to social media termination or discipline decisions, absent the exceptional

155. The authors acknowledge the growing weight of authority analyzing the inconsistencies and unclear lines drawn by NLRB authorities in deciding social media cases. *See, e.g.*, James Glenn, *Can Friendly Go Too Far? Ramifications of the NLRA on Employer Practices in a Digital World*, 2012 U. ILL. J.L. TECH. & POL'Y 219 (2012); Pat Lundvall & Megan Starich, *Employer Social Media Policies and the National Labor Relations Act: Walking the Fine Line Between Prohibited Disparagement and Protected Employee Speech*, 20 NEVADA LAW. 8 (2012); Samantha Barlow Martinez, *Cyber-Insubordination: How an Old Labor Law Protects New Online Conduct*, 49 HOUS. L. REV. 16, (2012). However, rather than distinguishing and parsing language to analyze, for example, why the employer's "venting" in the Wal-Mart case was protected as opposed to the "venting" in AMR Connecticut, the authors attempt to provide certain recommendations in shaping this analysis, that if acknowledged, would lead to clearer lines for employers and employees, rather than relying on fine-point distinctions more conducive to scholarly critiques than practical application.

156. *See generally* Parexel Int'l, 5-CA-33245, 2011 WL 288784 (N.L.R.B. Jan. 28, 2011).

circumstances described below.

On a practical level, in cases where an employee alleges he/she has been disciplined for engaging in concerted social media activity, evidence of the alleged concerted activity will be available on the employee's Facebook wall or on a similar social media forum, and it will be readily available to the AGC in proving his case. In those cases where an employee argues that a Facebook posting that elicited no responses from co-workers is concerted because it was the logical outgrowth of a previous conversation with co-workers at the facility, the concerted activity would have therefore already taken place *prior to* the social media posting being made. Admittedly, this leaves the rare circumstance where an employee may post a call to action regarding terms and conditions of employment on his Facebook page, and the employer immediately terminates the employee before a co-worker is able to read or respond to the posting. It is only in these rare circumstances, where an employer would likely have to engage in regular surveillance of its employees' Facebook postings[157] and act hastily in response to such postings, that the *Parexel* decision should be applied to social media terminations. Typically, in these matters, the application of a pre-emptive strike unfair labor practice theory should not be considered in the social media discipline analysis.

Next, to further clarify the Board's analysis of concerted activity, the authors suggest a conclusive determination that simply "liking" an employee's Facebook status should not constitute concerted activity unless exceptional circumstances exist. An example of exceptional circumstances may be a poll by an employee that asks for individuals to "Like" his/her status if they agree with a statement regarding certain protected terms or conditions of employment.

A recent discussion of the significance of "liking" a Facebook status by a district court in the Fourth Circuit is instructive.[158] In the context of a constitutional freedom of speech claim, the court found that simply liking a Facebook page is not the kind of substantive statement that warrants constitutional protection.[159] The court further stated that "[t]he Court will not attempt to infer the actual content of [Plaintiff's] posts from one click of a button on [another individual's] Facebook

157. A practice that could potentially have legal ramifications for the employer outside the NLRA context and which, of course, is not a topic of this Article.

158. Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012).

159. *Id.*

page."[160]

While admittedly applied in a different context, this statement stands in stark contrast to the ALJ's decision in *Triple Play Sports Bar*. In *Triple Play Sports Bar*, the ALJ found, without any meaningful discussion, that "liking" constituted an assent to the comments being made, and a meaningful contribution to the discussion.[161] The ALJ's reasoning was particularly inappropriate as the ALJ found that by liking the former employee's initial posting, the employee had thereby constituted his assent to all other contributions and postings that had since been made after the initial posting.[162] Attempting to ascertain what portion of the statement, or what particular sentiment an employee is attempting to convey by liking a Facebook status, a feature that can commonly be used by individuals in a sarcastic manner, is particularly the kind of inconclusive guessing game that the Board should avoid.

B. Lessons from the Second Circuit: Breaking from Atlantic Steel

In *NLRB v. Starbucks Corp.*, the Second Circuit reviewed the discharge of an employee who had protested the company's button policy regarding union insignia.[163] In a heated exchange with a manager that took place in front of customers, the employee told the manager that he could "go fuck" himself.[164] Applying *Atlantic Steel*, the Board had initially ordered the employee's reinstatement, finding that such behavior was still protected under the Act.[165] In its review, the Second Circuit acknowledged that generally, to determine whether an employee has lost NLRA protection by engaging in an outburst, the Board considers the four factors laid out in the *Atlantic Steel* decision.[166]

However, the Second Circuit rejected the application of *Atlantic Steel* in these circumstances, finding that "the Board improperly disregarded the entirely legitimate concern of an employer not to

160. *Id.* at 604.

161. Three D, LLC (*Triple Play Sports Bar & Grille*), 34-CA-12915, 2012 WL 76862 (N.L.R.B. Jan. 3, 2012).

162. *Id.* at 8. As each post on a thread is capable of being liked individually, it appears likely that the ALJ's reasoning that liking the initial post constituted assent to all other posts was due to a rudimentary understanding of Facebook rather than any kind of meaningful analysis, and such reasoning should not be embraced by the Board in evaluating the concerted nature of Facebook activity.

163. NLRB v. Starbucks Corp., 679 F.3d 70, 77 (2d Cir. 2012).

164. *Id.* at 74.

165. Starbucks Corp., 354 N.L.R.B. 99 (2009).

166. *Starbucks Corp.*, 679 F.3d at 78 (citation omitted).

tolerate employee outbursts containing obscenities in the presence of customers."[167] The court therefore found the *Atlantic Steel* test "inapplicable to an employee's use of obscenities in the presence of an employer's customers."[168] The Second Circuit remanded the case to the Board in order to develop a proper standard to apply in these circumstances.[169]

It will be interesting to see how the Board articulates its standard on remand, particularly given the instruction by the Second Circuit to not "disregard the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers."[170] Obviously, it is precisely this type of concern of employers when employees vent on Facebook about their employment.

Accordingly, the NLRB's decision on remand is likely to influence any analysis in future NLRB social media cases. Nonetheless, even if the Board cleverly side-steps the issue and refuses to produce a standard, and/or subsequently refuses to apply that standard to social media activity, the Board should take a lesson from the general thrust of the Second Circuit's decision. That lesson is that *Atlantic Steel* is not always appropriate, and that different tests and considerations must be established to properly reflect the nature of the communications at issue. It is within this framework that we suggest the following factors be considered in developing an appropriate standard for analyzing social media discipline.

C. Factors for Consideration in Developing a New Standard

As a general matter, the AGC Memoranda, ALJ decisions, and the first Board decision indicate that Facebook posts communicated to an internet audience beyond those involved in the actual posting will not lose protection under the Act provided the posts involve protected concerted activity.[171] The fact that the internet discussion is not taking place around a "water cooler" or through an employer's email system (where everyone knows who is inside and outside the audience), seems to have had little impact in the analysis applied to date. Likewise, neither the ALJs nor the AGC appear to have made note of the number

167. *Id.* at 79.

168. *Id.* at 80.

169. *Id.*

170. *Id.* at 79.

171. *See generally* AGC Memorandum I, *supra* note 14; AGC Memorandum II, *supra* note 14, at 18; AGC Memorandum III, *supra* note 17.

of Facebook friends or Twitter followers who may have had access to such postings. Also absent is a discussion of how or if the employee has identified to his Facebook friends the name of his employer and/or his affiliation with that employer. Where such affiliation or connection is not easily made, the potential for damage to the employer is less likely to be significant. Similarly absent is any significant discussion on whether the poster's profile was public or private, or the use of other advanced Facebook privacy features to limit the audience for particular posts or photographs. The Board should analyze each of these subjects in detail to provide guidance to employees on prudent privacy measures they may take to alleviate concerns over their social media postings.

Also absent from the early discussions of social media postings is how the nature of the particular employer's industry could be impacted by negative publicity. In a technological age where companies spend millions on social media marketing campaigns, the importance of maintaining the integrity and legitimacy of a brand in the social media market is clear. This is particularly critical in industries where reviews on social media websites, such as Yelp, could play a significant role in making or breaking a company.

In *Triple Play Sports Bar*, the ALJ required proof of "actual harm" to the company in its analysis of whether the employees lost the protection of the Act and was unwilling to give any significance to the fact that customers were participating and viewing the Facebook discussion. If the Board were to adopt this reasoning, it would ignore the potentially subtle yet nonetheless negative impact that an employee's posts regarding the services provided by the employer or regarding the alleged negative treatment of individuals employed by the employer could have on a potential customer's decision to patronize or utilize the services of an employer. Proof of clear direct harm when an employee's post may be viewed by hundreds or thousands of Facebook friends should not be required where the nature of the post is likely to reflect negatively on the services provided by the employer.

Public opinion is subject to dramatic change overnight, and Facebook and Twitter are two primary grounds upon which employers, politicians, individuals, and even the NLRB[172] attempt to curb and shape public opinion. Recognizing the nature of these forums as such a tool must be factored into the Board's analysis. Expecting employees to

172. *See National Labor Relations Board*, FACEBOOK, https://www.facebook.com/NLRBpage (last visited Jan. 6, 2013).

treat posts with greater sensitivity and caution because of the potentially large audience who may be able to view such communications should not be treated as an unreasonable expectation. Simply put, any standard developed by the Board must acknowledge a critical distinction between online communication and so-called "bricks and mortar" discourse. With the latter, the speaker almost without exception knows the audience to whom he or she is speaking. With the former, the speaker loses nearly all control of the words once they go online. The Board should credit an employer's legitimate expectation that employees' online conduct must be different from what has been tolerated historically in run-of-the-mill employee speech cases.

Finally, it seems legitimate to examine what, if anything, happened to the posts once they entered cyberspace. Even a rookie internet user knows the ease with which a semi-private posting on Facebook may be copied and pasted and sent beyond a limited audience. The early social media cases do not address what actually happened to the post once it went online. Clearly, a post that is arguably disparaging to an employer may or may not be in part, depending on whether 1 or 1,000 people read the post. Likewise, an employee who takes great care to control his or her audience (through various privacy settings) may fare better in arguing the point that he really was engaged in concerted activity, as opposed to the simple employee griping.

CONCLUSION

We realize that asking the Board to stray far from its "brick and mortar" analysis may be an exercise in scholarly futility. Accordingly, the above suggestions provide minor alterations and additions to supplement and more clearly define the Board's analysis of social media discipline. The Board is faced with the unique opportunity of establishing a meaningful and forward-thinking analysis to analyze a medium to which established standards do not neatly apply. By acknowledging the far-reaching impact of this medium along with the privacy features employees can use to limit this potential impact, the Board has an opportunity to protect employees' interests in protected speech while at the same time protecting the legitimate concerns of employers in establishing and maintaining the reputation of their company.

If the Board refuses to recognize this reality and blindly adheres to old standards in developing its analysis, it will only ensure its slumber for another twenty years in the Catskills.