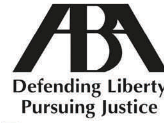

*Using Social Media: An Individual Gripe or Concerted Activity**

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Using Social Media:

An Individual Gripe or Concerted Activity?

SOCIAL MEDIA AND THE NLRA: REPORT OF THE OFFICE OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA OM MEMO 11-74

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INTRODUCTION

NLRB on the Cutting Edge

The explosive use of social media has brought the NLRA to non-union workplaces at a rapid pace. Employees who use their online accounts -- often from outside the workplace -- to speak (and complain) with friends and colleagues about work may suddenly find themselves facing discipline. As more employees seek redress from adverse employment actions for engaging in online communications, the NLRB has experienced a growth in social media cases. Employees and employers are learning that the NLRA is not just about unions and also affords protections for activities among employees related to terms and conditions of employment other than for union activity.

Social media use impacts (at least) three areas of the law under the NLRA: protected concerted activity, employer confidentiality and social media policies, and surveillance.[1] Employees, like all people, "talk" about themselves, including about their work lives, online in what has become a semi-public forum. As online activity is readily discovered by employers, more employees have been disciplined for their online postings. Whether such postings online are activities protected by Section 7, and ensuing disciplines unlawful, is a growing area of analysis. Employers have responded to social media by promulgating rules to restrict employees from "publishing" various types of information about their workplaces in cyberspace. Such rules may unlawfully restrict Section 7 rights. Finally, does an employer who confronts an employee with knowledge of online postings create the impression of surveillance or engage in surveillance in violation of the Act.

Since April 2011, the Acting General Counsel (GC) has required that all social media cases be submitted to the Division of Advice. GC Mem. OM 11-11. As of that

[1]Most of the social media communications at issue in GC Mem. OM 11-74 involve employees posting from outside the workplace with their own property. However, property rights and the discriminatory enforcement of solicitation policies at the workplace is a very important issue also raised by social media. Hopefully, the GC will soon find an appropriate vehicle with which to revisit *Register Guard,* 351 NLRB 1110 (2007).

edict, about 75 cases have been forwarded to that office. *NLRB Press Release 1/25/12.* Advice has issued numerous memoranda, some of which have authorized complaint, addressing whether social media activity and employer conduct run afoul of the Act. To date, three ALJ decisions addressing Facebook postings have issued, but no companion Board decisions. All three ALJ decisions are pending before the Board. This paper will focus on how the GC and the three ALJ decisions have applied existing law to determine whether activity is concerted.

I. **The NLRB Applies Long-Standing Legal Principles to the New World of Communication**

A. Background

While the social media explosion is new, there may not be a lot new here in terms of legal principles. As is evident from the GC August 18, 2011 report, which describes 14 cases considered by Advice, the GC is applying long-standing principles from existing Board law to analyze charges filed related to communications via social media.[2] GC Mem. OM 11-74.

Many of the social media cases being sent to Advice involve employees' individual postings in cyberspace about their jobs that resulted in an adverse work action against them. Often the discipline stems from application of a work rule against such postings. Most of the social media cases related to adverse employment practices turn on whether an employee's online posts constitute protected concerted activity. Under Section 7, "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…." It is a violation of Section 8(a)(1) for an employer to discipline an employee for engaging in protected concerted activity.

[2] On January 24, 2012, the General Counsel issued another memorandum in which it summarizes 14 Advice memoranda involving issues around social media. GC Mem. 12-31. It arrived too late for consideration for this paper, although I have noted here some of the same Advice memoranda summarized therein.

The Board has already established that the medium for communication is not a determining factor. See *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997) (finding that an employee's email to his employer and co-workers was concerted activity). Therefore, there is no doubt that the Board, assuming the elements of protected concerted activity are met, will find communications on social media sites protected. And, in fact, has already done so in a case before it on default judgment. See *Bay Sys Technologies, LLC,* 357 NLRB No. 28 (2011) (finding unlawful discipline issued to employees who complained to one another on Facebook about paychecks).

Employees at a unionized workplace are also being disciplined for use of social media and subject to overly broad rules. However, often the postings about working conditions in a unionized workplace will readily be viewed as union activity or protected, as the actions are tied to collectively bargained rights. Finding that an employer violated the Act by discipline a lone employee who posted about her hours, for example, may not be as difficult. See *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984) (individual employee's action to enforce terms of a collective bargaining agreement concerted activity).

B. Facebook Communications as PCA: The General Counsel's Analytical Steps

A review of the August 2011 GC Memorandum demonstrates how the GC analyzes social media cases involving adverse employment action against an employee for a posting on a social media website. See GC Mem. OM 11-74, passim. First, a determination is made as to whether the communication is concerted under the *Meyers* cases.[3] In *Meyers*, the Board held that an activity is concerted when an employee acts, "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497.

[3] *Meyers Industries (Meyers I*), 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Next the GC determines whether the content of the communications are protected, that is, whether they involve working conditions. The GC noted that the determination of whether the communications involve protected activity does not change if the communications occurs via the internet. GC 11-74, p. 3. See *Timekeeping Systems, Inc*. 323 NLRB 244 (1997). Next the GC determines whether the employee lost the protection of the Act because of the nature of the communications. Here, the GC applies the test under *Atlantic Steel Co.* as to whether the communications or postings were so opprobrious so as to deprive the employee of protection. The GC will also consider, if relevant, whether the statements are unprotected under *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard)*, 346 U.S. 464 (1953) because they demonstrate disloyalty and or disparage the company or product.

C. Concerted Activity in Cyberspace: Where is the GC Drawing the Line?

In order for a social media communication of an individual in a nonunion setting to be protected under the Act it must be concerted. Long before the advent of Facebook the Board struggled to determine whether an employee's activity was concerted. However, cyberspace has presented challenges for analyzing concerted activity, as it involves conduct less readily identifiable as concerted than do encounters at the water cooler, meetings, handing out leaflets and circulating petitions among coworkers at the workplace. How is the General Counsel drawing the line in determining conduct is concerted when evaluating communications via social media?

<u>Relevant legal principles for analyzing concerted activity on social media sites</u>.

The Board in the *Meyers* cases held that a single individual complaint even if it raised a group concern was not necessarily concerted action. However, an activity is concerted when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I* at 497. Moreover, the authority can be specifically authorized in the formal sense or otherwise. *Meyers II* at 886. Thus, an employee may be engaged in protected concerted activity even when he

or she acts alone. Concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.” *Worldmark by Wyndham*, 357 NLRB No.104 at p. 2 (2011), *quoting Meyers I.*

Even in the absence of overt authorization, a lone action may also be concerted when it is a “logical outgrowth” of earlier concerted activity. See e.g., *Salisbury Hotel,* 283 NLRB 685 (1987) (even in absence of explicit authorization from co-workers, an employee’s call to the Department of Labor over lunch breaks found concerted when employees had discussed it previously).

Finally, the Board has long recognized that concerted activity includes activity that begins with only “a speaker and a listener,” for such activity is an indispensable preliminary step to employee self organization. *Whittaker Corp* 289 NLRB 933 (1988); see also *KNTV, Inc.*, 319 NLRB 447, 450 (1995) (“concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action”). Furthermore, the object of inducing group action need not be expressed. *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976).

The Board in applying *Meyers* has cautioned in limiting the definition of concerted activity. Rather it stated, “we acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law.” The Board goes on to say, “the question of whether an employee engaged in concerted activity is, at its heart, a factual one .” *Meyers II* at 496-497. It is this factual analysis that is now adapted to communications via social media.

II. <u>The GC Advice Memoranda</u>

A. Identifying Protected Concerted Activity.

1. <u>No protected activity.</u>

Advice readily dismisses social media cases where the postings or tweets do not concern working conditions. See e.g., *Lee Enterprises d/b/a Arizona Daily Star*, OGC

Advice Memo, 28-CA-23267 (April 21, 2011) (GC did not find newspaper reporter's tweets to be protected concerted activity where they included merely inappropriate and offensive content regarding crime in the city and news staff, and did not concern working conditions); *Children's National Medical Center,* OGC Advice Memo, 5-CA-036658 (November 14, 2011) (finding employee's Facebook posts complaining about a co-worker making sucking sounds with his teeth not protected because did not concern terms and conditions of employment).

2. Protected Activity, but is it Concerted?

The more difficult problem is determining whether communications via social media that do concern working conditions are concerted.

a. *A call to action.*

Where it is clear that employees are using social media to discuss working conditions among coworkers the GC has found concerted activity and authorized complaints, assuming the communications are also protected. See GC Mem. OM 11-74 at 2-3, revealed to be *Hispanics United of Buffalo,* 3-CA-27872. This is true even if there is no call to group action, but only complaining. In this case, the employer conceded that the sole reason for its terminating five employees were their postings on Facebook about a co-workers criticism of their work. The postings were a response to a consultant's complaints about their work and encompassed a discussion about the difficulties of their job. The GC found the discussion "a textbook example of concerted activity, even though it transpired on a social network platform." GC Mem. OM 11-74 at 3. The GC found that one of the employee's initial postings constituted a survey of her coworkers on the issue for an anticipated discussion with the employer about working conditions.

In the cases summarized for the GC August memo, where Advice authorized complaint, there was either an interactive conversation on Facebook or the comments posted by an individual reflected a prior discussion with coworkers. See e.g. GC Mem. 11-74, cases subsequently identified as *Triple Play Sports Bar,* 34-CA-12915) (Facebook conversation among coworkers); *Hispanics United of Buffalo,* 3-CA-27872

(Facebook conversation among coworkers); *Karl Knauz BMW*, 13 CA-46452 (postings were logical outgrowth of prior discussions).

b. Individual Griping?

But even when content concerns working conditions, the General Counsel frequently has not found Facebook postings to be concerted activity. This is particularly true when coworkers do not respond to a Facebook post. In these cases, the GC finds such posts to be individual gripes and not protected. See, e.g., *Rural Metro,* OGC Advice Memo, 25-CA-31802 (June 29, 2011) (emergency medical transport employees' posting on a U.S. Senator's Facebook wall describing below average pay was found not to be concerted when employee did not discuss the posting with coworkers); *JT's Porch Saloon & Eatery*, OGC Advice Memo, 13-CA-46689 (July 7, 2011) (bartender not engaged in concerted activity when posted on Facebook that had not had a raise in 5 years and was doing the waitresses' work where no evidence spoke to coworkers about posting or that they responded). Yet, in both *Rural Metro* and *JT's Porch Saloon*, there was evidence that employees had discussed the very working conditions that were the subject of the posting, albeit at an earlier time. The GC, however, did not find evidence that the postings were a "logical outgrowth" of earlier concerted activity under *Meyer* and its progeny.

c. Concerted activity on Facebook or group gripe session?

What if there is evidence that coworkers responded to a post about working conditions? That is, more than postings from a single worker are on the "wall." Even here the GC has not necessarily found the communications to be protected concerted activity. Rather, the GC has evaluated the substance of the responses, as well as what the employees intended by their responses. In several instances the GC found that the content of the responses was not indicative of concerted activity. See e.g., *Sagepoint Financial, Inc.*, OGC Advice Memo, 28-CA-23441 (August 9, 2011) (employee postings about his supervisor's preferential treatment found to be personal gripe despite coworkers responding to the post); *Helser Industries*, OGC Advice Memo, 19-CA-33145 (August 22, 2011) (same).

This approach may prematurely cut off the possibility of concerted activity over working conditions. Thus, in *Wal-Mart*, Case 17-CA-25030 (July 19, 2011), the employer disciplined an employee who had posted on his Facebook page complaints about his supervisor, including being “chewed out” because coworkers “put stuff in the wrong spot”. His comments were limited to his Facebook friends, which were composed of co-workers. His post drew responses from several co-workers. Advice determined that there was insufficient evidence that the employee was engaged in concerted activity and that the Facebook postings were an expression of an individual gripe. In reaching this conclusion, Advice reasoned that the Facebook postings did not contain language suggesting a call to group action nor did any of the responses appear to interpret the employee’s comment as such.

But, this was a group gripe session. Presumably, the employees at Wal-Mart share working conditions and issues over supervision and stocking shelves correctly. By not authorizing complaint, is the GC prematurely cutting off a possible inducement to action? Would the result have been different if the employees had been speaking together in the store and were overheard by a manager? Perhaps.

d. Drawing the line between concerted and individual activity.

The GC’s refusal to authorize complaint in numerous instances in applying Board law to social media cases raises the question as to whether the GC is drawing the line in such a way as to limit Section 7 protections. In *Meyers* the Board cautioned against limiting the definition of concerted activity and acknowledged “the myriad of factual situations that have arisen, and will continue to arise, in this area of the law.” And goes on to say, “the question of whether an employee engaged in concerted activity is, at its heart, a factual one.” *Meyers II* at 496-497. The Advice memoranda certainly demonstrate that deciphering which on-line communications are concerted is fact specific. However, some union counsel have suggested that the GC is setting a higher bar for finding social media communications to be concerted activity than is applied to

face-to-face discussions.[4] It is too early to tell if this is the case, and as the Board has yet to speak substantively on the matter, it is hard to know, but the Advice memos raise some concerns.

While the social media protected concerted activity cases are analogized to the water cooler, there are important differences. Unlike employees speaking with one another at work, the activity of posting on the internet is something an individual does alone. This action lends itself to a conclusion that it is isolated conduct. However, by accessing Facebook and other social media, the individual becomes an interactive broadcaster. The Advice memoranda certainly acknowledge that concerted activity can encompass activity that begins with only a speaker and listener. When the GC does not find concerted activity it is because he finds insufficient bases to relate a single worker's postings to group action or to preparations for group action. But, why shouldn't a posting on an internet site alone to which coworkers subscribe meet that standard? Why should the bar of establishing that a posting was a logical outgrowth of prior conduct be difficult to meet? Does the GC's approach prematurely cuts off the possibility of group action?

III. <u>The ALJ Decisions</u>

The ALJ decisions that have issued offer further insight into the development of the law in this area and in particular into where we can expect the Board to draw the line in viewing Facebook communications as concerted. All three decisions are on appeal pending before the Board.

<u>A Call to Action:</u>

In *Hispanics United of Buffalo, Inc.* 3-CA-27872 (September 2, 2011), the employer conceded that the sole reason for its terminating five employees was their conversation on Facebook about a co-worker's criticism of their work. The initial post read:

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[4] See Pamela Jeffrey & Alvin Velazquez, *Social Media Issues for Unions and Employees,* ABA- 5th Annual Labor and Employment Law Conference, November 2, 2011 at 5.

> 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?

A number of co-workers responded with complaints about their work and the offending coworker. The ALJ readily found the conduct concerted. He noted that protected activity includes activity that seeks to maintain the status quo and need not explicitly seek a change to working conditions. *Hispanics United* at 8 (citing *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218, 220 (1995) enf. denied on other grounds 81 F. 3d 209 (D.C. Cir. 1996); *Five Star Transportation, Inc.,* 349 NLRB 42, 47 (2007). Therefore, notwithstanding the fact that the employees' postings were general complaints that did not necessarily seek any change to the status quo, and that there was no evidence that the employees had an object of "initiating or inducing group action" he found the Facebook conversation concerted because "employees have a protected right to discuss matters affecting their employment amongst themselves." While there was no explicit call to group action, he found the Facebook online complaint session to be "a first step towards taking group action." Moreover, citing *Whittaker Corp.* supra, he noted that the fact that the employer terminated all participants of the Facebook chat together, established that their activity was concerted. *Hispanics United* at 9.

Logical Outgrowth of Prior Discussions

In *Karl Knauz Motors, Inc., d/b/a Knauz BMW*, 13-CA-46452 (September 28, 2011), the GC issued complaint which alleged that BMW salesman Robert Becker "posted on his Facebook page employees' concerted protests and concerns and about Respondent's handling of a sales event which could impact their earnings," that 8 days later, Becker was fired, and that he was fired because of his Facebook posting and "to discourage employees from engaging in these or other concerted activities." The GC theory was that while he acted alone in posting pictures of the sales event, he told his co-workers he would do so and the postings expressed a group sentiment of frustration of the sales event which had been discussed. Thus, the postings were a direct outgrowth of earlier discussions among salespeople of an issue that affected their commissions. GC Mem. OM 11-74 at 7.

The ALJ agreed. He found that Becker was engaged in concerted activity when he acted alone in posting a picture and comment about the food at a sales event on his Facebook page. The ALJ found the single posting by the employee to be concerted because employees had previously discussed their dissatisfaction with the planned event and that Becker's actions were a "logical outgrowth" of the prior concerted activity. *Knauz BMW* at 8. The ALJ made this finding notwithstanding the absence of any evidence of subsequent comment by coworkers on the sales event or any express discussion of group action. However, while he found the postings to be protected concerted activity, the allegation was dismissed because the ALJ found that the employer had fired Becker for a separate Facebook posting -- one of an accident of a customer's child driving a test vehicle into a lake. This latter posting did not concern subject matter discussed with coworkers and served to mock the dealership over a serious event.

The Wall & Hitting "Like" Equals PCA

In *Triple Play Sports,* 34-CA-12915 (January 3, 2012), an ALJ found that the employer had unlawfully terminated two employees who participated in a Facebook discussion which was critical of their employer's tax withholding practices. The GC authorized complaint on the theory that the Facebook discussion about the tax withholding was concerted activity because it related to shared concerns of employees that had been previously discussed and called for a meeting with management on the issue. GC Mem. OM 11-74 at 8-11.

After hearing the evidence, the ALJ concurred that the activity was concerted. While the ALJ found that the Facebook conversation was a logical outgrowth of face to face discussions of the issue among employees at the workplace, the ALJ's analysis of the Facebook conversation reflects an understanding of how Facebook is used and is instructive for how the Board should or may handle cyberspace conversations. The conversation at issue appeared on the "wall" of a former employee, Jamie LaFrance, who had worked with the discriminatees and had also experienced a problem with her

tax withholding. The two discriminatees, Jillian Sanzone and Vincent Spinella were Facebook "friends" with LaFrance. The postings on LaFrance's "wall" read as follows:

> LaFrance: 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!!!!"
>
> Ken DeSantis (customer): You owe them money...that's fucked up.
>
> Danielle Marie Parent (employee): I FUCKING OWE MONEY TOO!
>
> LaFrance: The state. Not Triple Play. I would never give that place a penny of my money. Ralph fucked up the paperwork…as per usual.
>
> 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 bullshit 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 fucked 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.
>
> **Sanzone (discriminatee): I owe too. Such an asshole.**
>
> 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.

Triple Play Sports at 3-4

The ALJ continues,

> [Discriminatee] Spinella clicked "Like" under LaFrance's initial comment, and the text "Vincent VinnyCenz Spinella and Chelsea Molloy like this" appears beneath it. Spinella testified that at the time he clicked "Like," the last comment on the wall was LaFrance's statement, "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.
> Id. At 4.

Hitting "Like"

The ALJ looked carefully at the discriminatees' participation in the conversation and how the conversation on the wall progressed in determining whether or not their involvement in the Facebook conversation was concerted. Thus, as shown above, the ALJ notes precisely which comment Spinella clicked 'like" under ("maybe someone should do the owners of Triple Play a favor..") and what posts Spinella read before he hit "like" as well as what the employer reviewed. Discriminatee Spinella did not write anything on the wall. Nor is their evidence that he contributed to any pre-Facebook conversation on the topic. Thus, the ALJ had to determine whether pressing "like" beneath certain comments constituted concerted activity. The ALJ found that it did:

> I further find that Spinella's selecting the "Like" option on LaFrance's Facebook account constituted participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity. Spinella's selecting the "Like" option, so that the words "Vincent VinnyCenz Spinella…like[s] this" appeared on the account, constituted, in the context of Facebook communications, an assent to the comments being made, and a meaningful contribution to the discussion.
> Id. at 8.

This is a remarkable finding that reflects an understating of online communications. It suggests that the law may be applied to interactive social media in a manner that accommodates this new medium of communication rather than to limit the breadth of concerted activity. As we had seen above, some GC Advice memos

suggested that it is more difficult for a worker to find the protection under Section 7 using social media than at the water cooler.

Here, Spinella did nothing more than press "Like." Yet, the ALJ concludes in evaluating this conduct that the degree of participation is not at issue. The ALJ reasons:

> [t]he Board has never parsed the participation of individual employees in otherwise concerted conversations, or deemed the protections of Section 7 to be contingent upon their level of engagement or enthusiasm. Indeed, so long as the topic is related to the employment relationship and group action, only a "speaker and a listener" is required. *KNTV,Inc.*, 319 NLRB at 450. I find therefore that Spinella's selecting the "Like" option, in the context of the Facebook conversation, constituted concerted activity as well.
> Id. at 8-9.

Thus, just as the Board does not evaluate the level of participation of an employee in a conversation that took place at the water cooler, it should not compare the weight of contributions of employees on line. In the pre-social media world, a signature on a petition was sufficient. Thus, pressing the like button here should be sufficient.

In finding selecting "Like" to be concerted activity, the ALJ noted that the Employer told Spinella that he knew by selecting "Like" Spinella "stood by the other commentators." Id. at 9. However, as using social media has become widespread, and even those who do not use it become familiar with its applications, it may be appropriate to make assumptions about the significance of participating. Thus, whether or not an employer affirmatively states that they know what "Like" means and the employee admits it, as occurred here, knowledge of the significance of selecting 'Like" should be assumed.

Is an employee responsible for the wall's entire content?

In determining whether the discriminatees had lost the protection of the Act and in applying the *Atlantic Steel* factors, the ALJ found that the discriminatees were

responsible only for their own postings to the wall and not for the entire conversation. The ALJ rejected the contentions that they be deemed responsible for comments that they did not specifically post. Id. at 9. Thus, Sanzone's sole posting was "I owe too. Such an asshole." This was the only language to which the ALJ applied the disloyalty and defamation analysis. Similarly, the ALJ found Spinella responsible only for the posting under which he selected "Like." The ALJ reasoned,

> [T]he Board has emphasized that when evaluating the conduct of individual employees engaged in a single incident of concerted activity, each employee's specific conduct must be analyzed separately. *Crown Plaza LaGuardia,* 357 NLRB No. 95 at p. 4-6 (2011) (only employees that deliberately attempted to physically restrain manager lost Section 7's protection; other employees involved in confrontation were unlawfully discharged)."
> Id. at 10.

As compared with witnesses testimony to a meeting or conversation, the written form of communications in cyberspace memorializes exactly what an individual employee says in a group interaction. The ALJ's application of Board law to the wall in this case is significant and offers guidance for subsequent analyses.

CONCLUSION

This is an exciting time in the development of the law under the NLRA as the GC -- and soon the Board -- grapple with applying Section 7 rights to a rapidly changing way in which employees communicate with one another and with friends. This is a burgeoning issue as it seems soon everyone will be using some form of social media. This development has proven to increase the NLRA's relevance and reach in the era of social media – expanding its protections to the non-union setting. Identifying which written communications on an interactive webpage are concerted within the meaning of the Act, presents challenges. Employees often share access to their Facebook and other web-based accounts, and therefore, the group setting of an online conversation, or even a single posting, is a given. The GC has made certain judgments as to the significance of online participation and evaluated when such communications are concerted under the Act. We await Board decisions for further guidance as to how to draw lines between individual gripes and concerted activity.