What Is The Effect Of Social Networking In The Private Workplace?

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1 ABSTRACT

Social networking is used by 67% of all Internet users in the United States.[1] Because social networking is still a relatively new concept, private companies struggle with how to respond to issues arising from their employees' use. This article will explore three of those issues.

The first issue this article will explore is whether an employee is or should be entitled to any amount of privacy in his own private social networking usage. Here, this article will look at case law for guidance on what an employer's conduct may or may not entail. Questions to be answered include whether an employer may force a third-party ISP to disclose the identity of an anonymous blogger who is suspected of being an employee? Additionally, this section will look at emerging issues dealing with employer actions and privacy concerns.

The second issue discussed is what actions a company may take when faced with an employee who has posted offensive or derogatory statements on a social networking site. The NLRB has issued recent Advice Memos on this issue. These memos will be discussed as well as recent case law.

The third and final issue this article will explore is how a company's policies should address social networking usage. Specifically, what guidance is available for developing those policies. To accomplish this, this article will look to recent case law on this subject for guidance. The question to be answered is what should a company's social media policy include?

Before tackling these issues, this article will give a brief synopsis of social networking and the rise of its use. There will also be some distinctions drawn between social media and social networking.

Finally, a brief overview of the issues in regards to public employment will be given. This brief discussion will prove beneficial for comparison purposes and highlight the additional burdens that private employers face daily.

2 INTRODUCTION AND BACKGROUND

2.1 What Are Social Media and Social Networking?

Broadly speaking, social media is the use of internet-based tools to communicate and share information with others. There are a wide variety of social media technologies. These technologies include magazines, internet forums, weblogs, social blogs, microblogging, wikis, social networks, podcasts, photographs or pictures, video, rating, and social bookmarking.[2] The key distinction between social media and other media forms is that content is collaboratively created by social media users.[3]

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[1] Joanna Brenner, *Pew Internet: Social Networking*, PEW INTERNET (Feb. 14, 2013), http://pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx

[2] Social media, http://en.wikipedia.org/w/index.php?title=Social_media&oldid=554381740 (last visited May 10, 2013).

[3] This article will refer to individuals who use social media sites as "social media users."

Social media is often confused with social networking. In general, people use both terms interchangeably. However, there is a difference between the two terms. One can think of social media as a "strategy and an outlet for broadcasting."[4] For example, YouTube may be used by a musician to reach music lovers whom they otherwise might not be able to reach. Or, a company might use it to advertise a new product.

In comparison, social networking is "a tool and a utility for connecting with others."[5] The site that most often comes to mind in regards to social networking is Facebook, where users can connect with other people, i.e., network.

Leading to the confusion between the two terms is that oftentimes the two terms overlap. For example, many companies now have a Facebook page for the purpose of generating new customers, advertising, and brand recognition. A company's Facebook page in essence is a marketing tool. As stated above, Facebook is also used by individuals for networking purposes. Thus, it is easy to see that Facebook is one example of the overlapping of the two terms.

2.1.1 Usage

The number of social networking users has significantly risen since 2005. In 2005, 8% of internet users reported use of some form of social networking.[6] By December 2012, this percentage had grown to 67%.[7]

The most popular social networking sites are Facebook, Twitter, and LinkedIn.[8] In a 2011 survey of social networking users conducted by Pew Internet,[9] it was found that the most popular use of social networking revolves around connecting with family and friends.[10] Other reasons for use revolve around shared hobbies, meeting new people, and even finding romantic partners.[11]

2.1.2 Social Media As A Tool For Business

With the rise of the number of social networking users, it is no surprise that businesses have turned to social media for marketing purposes. Research shows that of the top 100 of the

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[4] Lon S. Cohen, *Is There A Difference Between Social Media And Social Networking?*, AKA@OBILON (Apr. 30, 2009), http://lonscohen.com/blog/2009/04/difference-between-social-media-and-social-networking/
[5] *Id.*
[6] Brenner, *supra* note 1.
[7] *Id.*
[8] Olivia Barrow, *Top 15 most-popular social media sites*, DAYTON BUSINESS JOURNAL (Dec 17, 2012), http://www.bizjournals.com/dayton/news/2012/12/17/top-15-most-popular-social-media-sites.html, Estimated Number of Unique Visitors Per Month (As of December 2012): Facebook – 750,000,000; Twitter – 250,000,000; LinkedIn – 110,000,000
[9] *About the Pew Research Center*, PEW INTERNET, http://pewinternet.org/Static-Pages/About-Us/About-the-Pew-Research-Center.aspx (last visited Apr. 12, 2013); The Pew Research Center is a nonpartisan "fact tank" that provides information on the issues, attitudes and trends shaping America and the world. It does so by conducting public opinion polling and social science research; by reporting news and analyzing news coverage; and by holding forums and briefings. It does not take positions on policy issues.
[10] Aaron Smith, *Why Americans Use Social Media*, PEW INTERNET (Nov. 11, 2011), http://pewinternet.org/Reports/2011/Why-Americans-Use-Social-Media/Main-report.aspx
[11] *Id.*

2012 Fortune 500 companies, 87 of the companies have at least one Facebook page; 86 have Twitter accounts; 60 utilize YouTube; and 86 have a corporate blog.[12]

2.2 The Issues

The competitiveness of today's market requires companies to utilize every means possible to gain customers, create brand awareness, and to communicate with customers effectively. As noted above, one of the fastest growing means being utilized is social media. However, because of the easy access to social networking and the overlap of that with social media, great damage can be done to a company by either misleading or false information. What are some of the specific threats to a company and how can a company respond to these threats?

This article will address three specific issues. To explain these issues and how they might arise, let's look at a hypothetical scenario.

> *Widget Maker Incorporated (WMI), is a private manufacturing company that makes widgets. WMI has been around for a number of years and has always had a reputation of building great widgets. WMI attributes its success to hiring exceptionally qualified employees from the top down.*
>
> *John Doe is an employee of WMI. John becomes disgruntled because he was passed over for a promotion. In retaliation, John decides to start an anonymous blog to vent his frustration. John's blog soon becomes viral on the internet because John has an amazing ability to tell a story.*
>
> *The majority of John's postings criticize management about decisions they have made. He specifically demeans plant supervisors who he feels are unqualified. Because of the blog's popularity, WMI's reputation of hiring only exceptionally qualified employees is being questioned by widget consumers as well as WMI's competitors. Subsequently, WMI widget sales begin to drop.*[13]

Obviously, in this hypothetical WMI would like to recover damages from this blog site. How do they begin? Can they determine who is posting to the blog? Can John be fired from his position? What could be done to prevent this from happening again?

This simple hypothetical raises three separate issues which will be discussed in this article. These same issues are faced daily by companies of all sizes and across all industries as a result of the convergence of social media and social networking.

The first issue this article will explore is whether an employee is or should be entitled to any amount of privacy in his own private usage of social networking. Specifically, what can a company do in order to find out who is speaking out against them? To resolve this issue, this article will look to case law, as well as statutory provisions, to find guidance.

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[12] This survey was conducted visiting each of the top 100 companies website and finding their social media pages.

[13] This is a purely hypothetical scenario created by the author and by no means has any intentional connection to actual people.

The second issue to be discussed is what actions a company may take when faced with an employee who has posted harmful, offensive, or derogatory statements on a social networking site. Here, the NLRB has issued recent Advice Memos on this issue. These memos will be discussed as well as recent case law.

The third and final issue this article will explore is how a company's policies should address social networking usage. Specifically, what guidance is available for developing those policies? And, how can a company's policy be maximized to limit risks? To accomplish this, this article will look to recent case law on this subject.

3 ISSUE ANALYSIS

3.1 Privacy

The first issue this article will explore is whether an employee is or should be entitled to any amount of privacy in his own private usage of social media. Specifically, what can a company do in order to find out who is speaking out against them?

3.1.1 Disclosure of Anonymous Users

Generally speaking, most social networking sites have stated policies of not disclosing information about its users without consent or in other specific circumstances. For example, blogger.com states in its privacy statement that they *"do not share personal information with companies, organizations and individuals outside of Google"* except under certain circumstances.[14] A second example is from Facebook, which allows its users to control who sees what on their Facebook page.[15] Facebook's policy is that each user owns *"all of the content and information [he/she] post[s] on Facebook, and [he/she] can control how it is shared through your privacy and application settings."*[16] Because of policies like these two examples, social networking users have some expectation of privacy of the things they may post.

However, there are circumstances where anonymity will not be the case. For example, if a company wishes to sue an individual for defamation based on postings by that individual, the company might file a pre-action discovery motion asking the court to force a social networking site to reveal the identity of that person. This was the case in *Cohen v. Google*.[17] In that case, an anonymous blogger called the petitioner a "skank" and a "ho."[18] In a pre-action discovery motion, the petitioner successfully petitioned the court to order Google to reveal the identity of the anonymous blogger.[19] Prior to the motion being granted, the blogger, in the interest of maintaining his anonymity, had only appeared through counsel.[20] The standard used by the

[14] *Privacy Policy: Information we share*, GOOGLE, http://www.google.com/policies/privacy/?hl=en (last visited Apr. 27, 2013).
[15] *Choose Who You Share With*, FACEBOOK, https://www.facebook.com/help/459934584025324/ (last visited Mar. 19, 2013).
[16] *Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/legal/terms (last updated Dec. 11, 2012).
[17] *Matter of Cohen v. Google, Inc.*, 25 Misc. 3d 945 (Sup. Ct. 2009)
[18] *Id.* at 946-947.
[19] *Id.* at 949.
[20] *Id.* at 946.

Cohen Court was that the identity of an anonymous individual will be disclosed by a showing that the information was both material and necessary to the claim being brought.[21] In addition, the claim of the one seeking the information must have merit, and the court has the discretion as to the adequacy of the merits of the claim.[22] In other words, a motion seeking the identification of an anonymous user would not be granted for the simple basis of obtaining the identity. A petitioner must show that they have a valid cause of action against that person. This standard was met in *Cohen* by a showing that they had a valid claim of defamation against the petitioner.[23]

3.1.2 Possible Protections for an Employee Through the Stored Communications Act of 1986

In 1986, Congress passed the Stored Communications Act ("SCA"), which is codified in Chapter 121 of Title 18 of the U.S.C.[24] The SCA makes it a crime when an unauthorized person intentionally accesses stored communications of another without authorization.[25] Under the SCA, an employee may argue that his employer was not authorized to view postings on social networking sites.[26] If successful in this argument, the employer may be liable for damages as set forth in the SCA.[27]

For this SCA provision to apply, the employee would first have to show that his employer *was not* authorized to view the postings.[28] Depending on the social networking site, this could be accomplished in several different ways. For instance, as stated earlier, Facebook allows users to manage who is authorized to view items that they choose to post through privacy settings.[29] A second example would be that an employee who has a blog may choose to only allow access to the postings through a password.[30]

A common issue for courts to decide is whether or not authorization has been given. Under § 2701(c)(2), a person may become authorized when a *user* provides authorization.[31] In the 2002 case *Konop v. Hawaiian Airlines*, the court had a detailed discussion on what "user" means.[32] In the *Konop* case, an employee, Konop, maintained a password-protected blog in which he was critical of his employer, Hawaiian Airlines. Konop authorized two other employees, Wong and Gardner, access to his blog by providing each with a password. A vice-president of the company, Davis, was neither authorized by Konop to view the site nor given a password to access the blog. However, Davis obtained access to the blog by first using Wong's password and later by Gardner's password.

The issue was whether or not Davis was authorized because he was given access by individuals who were authorized. In finding that Davis was not authorized, the court pointed to

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[21] *Id.* at 948.
[22] *Id.* at 948.
[23] *Id.* at 949.
[24] Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712 (West)
[25] *Id.* § 2701(a).
[26] *Id.* § 2701(a).
[27] *Id.* § 2701(b).
[28] *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002).
[29] Facebook, *supra* note 15.
[30] Password protection can be accomplished in one of several ways. Many blog sites already allow this capability. If a particular blog does not have the capability, the blogger could hire a software developer to create it.
[31] SCA, 18 U.S.C. § 2701(c)(2).
[32] *Konop*, 302 F.3d at 880.

the term "user" as it is defined in the SCA.[33] There, "user" is defined as one who 1) uses the service and 2) is duly authorized to do so.[34] To be a user, both of these requirements must be met. Under this definition, the court found that neither Wong nor Gardner were users. Although both Wong and Gardner were authorized by Konop, neither had actually used the service. Thus, they each failed to meet both requirements set forth in the statute.[35] Because neither Wong nor Gardner were "users" under the definition, they could not provide authorization to Davis under §2701(c)(2). Therefore, when Davis accessed the site, he was unauthorized to do so and the court held this to be the case in favor of Konop.[36]

Applying the SCA to sites such as Facebook is still in its infancy stage. However, some courts have began to look at the issue. For instance, a California district court took up this issue in 2010 with the case *Crispin v. Christian Audigier*.[37] There, the court applied the SCA to private messages and postings on both Facebook and MySpace.[38] The court held that when messages or comments are controlled by privacy settings of the particular social networking site, those private messages are protected under the SCA.[39] Since *Crispin*, other courts have also taken up this issue.[40] Thus, it appears that this defense might become more common as more courts are faced with this issue.

3.1.3 Emerging Issue: Username/Password Requests

A growing practice of private employers is to request from potential employees their usernames and/or passwords to social networking sites.[41] A similar issue is when employers request the social networking account usernames and/or passwords of existing employee's.[42] Currently, this is a legal issue that is yet to be resolved with any certainty. Few courts have spoken in regards to this issue and the guidance will likely evolve as both sides argue their points before the courts.

The arguments made by employers who want to obtain this information is that social networking sites provide a picture of who a person really is. In the hiring process, a potential employee may be screened and the information can be used to determine whether the individual is a good hire.

The opposing arguments are many. One such argument is that by requiring an employee's username and password, the employer opens itself up to potential lawsuits. For example, an

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[33] SCA, 18 U.S.C. § 2510(13)
[34] *Id.*
[35] *Konop*, 302 F.3d at 880.
[36] *Konop*, 302 F.3d at 880.
[37] *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010)
[38] *Id.* at 980.
[39] *Id.* at 980.
[40] *Pietrylo v. Hillstone Rest. Grp.*, CIV.06-5754(FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009); *Maremont v. Susan Fredman Design Grp., Ltd.*, 10 C 7811, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011).
[41] Manuel Valdes, *Job seekers getting asked for Facebook passwords*, YAHOO! (Mar. 20, 2012), http://finance.yahoo.com/news/job-seekers-getting-asked-facebook-080920368.html; Joanna Stern, *Demanding Facebook Passwords May Break Law, Say Senators*, ABC NEWS (Mar. 26, 2012), http://abcnews.go.com/Technology/facebook-passwords-employers-schools-demand-access-facebook-senators/story?id=16005565#.UWCc-r8ozfY.
[42] *Id.*

employer may be liable for discrimination if an individual can successfully prove that he was not hired because he was a member of a certain religious group page on a social networking site.

Social networking sites have taken a stance on this issue. For instance, Facebook has threatened legal action against any employer who asks employees for their passwords.[43] Facebook's stance stems from its "Statement of Rights and Responsibilities" (SRR).[44] Specifically, its SRR prohibits account holders from "[sharing their password] … let anyone else access your account, or do anything else that might jeopardize the security of your account."[45] This provision in the SRR was commented on publicly by Erin Egan, Facebook's Chief Privacy Officer. Ms. Egan stated the following:

> "As a user, you shouldn't be forced to share your private information and communications just to get a job. And as the friend of a user, you shouldn't have to worry that your private information or communications will be revealed to someone you don't know and didn't intend to share with just because that user is looking for a job. *** We don't think employers should be asking prospective employees to provide their passwords because we don't think it's the right thing to do. But it also may cause problems for the employers that they are not anticipating. *** Employers also may not have the proper policies and training for reviewers to handle private information. If they don't—and actually, even if they do—the employer may assume liability for the protection of the information they have seen or for knowing what responsibilities may arise based on different types of information (e.g. if the information suggests the commission of a crime)."[46]

Other social networking sites have similar password protection provisions included in its terms of use language.[47]

On April 27, 2012, a bill was introduced in Congress that would prohibit an employer's ability to request an employee's or a potential employee's usernames or passwords to private social networking accounts of those individuals.[48] Although the bill was not enacted at that time,

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[43] *Facebook threatens to sue to stop sharing of passwords*, SILICON VALLEY BUSINESS JOURNAL (Mar. 23, 2012, 2:57 PM), (http://www.bizjournals.com/sanjose/news/2012/03/23/senator-looks-to-prevent-employers.html.

[44] Facebook, *supra* note 16.

[45] *Id.*

[46] Erin Egan, *Protecting Your Passwords and Your Privacy*, FACEBOOK (Mar. 23, 2012), https://www.facebook.com/note.php?note_id=326598317390057

[47] *Keeping your account secure*, TWITTER, https://support.twitter.com/articles/76036-keeping-your-account-secure (last visited Apr. 30, 2013); *Google Terms of Service*, GOOGLE, http://www.google.com/intl/en/policies/terms/ (last updated Mar. 1, 2012); *User Agreement*, LINKEDIN, http://www.linkedin.com/legal/user-agreement (last updated Jun. 16, 2011).

[48] Social Networking Online Protection Act, H.R. 5050, 112th Cong. (2012), *available at* http://www.govtrack.us/congress/bills/112/hr5050; Social Networking Online Protection Act - Prohibits employers from: (1) requiring or requesting that an employee or applicant for employment provide a user name, password, or any other means for accessing a private email account or personal account on a social networking website; or (2) discharging, disciplining, discriminating against, denying employment or promotion to, or threatening to take any such action against any employee or applicant who refuses to provide such information, files a compliant or institutes a proceeding under this Act, or testifies in any such proceeding.

it has been reintroduced in the current legislative session.[49] Thus, there is still hope for a federal protection statute.

Uncertain of the federal legislation initiatives in regards to this issue, many states have began to enact state legislation prohibiting this practice. Maryland was the first to enact such laws and has been followed by California, Delaware, Illinois, Michigan, New Jersey, New Mexico, and Utah.[50] Many other states are also writing legislation to address the issue but have not yet passed legislation.[51]

Thus, it can be inferred that regardless of whether the legislation is enacted at the State or the Federal level, the trend nationally is to prohibit an employer's ability to request the individual's private social networking usernames and/or passwords. As stated above, this issue will continue to evolve as courts began taking on cases with this issue.

3.1.4 Privacy as it Relates to Public Sector Employment

In a recent survey of 100 Houstonians, respondents were asked two questions.[52] First, they were asked whether an employee could be fired for posting a negative comment about his non-government employer. Regardless of the response to the first question, they were asked why they felt the way that they did. Out of the 100 respondents, 57 answered the first question in the negative. The reasoning most often given was that a person has a constitutional right to free speech. This response shows a misinformed public in regards to what free speech is and what is protected. While the focus of this article is primarily on social networking issues in the context of private employers, this survey shows that it would be beneficial to give at least a brief overview of these same privacy issues within a public employment setting.

3.1.4.1 First Amendment: Freedom of Speech

Generally speaking, freedom of speech is an individual's right to communicate his or her opinions and ideas. This right is granted in the First Amendment of the Constitution which states that Congress shall not make any law that prohibits "the free exercise" of speech or "abridging the freedom of speech."[53] Stated differently the First Amendment places a restriction on laws passed by Congress in that laws cannot restrict the speech of individuals. Note that although the First Amendment only restricts the federal government, it was held in *Gitlow v. New York* that

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[49] Social Networking Online Protection Act, H.R. 537, 113th Cong. (2013), *available at* http://www.govtrack.us/congress/bills/113/hr537

[50] Cal. Lab. Code § 980 (West); Del. Code Ann. tit. 14, § 8103 (West); IL ST CH 820 § 55/10; Md. Code Ann., Lab. & Empl. § 3-712 (West); Mich. Comp. Laws Ann. § 37.273 (West); N.J. Stat. Ann. § 18A:3-30 (West); S.B. 371, 51st Reg. Sess. (N.M. 2013) (enacted); H.B. 100, 2013 Gen. Sess. (Utah 2013) (enacted).

[51] S.B. 1411, Leg., 51st Sess. (Ariz. 2013); H.B. 13-1046, 69th Gen. Assemb., Reg. Sess. (Colo. 2013); H.B. 149, 152nd Gen. Assemb., Reg. Sess. (Ga. 2013); H.B. 713, 2013 Leg., (Haw. 2013); H.F. 127, 85th Gen. Assemb., Reg. Sess. (Iowa 2013); H.B. 2092, 2013 Leg., (Kan. 2013); H.B. 314, 2013 Reg. Sess., (La. 2013); H.B. 838, 126th Leg., (Me. 2013); H.B. 1707, 188th Gen. Ct. (Mass. 2013); H.F. 293, 88th Reg. Sess. (Minn. 2013); H.B. 286, 2013 Leg. Reg. Sess. (Mo. 2013); S.B. 195 (Minn. 2013); L.B. 58 (Neb. 2013); A.B. 181 (Nev. 2013); H.B. 414 (N.H. 2013); A.B. 443 (N.Y. 2013); H.B. 846 (N.C. 2013); S.B. 45 (Ohio 2013); H.B. 2654 (Or. 2013); H.B. 1130 (Pa. 2013); H.B. 5255 (R.I. 2013); H.B. 318 (Tex. 2013); S.B. 7 (Vt. 2013); S.B. 5211 (Wash. 2013); H.B. 2966 (W.Va. 2013); *See also* http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx.

[52] *See* Table 1

[53] U.S. Const. amend. I.

the Fourteenth Amendment extends these restrictions to the states as well.[54] Thus, for a violation of the First Amendment to occur, there must be an action by the government that restricts an individuals rights.[55]

In some circumstances, the courts have allowed restrictions on an individuals speech. In order to determine whether a restriction should be allowed, the courts will balance the need for protection against the government's stated interest.[56] Depending on the type of speech being restricted, the courts will apply either strict scrutiny or intermediate scrutiny.[57] Regardless of which level of scrutiny applies, the government must have some interest in the law being challenged.[58]

However, when the government is acting as an employer, they will have different interests. For example, a government employer, just as any private employer, needs some level of control over its employees in order to provide some level of efficient service.[59] The issue becomes, is it a violation of free speech when a government employer restricts the speech of its employees? This issue was addressed in *Connick v. Myers*.[60]

In *Connick*, an assistant district attorney (respondent), was upset about a transfer she was being assigned to.[61] In response, she created a questionnaire that she gave to a handful of other employees. The questionnaire asked about general office morale, but also about pressure of contributing to public campaigns. The petitioner soon after terminated the respondent for both the refusal of the transfer and for the distribution of the questionnaire, which the petitioner considered an act of subordination. The respondent alleged that her free speech rights were violated because the questionnaire was protected.[62] The petitioner's interest was that the respondent's questionnaire caused a great deal of workplace disruption, undermined the district attorney's authority, and destroyed close working relationships.[63] Thus, the issue in *Connick* was whether the questionnaire was protected free speech.

In holding that the respondent's questionnaire was not protected, the *Connick* Court followed a balancing test, which has been adhered to in recent years as well.[64] This test balances the interests of the public employee as a citizen in commenting upon matters of public concern with the interest of the government as an employer in promoting the efficiency of the public services it performs through its employees.[65] The test itself contains two inquiries. First, did the

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[54] *Gitlow v. People of State of New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 630, 69 L. Ed. 1138 (1925).
[55] Note that a private company may be considered a state actor in some situations. This article will not go into the many details of whether or not a private company is a state actor.
[56] *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).
[57] *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 215-16, 65 S. Ct. 193, 194, 89 L. Ed. 194 (1944); *Craig v. Boren*, 429 U.S. 190, 196-97, 97 S. Ct. 451, 456, 50 L. Ed. 2d 397 (1976).
[58] *Pickering*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).
[59] *Connick v. Myers*, 461 U.S. 138, 151 (1983).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 157.
[65] *Id.*

employee speak as a citizen on a matter of public concern? To determine whether speech regards a public concern, look to the content, form and context. Only speech that is by a public employee in his capacity as a private citizen is protected by the First Amendment.[66] If the answer to this first inquiry is 'no,' then the employee has no First Amendment cause of action. If the answer to the inquiry is 'yes,' then the second inquiry is whether or not the governmental entity had a reason to treat the employee differently than a member of the public.[67] In the absence of governmental justification for differential treatment, it is likely to be a violation of the First Amendment.[68]

In a more recent case, *Dibble v. Chandler*, the court provided a summary on the issue of free speech in a public employment setting.[69] In *Dibble* the court stated:

> "[A] governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. See [Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)]; Pickering v. Bd. of Ed. of Township High School Dist. 205, Will County, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. United States v. Treasury Employees, 513 U.S. 454, 465, 475, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (NTEU)."[70]

3.1.4.2 Comparison To Private Sector Employment

As stated above, for First Amendment protections can only be violated when there is a state action. Generally speaking, a private employer's rules or policies will not constitute a state action.[71] Therefore, a private employee cannot raise a First Amendment violation claim against his employer.

While public employees do enjoy free speech protection guaranteed by the First Amendment, the protection cannot be applied in all circumstances. As stated above, the courts have recognized that government employers still have as much of a right as any private employer may have in employment decisions when employee's speech or actions adversely interfere with their job responsibilities.[72] If a public sector employer can characterize an employee's internet speech as disruptive to the workplace, then the courts tend to treat those public sector employees identical to their private sector counterparts.[73]

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[66] *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006).
[67] *Id.* at 418.
[68] *Id.*
[69] *Dibble v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008).
[70] *Id.*
[71] *Connick v. Myers*, 461 U.S. 138, 143 (1983).
[72] *Id.*
[73] *Garcetti*, 547 U.S. 410.

3.1.5 Privacy: Conclusion

In summary, employees generally should not expect their social network usage to be protected by privacy laws. However, there may be some hope under the SCA. An employer may be allowed to find out the identity of an anonymous social networking user, but the burden is on the employer to show that the anonymous user's name is both material and necessary to their claim. Finally, both Federal and State governments are currently trying to enact laws that will prohibit employers from asking individuals for the usernames and passwords for their private accounts.

3.2 Discipline

3.2.1 Introduction and General Rule

The second issue that this article will attempt to answer is what an employer may be allowed to do when its employees make offensive, derogatory, or any other statements about the company through a social networking site. To reach this answer, this article will look at recent decisions issued by the NLRB for guidance.[74]

One does not have to look too far in the news for an example of an employee who was fired because of some action or statement that they made. One recent example is that of Lindsey Stone of Plymouth, Massachusetts. Ms. Stone was an employee of LIFE, a nonprofit organization that provides supported independent living for adults with disabilities within its condominium communities on Cape Cod, Massachusetts.[75] On November 19, 2012, Ms. Stone visited Arlington National Cemetery as part of a work-sponsored trip. While standing next to a sign that reads "Silence and Respect" at the Tomb of the Unknown Soldier, Ms. Stone was pictured raising her middle finger and pretending to yell.[76] The photo was uploaded to her personal Facebook page, but it quickly became viral. Ms. Stone was roundly criticized for her insensitivity and calls were made to her employer asking that she be fired. Subsequently, LIFE released a statement apologizing for Ms. Stone's actions and ultimately terminated her, as well as the employee who took the photo.[77]

In all U.S. states except Montana, employment is presumed to be "at-will."[78] "At-will" employment is defined as "employment that is usually undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause."[79] Thus, the general rule is that an "at-will" employee may be fired for *any reason* the company chooses, including an employee's Facebook post such as the preceding example.

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[74] *See* Appendix A for information about the NLRB.
[75] LIFE – LIVING INDEPENDENTLY FOREVER, https://www.facebook.com/LIFECapeCod/info (last visited Apr. 27, 2013).
[76] Cavan Sieczkowski, *Lindsey Stone, Plymouth Woman, Takes Photo At Arlington National Cemetery, Causes Facebook Fury*, HUFFINGTON POST (Nov. 27, 2012 12:43 PM), http://www.huffingtonpost.com/2012/11/20/lindsey-stone-facebook-photo-arlington-national-cemetery-unpaid-leave_n_2166842.html.
[77] *We wish to announce that the two employees*, LIFE – LIVING INDEPENDENTLY FOREVER, https://www.facebook.com/LIFECapeCod/posts/536292869732823 (last visited Apr, 27, 2013).
[78] *The At-Will Presumption and Exceptions to the Rule*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/labor/at-will-employment-overview.aspx (last visited Apr, 27, 2013).
[79] BLACK'S LAW DICTIONARY 604, (9th ed. 2009)

3.2.2 "Concerted Activity" Exception

Ms. Stone's firing is but one of many examples of an employee being fired for social network postings.[80] In most cases, the general rule stated above applies and result would be the same. However, recent rulings by the NLRB have carved out narrow exceptions to this general rule.

One such exception is when the employee is engaging in protected concerted activity. This exception is provided for in § 7 of the NLRA which states *"employees shall have the right … to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."*[81] Thus, the first question to answer is what is a "concerted activity?"

Simply stated, a concerted activity is any act by an employee that furthers a group concern, regardless of whether or not the employee acted individually.[82] The current standard used by the court was set forth in *Myers Industries*, which held that *"concerted activities…are those engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."*[83] If an individual's actions are engaged with an intention of *"initiating or inducing group action,"* those individual's actions may be concerted as well.[84]

Two recently decided cases provide guidance on when a concerted activity is present in regards to social networking. The first case, *Hispanics United of Buffalo*, was decided on December 2012 and overturned the termination of five employees.[85] The second case, *Karl Knauz Motors, Inc. v. Becker*, was decided On September 28, 2012, and upheld the termination of Becker.[86] Both cases discussed concerted activities and why it did or did not exist in that particular case.

3.2.2.1 *Hispanics United of Buffalo*: Concerted Activity Exists, Terminations Overturned

On October 12, 2012, five employees were terminated from their positions at Hispanic's United of Buffalo (HUB), a nonprofit organization.[87] Prior to the Facebook post that eventually led to the termination of the five employees, there were several communications between Cruz-Moore and Cole-Rivera involving criticisms of the work performance of the HUB employees.[88] Eventually, Cruz-Moore stated to Cole-Rivera that she was going to speak with HUB's executive

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[80] Christine LaCroix, *Tempted to vent about work online? You could get fired*, AZFAMILY.COM (Jan. 23, 2013 6:40 PM), http://www.azfamily.com/news/Tempted-to-vent-about-work-online-You-could-get-fired-188133881.html; Sarah F. Sullivan, *New England Patriots Cheerleader Caitlin Davis Fired Over Facebook Pictures*, YAHOO! (Nov. 5, 2008), http://voices.yahoo.com/new-england-patriots-cheerleader-caitlin-davis-fired-2161126.html; Rick Borutta, *Waitress Serves Sour Grapes on Facebook, Gets Fired*, CBS NEWS (May 25, 2010 1:29 PM), http://www.cbsnews.com/8301-501465_162-20005894-501465.html;

[81] National Labor Relations Act of 1935 § 7, 29 U.S.C.A. § 157 (West).

[82] *Five Star Transportation v. N.L.R.B.*, 522 F.3d. 46, 51 (2008).

[83] *Meyers Indus*., 281 NLRB 882 (1986) (emphasis added).

[84] *Whittaker Corp.*, 289 NLRB 933, 940 (1988); *Owens-Corning Fiberglas Corp. v. N.L.R.B.*, 407 F.2d 1357, 1365 (4th Cir. 1969); *Salt River Valley Water Users' Ass'n v. N.L.R.B.*, 206 F.2d 325 (9th Cir. 1953).

[85] *Hispanics United of Buffalo, Inc. v. Ortiz*, 2011 WL 3894520; 3-CA-27872 (2011).

[86] *Karl Knauz Motors, Inc. v. Becker*, 2011 WL 4499437; 13-CA-46452 (2011).

[87] *Hispanics United of Buffalo, Inc.*, 2011 WL 3894520; 3-CA-27872 (2011).

[88] *Id.*

director and raise these criticisms with him.[89] In response, Cole-Rivera posted to Facebook the following message.[90]

> "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do u feel?"[91]

In response to this posting, several coworkers posted various messages.[92] Cruz-Rivera complained to HUB's executive director about the post and advocated for the termination of the employees.[93] On the next workday, each of the five employees who were involved in the Facebook message thread were called into the executive director's office and terminated.[94] Respondent conceded that the Facebook postings were the sole reason for the terminations.[95]

In deciding the case, the Administrative Law Judge (ALJ) applied the Myers Standard of concerted activity stated above.[96] The ALJ stated the Facebook postings were in response to the criticisms of Cruz-Moore.[97] It was held that Cole-Rivera's Facebook postings constituted a concerted activity because the posts were the first step "towards taking group action to defend themselves against the accusations the could reasonably believe Cruz-Moore was going to make to management."[98] Therefore, the postings are protected under the NRLA.[99]

3.2.2.2 *Knauz BMW v. Becker*: No Concerted Activity, Termination Upheld

This case arose when Robert Becker was terminated from his sales position at Karl Knauz Motors.[100] There were two separate incidents leading to Becker's termination. The first incident occurred when an one of Becker's co-workers had allowed a 13 year-old boy to test drive a Land Rover. On the test drive, the 13 year-old boy drove the Land Rover into a nearby pond. Becker snapped a few picture of the submerged vehicle and later posted them on his Facebook wall. Along with each photo, Becker made comments. On the first photo, Becker commented:

> "This is your car: This is your car on drugs."[101]

On the second photo, Becker commented:

> "This is what happens when you let 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

[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Karl Knauz Motors, Inc.*, 2011 WL 4499437; 13-CA-46452 (2011).
[101] *Id.*

> his father's foot and into the pond in all of about 4 seconds and destroys a %50,000 truck. OOOPS!"[102]

Additional comments on the photos were made by friends and co-workers of Becker.

The second incident leading up to Becker's termination revolved around a company sponsored event, the Ultimate Driving Event. The purpose of the event was to introduce a redesigned BMW 5 Series automobile, which was referred to as the "bread and butter" of the BMW product line.[103] Prior to the event, Knauz Motors held an employee meeting where the salespeople learned that the customers who come to the event were going to be served hot dogs, cookies, and chips. Upon learning about the planned menu for the night, Becker, as well as other salespeople, stated their disapproval of the menu. In their view, a BMW is a luxury brand and the people who purchase them have certain expectations which does not include hot dogs. As salespeople, they were partly dependent on commissions and they were concerned that serving hot dogs would hurt their paychecks. The fear was that people would not be as inclined to purchase a BMW if the customer's expectations were not met. Nevertheless, Knauz Motors stuck with the menu and served hot dogs, chips, and cookies.

On the day of the event, Becker took pictures of the hot dog stand and posted them on his Facebook wall. Just as he did with the pictures of the submerged Land Rover, Becker made comments about the photos of the event. Specifically, Becker wrote:

> "I was happy to see that Knauz went 'All Out' for the most important launch of a new BMW in years … the new 5 series. A car that will generate tens in millions of dollars in revenues for Knauz over the next few years. The small 8 oz. bags of chips, and the $2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were a nice touch … but to top it all off … the Hot Dog Cart. Where our clients could attain a over cooked wiener and a stale bunn."[104]

Shortly after these postings, Becker was terminated and he subsequently filed suit alleging that his Facebook postings were a protected concerted activity.

The court looked at each incident as its own issue and applied the Meyers Standard to each one. First, in regards to the submerged vehicle, the court found that there was not a concerted activity. In reaching this conclusion, the court found that the photo posted by Becker was posted as a joke.[105] There was no discussion amongst the employees that would give rise to this exception. As such, the photo of the submerged vehicle was held to not be a concerted activity and therefore Becker was afforded no protection.[106]

Second, in regards to the event's menu, the court found that a concerted activity did exist. The reasoning behind this conclusion was that prior to the event, Becker and other coworkers had voiced their dislike of the menu choice and their concern about it affecting their paychecks.

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[102] *Karl Knauz Motors, Inc*., 358 NLRB No. 164 (Sept. 28, 2012).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

Because the photos advanced the group's concerns, the court held that it was a protected concerted activity.

Although a protected concerted activity was found, the court still upheld Becker's termination. This was simply because the sole reason given for his termination was the submerged vehicle photo, which was not a concerted activity.

From these two cases, it can be seen that the distinction between an activity being classified as concerted or not hinges on the involvement of other employees and a common concern among them. Thus, if an individual acts on his own behalf without the involvement of other employees, as in *Knauz Motors*, then a concerted activity does not exist. However, if the actions are for a common group concern, as in *Hispanics United*, then there is a concerted activity, even if acting individually.

3.2.3 Losing Protected Status: The Atlantic Steel Four-Factor Test and The Jefferson Standard

As stated in *Hispanics United*, if an employee's conduct is deemed a concerted activity, it is afforded the protection on the NLRB.[107] However, this protected status may be lost when the employee's conduct is egregious that it does not warrant protection.[108] When the protected status is lost, an employee engaging in an otherwise protected activity may still be terminated.[109] Thus, the question to answer is how does a concerted activity lose its protected status?

Historically, there are two dominant approaches that the courts have taken to determine whether protection has been lost. The first approach, developed in 1953, is called the Jefferson Standard.[110] Under this approach, protection can be lost whenever the statements were made at a critical time in the initiation of the company's business, those statements were unrelated to any ongoing labor dispute, and they constituted a sharp, public, disparaging attack upon the quality of a companies product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income.[111] In other words, under the Jefferson Standard, the inquiry is whether the communication is related to an ongoing labor dispute and whether it is not so disloyal, reckless, or maliciously untrue as to lose the protection or the NLRA.[112]

The second approach utilizes a four-factor test that was demonstrated in *Atlantic Steel v. Chastain*.[113] The four factors under this approach are:

(1) the place of the discussion;

(2) the subject matter of the discussion;

(3) the nature of the employee's outburst; and

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[107] *Hispanics United of Buffalo, Inc.*, 2011 WL 3894520; 3-CA-27872 (2011).
[108] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979)
[109] *Id.*
[110] *N.L.R.B. v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 74 S. Ct. 172, 98 L. Ed. 195 (1953).
[111] *Id.*
[112] Memorandum OM 12-59; http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd
[113] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979)

(4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.[114]

The application of these two approaches depends on the situation. For example, if the situation involves employee communications that are meant as an appeal to third parties regarding a labor dispute, the Jefferson Standard usually applies. On the other hand, if the dispute involves communications between employees and supervisors the Atlantic Steel Factors will be applied and it will specifically focus on whether the communications would disrupt or undermine workplace discipline.

Recently, the NLRB stated that neither the Atlantic Steel Factors nor the Jefferson Standard precisely addressed the new age of social networking and the nature of employee conduct that was sufficiently opprobrious to warrant losing protection under the NLRA.[115] This is because in the social networking age we now have, an employee's complaints about management on a social networking site may not only be a communication directed at third parties, but it may also be directed at management. Additionally, that communication may affect the workplace. As such, there is a possibility that both approaches must be used in conjunction with each other in deciding whether protection is lost.[116] This approach is sometimes referred to as a "modified" test.[117] An example of this "modified" test is demonstrated below in *Triple Play*.[118]

3.2.3.1 *Triple Play Sports Bar & Grille*: "Modified" Test

In *Triple Play*, two employees were terminated after a Facebook discussion which also involved a customer. The two employees were Sanzone and Spinella. The Facebook discussion revolved around an issue at work about taxes and how their manager failed to file proper paperwork resulting in the employees owing the state money. The discussion, on its whole, contained a good amount of profanities. The entire conversation and each individuals relationship is as follows:

> Jamie LaFrance (former employee): "Maybe 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!!!!" (emphasis in original).
>
> "Ken DeSantis (customer): You owe them money...that's f***ed up.
>
> Danielle Marie Parent (employee): I F*****G OWE MONEY TOO!
>
> LaFrance: The state. Not Triple Play. I would never give that place a penny of my money. Ralph f***ed up the paperwork...as per usual.

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[114] *Id.*
[115] *Karl Knauz Motors, Inc*., 358 NLRB No. 164 (Sept. 28, 2012).
[116] *Three d, LLC d/b/a Triple Play Sports Bar & Grille & Jillian Sanzone, an Individual Three d, LLC d/b/a Triple Play Sports Bar & Grille & Vincent Spinella, an Individual*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).
[117] *Id.*
[118] *Id.*

De Santis: Yeah I really don't go to that place anymore.

LaFrance: It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it because he still owes me about 2000 in paychecks.

LaFrance: We shouldn't have to pay it. It's every employee there that it's happening to.

DeSantis: You better get that money...that's bull***t if that's the case I'm sure he did it to other people too.

Parent: Let me know what the board says because I owe $323 and I've never owed.

LaFrance: I'm already getting my 2000 after writing to the labor board and them investigating but now I find out he f***ed up my taxes and I owe the state a bunch. Grrr.

Parent: I mentioned it to him and he said that we should want to owe.

LaFrance: Hahahaha he's such a shady little man. He probably pocketed it all from all our paychecks. I've never owed a penny in my life till I worked for him. That goodness I got outta there.

Jillian Sanzone: I owe too. Such an a**hole.

Parent: Yeah me neither, I told him we will be discussing it at the meeting.

Sarah Baumbach (employee): I have never had to owe money at any jobs...I hope I won't have to at TP...probably will have to seeing as everyone else does!

LaFrance: Well discuss good because I won't be there to hear it. And let me know what his excuse is.

Jonathan Feeley (customer): And they're way too expensive."[119]

The first issue the court had to decide was who was involved in the conversation. First, Sanzone made the comment "I owe too. Such an a**hole." and this comment was enough for him to become involved in the conversation. In fact, the court stated that the single comment was sufficient to show clear involvement in the conversation.[120]

However, unlike Sanzone, Spinella did not actually make a comment. Instead, he simply "liked" the initial post. Thus, the court had to decide whether Spinella was a part of the discussion by simply liking a post? Here, the court held that when a person "likes" a post, it is enough to constitute participation in the conversation.[121] The court interpreted a "like" to be an assent to the comments being made.[122] This interpretation fits closely with Facebook's own definition of a like, which states that a "like" is an easy way to let someone know that you enjoy

[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*

a comment, without actually leaving a comment.[123] Spinella's comment in essence was "Spinella likes this" and it referred to the entire conversation. Thus, Spinella was also a part of the discussion.[124]

With the first issue resolved, the court then had to determine whether or not there was a concerted activity. I won't go into detail here since we just discussed what a concerted activity is and this case did not spend a great deal of time on it either. Suffice it to say that the court held that a concerted activity was present because it was a discussion that furthered a group concern, that is, employment taxes. The court also noted that as a general rule, discussions in regards to employment tax issues are a concerted activity.[125] With the determination that a concerted activity exists, the court then began to analyze whether or not those concerted activities lost their protection.

As stated above, the Atlantic Steel factors are applied to communications or discussions between employees and employers.[126] Despite Sanzone's assertion that she stated the word "a**hole" as a reference to the fact that she owed money to the state, the court said that is was more likely referring to the manager, Ralph.[127] Likewise, Spinella's "like" was in reference to the entire Facebook conversation, which also referred to the manager, Ralph. Therefore, the discussion was an issue between employee and employer, and as such the Atlantic Steel factors are applicable to both comments. The same comments also bring about an ongoing labor issue, employment taxes.[128] Because it's an ongoing labor issue, the Jefferson Standard is also applicable.[129] Thus, the court in *Triple Play* applied the "modified" test to determine whether protection was lost.

Under the first factor, what the courts are generally looking for is whether the discussion disrupted the workplace environment.[130] Here, the court found that it did not. The discussion took place after hours and away from Triple Play and as such, it had little (if any) opportunity to disrupt the workplace environment.[131]

Triple Play argued that because a customer was also involved in the conversation, that was a disruption.[132] However, the court stated that short impulsive episodes when customers are present is not sufficient to remove protection when there is no evidence of an actual customer disruption.[133] This statement followed precedent set in other cases.[134] Thus, this first factor weighed in favor of Sanzone and Spinella.

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[123] *Like*, FACEBOOK, https://www.facebook.com/help/452446998120360/ (last visited May 5, 2013).
[124] *Triple Play*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).
[125] *Id.*
[126] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).
[127] *Triple Play*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).
[128] *Id.*
[129] *N.L.R.B. v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 74 S. Ct. 172, 98 L. Ed. 195 (1953).
[130] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).
[131] *Triple Play*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).
[132] *Id.*
[133] *Id.*
[134] *Laguardia Assoc., LLP*, 357 NLRB No. 95 (Sept. 30, 2011).

Under the second factor, the courts are looking at the subject matter of the discussion.[135] Here, as stated earlier, the subject matter of the discussion involved the employer's calculation of taxes owed by the employees on their earnings and the fact that many owed state income taxes when filing their returns. In stating that this factor weighed in favor of the Sanzone and Spinella, the court cited *Plaza Auto Center*.[136] In that case the court held that discussions pertaining to compensation that involve uncontrolled comments are protected concerted activity.[137] That is what the court found here as well.

Under the third factor, the courts look to the nature of the employees outburst.[138] Generally, the courts are looking at who the comments are geared towards, what was the extent of the outburst, was the discussion heated, was it defiant, and other similar questions. The court first noted that the discussion itself did not actually involve the employer and the comments themselves were not really directed at a specific person. In other words, there was no direct communication between the employees and the employers. Second, the court noted that there were no threats, no acts of insubordination, and no physically intimidating conduct.

The court also spent some time discussing the use of profanities. In citing several cases, the *Triple Play* court upheld the a general rule that profane language by itself is not enough to warrant the loss of protection.[139] In fact, the *Atlantic Steel* case recognized that strong language that would be wholly inappropriate in other contexts might be used within "the heat of discussion" and in fact, it usually is.[140] For profanity to remove the protection of the statute, it would need to be accompanied by an attempt to undermine an employer's authority.[141] In other words, a single profane outburst does not deny the protection unless those comments are "so violent or of such serious character as to render the employee unfit for further service."[142] Here, that simply was not the case. There was no violence in the discussion. Instead, Sanzone used one simple profane word to describe the manager within a Facebook discussion among coworkers and friends.

For the forgoing reasons, the court held that the third factor weighed in favor of Sanzone and Spinella.[143]

Finally, the fourth factor, asks "was the outburst provoked by unfair labor practices?"[144] Here, there was no contention that this was the case. Therefore, in *Triple Play*, this factor weighed towards the employer. However, the court held that because the first three factors all weighed in favor of Sanzone and Spinella, protection was not lost under the Atlantic Steel factors.[145]

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[135] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).
[136] *In Re Plaza Auto Ctr., Inc*., 355 NLRB No. 85 (Aug. 16, 2010).
[137] *Id.*
[138] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).
[139] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979); *Triple Play*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).
[140] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).
[141] *Id.*
[142] *Triple Play*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).
[143] *Id.*
[144] *Atl. Steel Co.*, 245 NLRB 814, 816 (1979).
[145] *Triple Play*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).

The second approach that the *Triple Play* court applied was the Jefferson Standard. Here, the employer contended that the comments lost the act's protection in that they were disparaging and disloyal.[146] However, in order for the statements to lose protection, the public criticism must have a malicious intent.[147] A statement has malicious intent when it is made with knowledge of its falsity or with reckless disregard for its truth or falsity.[148] Here, it was only shown that the statements were false, misleading, or inaccurate. In other words, it was not shown that the employees had a malicious motive.[149]

Secondly, the statements were not made in a public fashion. In the context of the Jefferson Standard, public fashion is generally thought of as a deliberate dissemination of the statements through the news media or as part of a campaign specifically directed to the public at-large.[150] The courts have not yet expanded the reach of public fashion to include social networking.

Because the requirements to remove protection under the Jefferson Standard were not met, the employers were unsuccessful in applying the Jefferson Standard and the concerted activities remained protected.

In conclusion, the *Triple Play* court held that Sanzone and Spinella were engaged in a protected concerted activity. Further, the protection was not lost under the "modified" test. As such, Sanzone and Spinella were wrongfully terminated.

3.2.4 Discipline: Conclusion

In summary, the general rule is that an at-will employee may be terminated for any reason. However, if the reason for the termination is a protected concerted activity under the *Myers* standard, that termination would be a violation of the NLRA. However, under certain circumstances, protection may be lost. To determine if protection is lost, the courts will apply either the Atlantic Steel four-factor test, the Jefferson Standard, or a "modified" test. If the protection is lost under any of these approaches, then the employee may be terminated without violating the NLRA.

3.3 Setting Employee Policies

The third and final issue this article will explore is how a company's policies should address social networking usage. Specifically, what guidance is available for developing those policies? And, how can a company's policy be maximized to limit risks? To accomplish this, this article will look to recent guidance issued by the NLRB on the topic.

A social networking policy serves the interests of the company by providing some mitigation of the risks that companies face in regards to social networking. First, by implementing a sound policy, the company has set the expectations for the employees. Second,

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[146] *Id.*
[147] *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250 (2007).
[148] *Id.*
[149] *Triple Play*, 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).
[150] *Mastec Advanced Technologies*, 357 NLRB No. 17 (July 21, 2011); *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1251, 1253-1254 (2007).

in the event of litigation resulting from social networking issues, a sound policy provides the employer with more leverage than they would otherwise have. Thus, a company should invest some time in order to develop a sound policy.

Thankfully, the NLRB has provided some guidance on developing a social networking policy. This guidance was given in Memorandum OM 12-59.[151] The memo itself looks at the policies of six different companies and points out flaws in those policies. In addition to the analysis of those policies, the memo also provides a full sample of an effective social networking policy.[152]

As this paper has discussed, employers are not allowed to interfere, restrict, or otherwise limit an employees right to engage in protected concerted activities.[153] As such, any policy that the company chooses to implement must be looked at closely to ensure that it does not surpass those bounds. The biggest issue that companies face in crafting an effective social networking policy is making overbroad policies that violate the protected concerted activity rights.

While this is still a relatively new area being addressed by the NLRB, there has been one recent decision issued by the courts that does provide guidance. That decision came in September 2012 in the *Costco v. NLRB* case.[154] There, the court found that Costco had violated Section 8(a)(1) by maintaining certain rules within its policies. In rejecting several of the policy rules, the NLRB stated that the rules were "overly broad" and that employees' rights would be greatly effected.

One specific rule that the NLRB rejected was one that prohibited employees from posting online statements "that could harm the company or any person's reputation."[155] The rule provided that:

> "Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment."[156]

In making the determination that this rule was a violation, the court uses the standard set forth in *Lafayette Park Hotel*.[157] There, the court states that the appropriate inquiry is "whether the rule would *reasonably tend to chill* employees in the exercise of their Section 7 rights."[158] The rule is considered unlawful if it explicitly restricts protected concerted activity rights.[159] If it

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[151] General Counsel Memorandum OM 12-59 (May 30, 2012); available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd.
[152] *Id.*
[153] National Labor Relations Act of 1935 § 8(a)(1), 29 U.S.C.A. § 158(a)(1) (West).
[154] *Costco Wholesale Corp*., 358 NLRB No. 106 (Sept. 7, 2012).
[155] *Id.*
[156] *Id.*
[157] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).
[158] *Id.*
[159] *Martin Luther Mem'l Home, Inc*., 343 NLRB 646 (2004).

does not explicitly restrict those rights, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[160]

In ruling against Costco, the court stated that the rule was overly broad because it was a *complete prohibition* against any damaging or defamatory statement.[161] In other words, there were no exclusions for protected concerted activities. Note, however, that the court did not state that if there were such an exclusionary statement, the rule would be valid. Thus, it is unclear at this time what the result might be if it were there.

In response to the emerging issue discussed in section 3.1.3 above, it is this author's opinion that a company should also maintain a policy that prohibits any employee from asking another employee for their social networking usernames and/or passwords. This policy should apply generally to all employees, but more specifically managers, whether in a supervisory role or a hiring role. A policy such as this could potentially help an employer in the event that one of its employees violates this policy, causing the employer to be sued.

In conclusion, a sound policy can help a company should a social networking issue arise. However, in adopting a policy, the company should be mindful to not overstep the bounds of the law. To ensure a policy is accordance with the law, the company should look to the guidance issued by the NLRA. Finally, as a general comment, once a policy is in place, the company should continue to monitor for changes and new guidance as this is an emerging issue.

4 CONCLUSION

This article has attempted to address three issues that are faced by private companies on a daily basis.

First, we discussed a few of the privacy issues that arise as a result of social networking. Generally, employees should not expect their social network usage to be protected by privacy laws. However, there may be some hope under the SCA. An employer may be allowed to find out the identity of an anonymous social networking user, but the burden is on the employer to show that the anonymous user's name is both material and necessary to their claim. Finally, both Federal and State governments are currently trying to enact laws that will prohibit employers from asking individuals for the usernames and passwords for their private accounts.

Second, we discussed what disciplinary actions an employer may take against an employee who has harmed them in some way via social networking. The general rule is that an at-will employee may be terminated for any reason. However, if the reason for the termination is a protected concerted activity under the Myers Standard, that termination would be a violation of the NLRA. Under certain circumstances, that protection may be lost. To determine if protection is lost, the courts will apply either the Atlantic Steel Factors, the Jefferson Standard, or a

[160] *Id.*
[161] *Costco Wholesale Corp*., 358 NLRB No. 106 (Sept. 7, 2012).

"modified" test. If the protection is lost under any of these approaches, then the employee may be terminated without violating the NLRA.

Third, we discussed the importance of creating a sound social networking policy. A sound policy can help a company should a social networking issue arise. However, in adopting a policy, the company should be mindful to not overstep the bounds of the law. To ensure a policy is accordance with the law, the company should look to the guidance issued by the NLRA. Finally, as a general comment, once a policy is in place, the company should continue to monitor for changes and new guidance as this is an emerging issue.

In conclusion, while I have attempted to provide a thorough analysis of the issues presented, this article should be thought of as a fluid document. Many of the issues discussed are currently in the courts being decided. Therefore, the analysis is subject to change.

5.1 Appendix A: NLRB

5.1.1 What is the NLRB?

The National Labor Relations Board's (NLRB) purpose is to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.[162] These purposes are fulfilled by five functions: conduct elections, investigate charges, facilitate settlements, decide cases, and enforce orders.[163]

The jurisdiction of the NLRB is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with "Right to Work" laws.[164] This article will only be addressing issues where the NLRB has jurisdiction.

5.1.2 Rules

In 1935, Congress enacted the National Labor Relations Act (NLRA) "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[165]

The two sections that are applicable to this article are Sections 7 and 8. Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... (Emphasis added)*".[166]

5.1.3 Guidance

The NLRB offers guidance through various forms. Generally, the guidance is released on the Agency's website. The forms of guidance include: Reports, Rules & Regulations, General Counsel Memos, Operations-Management Memos, Public Notices, Manuals, and Policies.[167] While this memos are not binding precedent on an employer, it should nevertheless be considered strong guidance as to how an employer should act.

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[162] *What We Do*, NLRB, http://www.nlrb.gov/what-we-do (last visited Apr. 27, 2013).
[163] *Id.*
[164] *Jurisdictional Standards*, NLRB, http://www.nlrb.gov/rights-we-protect/jurisdictional-standards (last visited Apr. 27, 2013).
[165] *National Labor Relations Act*, NLRB, http://www.nlrb.gov/national-labor-relations-act (last visited Apr. 27, 2013).
[166] *Hispanics United of Buffalo, Inc.*, 2011 WL 3894520; 3-CA-27872 (2011).
[167] *Reports & Guidance*, NLRB, http://www.nlrb.gov/reports-guidance (last visited Apr. 27, 2013).

5.2 Survey of 100 Currently Employed Houstonians in Regards to Social Networking Usage and Employment

The following survey was conducted by this author. The survey took place over the span of one week outside of the Harris County Civil Court. Survey respondents included both professionals, laborers, as well as unemployed persons. All respondents were over the age of 18.

Question 1*:* Can an employee could be fired for posting a negative comment about his non-government employer?

	Yes	**No**
Female	23	27
Male	34	16
Total	57	43

Question 2a*:* If you responded "yes" to the first question, why do you feel that this is the case?

Answer	**Number**
Free speech	34
Statement not made at work; It's my own time.	9
It just sounds wrong	7
Other	7

Question 2b*:* If you responded "no" to the first question, why do you feel that this is the case?

Answer	**Number**
Protection of company reputation	22
Not protected	13
Other	8