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Employee Speech and Protected Concerted Activity in Today's Public Schools

Marc L. Terry, Mirick, O'Connell, DeMallie & Lougee, Westborough, MA

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By: Marc L. Terry and Brian M. Casaceli
Mirick, O'Connell, DeMallie, and Lougee, LLP

Introduction

Caitlin is a high school science teacher who regularly has between thirty and forty students in her classes at any given time. Caitlin has repeatedly complained to the high school principal, and other members of the school administration, that her large class sizes pose several challenges including that (i) they are difficult to manage; (ii) she has too much homework to review, which makes it difficult to provide instructive feedback to each student; (iii) the students' abilities levels are not all the same, which prohibits her from getting through all of the assigned materials; and (iv) she can't establish a good rapport with her students. Not satisfied with administration's response to her complaints, Caitlin takes to her Facebook page and writes a post that reads:

> "I'm sick and tired of all the bulls**t excuses I'm getting from administration about the size of my classes. I can't get anything done! Administration needs to hire more teachers but they are too f***king cheap to consider that. Let's do something about it! My fellow teachers: who feels the same way?"

Caitlin's Facebook post was quickly "Liked" by several of the teachers at the school with whom she was Facebook "friends." Other teachers from the school district commented on the post offering their support, acknowledging they have similar issues with class size.

Inevitably, administration catches wind of Caitlin's Facebook activity. The school district has a social media policy prohibiting teachers from making online posts that cast the school in a negative light. The school district believes that Caitlin violated that policy and wants to terminate her employment to send a message that such behavior will not be tolerated. As the school district's attorney, how would you advise on the issue of Caitlin's termination of employment? Several levels of analysis are required before a recommendation can be made with

respect to the termination of Caitlin's employment. First, is Caitlin's speech protected by the First Amendment? Second, does Caitlin's post constitute protected, concerted activity as defined by her state's public employee labor relations law? Finally, is the school district's social media policy legal under the First Amendment and/or the state's public employee labor relations law?

This paper seeks to address the foregoing issues, and to present a sampling of the current state of the law on these topics. In that regard, this paper begins by examining First Amendment jurisprudence regarding public employees' free speech rights. From there, the paper examines the aggressive trend of the National Labor Relations Board ("NLRB") over the past several years with respect to the scope of employee speech as constituting protected concerted activity under the National Labor Relations Act ("NLRA"). Although NLRB decisions are not applicable to public entities, a discussion of current NLRB precedent is necessary to set a baseline for the third part of this paper which reviews whether such public entities have followed the NLRB's lead in aggressively expanding the scope of employee speech constituting protected concerted activity. This paper will focus particularly on employee social media posts and employer social media policies, with a side discussion of the NLRB's treatment of employer confidentiality policies. This paper will conclude by offering a series of recommendations to assist counsel in managing the employee communications of their public school clients.

I. The First Amendment

Some 228 years ago, the United States ratified the First Amendment to the Constitution. Intending to prevent the federal government from curtailing its citizens' freedom, the First Amendment prohibits Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of

grievances." Chief among the civil liberties protected by the First Amendment is a citizen's freedom of speech.

Although initially written to proscribe action by the federal government, the Supreme Court has extended the First Amendment's reach to apply to state and local governments through incorporation by the Fourteenth Amendment.[1] Notably, however, the First Amendment only proscribes conduct taken by governmental entities – it does not apply to private entities. As such, a private employer, for example, may enact a policy that prohibits its employees from discussing a particular topic at work and not run afoul of the First Amendment. What happens, though, when the employer is a government organization to which the First Amendment applies? Can such a public employer enact a rule governing the conduct/speech of their employees without violating the First Amendment? These questions have been the subject of over fifty years of Supreme Court jurisprudence.

1. Pickering v. Board of Ed. Of Township High School Dist. 205, Will County, Illinois[2]

Pickering was the Supreme Court's first significant foray into public employees' free speech rights. Marvin Pickering was a public school teacher who sent a letter to a local newspaper regarding a proposed tax increase. Pickering's letter was critical of the school board and the district superintendent for the way they had previously attempted to raise revenue for the schools. After Pickering wrote his letter, which was published in the local newspaper, the school district dismissed him from his employment. Attempting to justify its decision, the school district claimed that Pickering's letter was false in certain material respects. According to the school district, these alleged falsities damaged its professional reputation and that of its

[1] Gitlow v. New York, 268 U.S. 652, 666 (1925).
[2] 391 U.S. 563 (1968).

administrators, and would necessarily tend to create controversy among teachers, administrators, the school board, and district residents. Following his dismissal, Pickering sued the school district claiming that his writing of the letter was protected by the First Amendment.

Pickering's case ultimately made it to the Supreme Court, which held that the school district violated the First Amendment by dismissing Pickering for writing the letter. In so holding, the court formulated the "Pickering test" which "provides the framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees."[3] Under the Pickering test, a court must "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[4]

As applied to the specific facts from the case, the Court found that Pickering's letter dealt with a matter of public concern, i.e., the proposed tax increase. Moreover, the Court found that the school district's operational efficiency was not affected because the letter did not "imped[e] the teacher's proper performance of his daily duties in the classroom" or "interfer[e] with the regular operation of the schools generally."[5] As such, the Court held that Pickering's dismissal for writing the letter violated the First Amendment.

2. Connick v. Myers[6]

Fifteen years after Pickering, the Supreme Court was presented with another public employee speech question involving the actions of Sheila Myers, an Assistant District Attorney in Louisiana. After learning that she was being transferred to a different section of the criminal

[3] Lane v. Franks, 134 S. Ct. 2369, 2377 (2014).
[4] Pickering, 391 U.S. at 568.
[5] Id. at 572-573.
[6] 461 U.S. 138 (1983).

court – a transfer she strongly opposed – ADA Myers prepared a questionnaire for her co-workers to solicit their views regarding the "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[7] Myers later submitted the questionnaire to 15 ADAs. The District Attorney quickly learned of Myers actions, terminated her employment for refusing to accept the transfer, and told her that distributing the questionnaire was an act of insubordination. Following her employment termination, Myers filed suit alleging a violation of her First Amendment rights.

In its decision, the Supreme Court focused on whether Myers' questionnaire involved a matter of public concern. According to the Court, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record."[8] By way of example, the Court opined that speech related to matters of political, social or other community concerns will often be considered speech related to a public concern. Consequently, if Myers' distribution of the questionnaire "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the Court] to scrutinize the reasons for her discharge."[9] If an issue on which an employee speaks is not a matter of public concern, the Pickering test will not apply.

In analyzing the specifics of the questionnaire, the Court found that, with one exception, the questions Myers posed did not constitute matters of public concern. To the contrary, the questions dealt with internal office issues – namely, confidence in supervisors, office morale, and the need for a grievance committee. As such, the Court held that the First Amendment did not protect Myers for asking such questions. For the one question that did relate to public concern –

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7 Id. at 141.
8 Id. at 147-148.
9 Id. at 146.

i.e., whether employees have felt pressure to volunteer on political campaigns – the Court applied the Pickering balancing test and found that the District Attorney's interest in maintaining institutional efficiency and being able to manage personnel issues in his office outweighed Myers' interest in asking the question.

3. Garcetti v. Ceballos[10]

The Supreme Court's 2006 Garcetti decision added another wrinkle to the public employee free speech analysis. In Garcetti, a deputy district attorney, Richard Ceballos, wrote a memorandum to his supervisors recommending dismissal of a case because an affidavit that was used to obtain a critical search warrant contained "serious misrepresentations." At a hearing regarding the legitimacy of the search warrant, Ceballos reiterated his opinion to the court, but the judge rejected his challenge. Following his testimony, Ceballos was subjected to a number of alleged retaliatory employment actions including reassignment to a different job, transfer to a different court, and denial of a promotion. Ceballos later filed a suit alleging, in part, that his supervisors violated his First Amendment rights by retaliating against him for his memorandum.

The Court rejected Ceballos's claim holding, instead, that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[11] Thus, because Ceballos wrote the memorandum pursuant to his official duties as a deputy district attorney, his speech did not implicate the First Amendment. According to the Court, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[12]

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10 547 U.S. 410 (2006).
11 Id. at 421.
12 Id. at 421-422.

Notably, in one of the opinion's final paragraphs, the Court observed that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[13] As such, the Court did not decide whether the Garcetti analysis would apply to a case involving speech related to "scholarship or teaching."[14] Since the Court punted on this issue, several Federal Circuit Courts have addressed the issue, with varying results.[15] The Second Circuit, Third Circuit, and the Seventh Circuit have all applied the Garcetti analysis to First Amendment cases brought by public educators.[16] Conversely, the Fourth Circuit and the Ninth Circuit have adopted the Pickering test when reviewing First Amendment claims by public educators.[17] In its opinion, the Ninth Circuit stated that, "if applied to teaching and academic writing, Garcetti would directly conflict with the important First Amendment values previously articulated by the Supreme Court."[18] Given the present circuit split generated by the Garcetti opinion as it relates to educational speech, it is necessary to check the law in your specific jurisdiction.

4. Lane v. Franks[19]

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13 Id. at 425.

14 Id. The Supreme Court's position in this regard appears to be motivated by Justice Stevens' and Justice Souter's dissenting opinions. Justice Souter in particular expressed concern as to whether the majority intended to abrogate First Amendment protection for educators in public colleges and universities who routinely speak and write pursuant to official duties. Id. at 438.

15 For a detailed recitation of the Circuit Courts positions on this question, see The First Amendment in the Public School Classroom: A Cognitive Theory Approach, Rosina E. Mummolo, 100 Cornell L. Rev. 243, 249-255 (2014). The author also outlines the varying responses to the question of whether the application of Garcetti or Pickering should depend upon if the public educator is in a primary or secondary school setting, or if the educator is a college or university professor, arguing for the application of Pickering. Id. at 253-258.

16 Massaro v. N.Y.C. Dep't of Educ., 481 F. App'x 653, 654-656 (2nd Cir. 2012); Gorum v. Sessoms, 561 F.3d 179, 185-186 (3rd Cir. 2009); Renken v. Gregory, 541 F.3d 769, 773-775 (7th Cir. 2008).

17 Adams v. Trs. Of the Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011) ("We are…persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case."); Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014).

18 Demers, 746 F.3d at 411.

19 134 S. Ct. 2369 (2014).

Edward Lane was the director of a program for under-privileged youth that was operated by the Central Alabama Community College. As the director, Lane conducted a business audit that revealed that one employee on the payroll, Susan Schmitz, had not been reporting for work. Lane later terminated Schmitz's employment. Following her termination, Schmitz was indicted on charges of mail fraud and theft. Notably, at the time of Schmitz's trial, Lane testified under subpoena about the events that led to him terminating Schmitz's employment. Schmitz was later convicted and sentenced to thirty months in prison. Under the guise of financial difficulties, Lane's employment was later terminated by the Community College's president, Steve Franks. Following his termination, Lane filed suit against Franks claiming Franks had violated the First Amendment by terminating his employment in retaliation for his testimony against Schmitz.

In its analysis, the Supreme Court held, under Garcetti, that Lane was speaking as a citizen in a capacity that was not ordinarily within the scope of his job responsibilities. In that regard, although Lane's speech related to, and was learned during the course of, his public employment, it was not part of Lane's ordinary job duties to give sworn testimony under oath in response to a subpoena.[20] Because Lane was speaking as a citizen, the Court applied the Pickering balancing test. First, the Court concluded that Lane's speech dealt with a matter of public concern – namely, "corruption in a public program and misuse of state funds."[21] Second, the Court analyzed whether the government, as an employer, was adequately justified for terminating Lane's employment because of his speech. On this point, the Court found no governmental interest that supported Lane's termination. To the contrary, Lane's testimony was not "false or erroneous" and did not "unnecessarily disclos[e] any sensitive, confidential or

[20] According to the Supreme Court, "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." Id. at 2379.

[21] Id. at 2380.

privileged information while testifying."[22] Lane's speech, was, therefore, entitled to First Amendment protection.

The Court's decision in Lane was significant because it clarified the fact that the "critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." By its opinion, the Court refined Garcetti's holding, which precluded First Amendment protections if an employee was speaking pursuant to his "official" duties. Indeed, if Lane's facts were analyzed under the Garcetti standard, it's plausible – perhaps even likely – that Lane's speech would not have been protected as his testimony in response to the subpoena directly related to events that took place in his capacity as a public employee. Ultimately, however, because responding to a subpoena was not ordinarily within the scope of Lane's duty, his speech was protected.

5. Heffernan v. City of Paterson, N.J.[23]

Jeffrey Heffernan was a police officer in Paterson, New Jersey. In the middle of a hotly contested mayoral campaign, Heffernan picked up a campaign sign for a rival mayoral candidate – who most police officers, including Heffernan's supervisors, did not support – at the request of his mother who intended to display the sign herself. After several other police officers in the department observed Heffernan picking up the sign, word spread to Heffernan's supervisors who confronted him about his apparent support for the rival mayoral candidate. Heffernan tried to explain that he was simply picking up the sign for his mother, but his explanation was ignored. A day later, Heffernan was demoted from his position as a detective to a patrol officer. Heffernan filed suit alleging his demotion was in retaliation for exercising his First Amendment

[22] Id. at 2381.
[23] 136 S. Ct. 1412 (2016).

rights, notwithstanding the undisputed fact that Heffernan did not actually exercise his First Amendment rights (i.e., he was picking up the sign for his mother).

Given that Heffernan had not actually exercised his right to speech, the City of Paterson argued that he could not assert a claim for violation of his constitutional rights. Both the District Court and Third Circuit found this argument persuasive, and ruled in favor of the City. On further appeal, however, the Supreme Court overturned the decisions of the lower courts and, instead, held in Heffernan's favor, writing that:

> When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983 – even if, as here, the employer makes a factual mistake about the employee's behavior.[24]

In so holding, the Court reasoned that:

> The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employee discharged (or demoted) and his or her colleagues—from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. . . . . The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.[25]

6. Liverman v. City of Petersburg[26]

As a public employer, the City of Petersburg had a social media policy that contained, in part, the following two provisions:

- Negative Comments – Employees are prohibited from making "[n]egative comments on the internal operations of the [Police Department], or specific conduct of supervisors or peers that impact's the public's perception of the department…."[27]

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[24] Id. at 1418.
[25] Id. at 1419.
[26] 844 F.3d 400 (4th Cir. 2016).
[27] Id. at 404.

- Public Concern – Employees are permitted to speak on matters of public concern "so long as the comments do not disrupt the workforce, interfere with important working relationships or efficient work flow, or undermine public confidence in the officer."[28]

Unhappy about certain issues in the police department, two police officers took to their Facebook pages to voice their displeasure. In particular, the two officers complained that inexperienced officers were undeservedly assigned police instructor roles and were given promotions, and that the police department lacked leadership. After Petersburg's police chief caught wind of the Facebook posts and determined that the officers violated the department's social media policy, each police officer was placed on probation for six months and given a verbal reprimand. The two police officers challenged the legality of the discipline they received – as well as the department's social media policy itself – as violating their First Amendment rights.

According to the 4th Circuit, the social media policy violated the First Amendment because it limited the officers' right to speak on matters of public concern, without sufficient justification. Indeed, by its express terms, the policy essentially prevented the officers from discussing "just about anything." The court found this particularly troublesome in light of the fact that social media can be a place for "constructive public debate and dialogue" and the policy prevented any such debate from occurring.

II. The National Labor Relations Act

In addition to violating the First Amendment, the City of Petersburg's social media policy would almost certainly run afoul of the NLRA. Of course, the NLRA does not apply to public entities and, therefore, its legality would need to be analyzed under the state's public employee labor relations law. For the purpose of laying the groundwork for our examination of the current

[28] Id.

trends and understanding the overlap between First Amendment free speech rights and protected concerted activity, however, we must start by looking at the NLRA because of the NLRB's recent activity in this area.

Section 7 of the NLRA guarantees employees "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.*"[29] The NLRA, therefore, "protects employees' rights to discuss organization and the terms and conditions of their employment, to criticize or complain about their employer or their conditions of employment, and to enlist the assistance of others in addressing employment matters."[30]

To receive Section 7 protections, the activities in question must also be "concerted," meaning, either, that the activities must involve two or more employees, or one employee must act on behalf of other employees.[31] A single employee who complains about an issue that does not implicate anyone except him/herself has not engaged in concerted activity.[32] Assuming there is concerted activity, the activity must be undertaken for the purpose of "mutual aid or protection." In other words, employees must act with a common cause, as expressed by Judge Learned Hand in a 1942 opinion from the Second Circuit:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The

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29 29 U.S.C. § 157.

30 Quicken Loans, Inc. v. N.L.R.B., 830 F.3d 542, 545 (D.C. Cir. 2016).

31 Five Star Transp. Inc., 349 NLRB 42, enforced, 522 F.3d 46, 51-52 (1st Cir. 2008) (letters written by 15 employees regarding workplace concern was concerted activity); Esco Elevators, 276 NLRB 1245, enforced 794 F.2d 1078, 1079-1080 (5th Cir. 1986) (individual employee's safety complaint was concerted activity because it was his job to ensure a safe workplace environment).

32 Kohls v. N.L.R.B., 629 F.2d 173, 177-178 (D.C. Cir. 1980) (individual employee who protested his work environment was not engaged in concerted activity), disapproved of by N.L.R.B. v. City Disposal Systems Inc., 465 U.S. 822 (1984).

> rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.[33]

An employer who "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]" shall have committed an unfair labor practice.[34]

Section 7 rights are not without limits, however. In that regard, even if an employee's conduct seemingly constitutes protected, concerted activity, the employee may lose the protections of the NLRA if his or her conduct is carried out through abusive means that are excessive and/or indefensible.[35] Similarly, if the concerted activity involves communications to third parties, such communications will lose the protections of the Act if they are "so disloyal, reckless or maliciously untrue."[36]

Employee Workplace Rules

To regulate workplaces, employers often draft and implement workplace rules through policies and/or handbooks that address various aspects of employment including employee confidentiality requirements and appropriate social media use. Over the past several years, there has been a significant increase in challenges to these rules on the grounds that they "interfere with, restrict, or coerce employees in the exercise" of their Section 7 Rights. An "employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights."[37]

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33 N.L.R.B. v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503, 505-506 (2nd Cir. 1942).

34 29 U.S.C. § 158(a)(1).

35 Five Star, 522 F.3d at 52.

36 In re Am. Golf Corp. (Mountain Shadows), 330 NLRB 1238, 1240 (2000), enforced sub nom. Jensen v. NLRB, 86 Fed.Appx. 305, *1 (9th Cir. 2004). See also N.L.R.B. v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953) (disloyal disparagement of an employee that does not relate to a labor controversy is not protected by the Act); Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 61 (1966) (the Act does not give a party "license to injure the other intentionally by circulating defamatory or insulting material known to be false.")

37 Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004).

To determine the legality of a challenged rule, the NLRB will first determine whether the rule "explicitly restrict[s] activities protected by Section 7."[38] If, as in most cases, a rule does not explicitly restrict Section 7 activity, the NLRB, historically, looked for evidence that either "(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."[39]

Social Media

It is undeniable that over the past decade, the way in which we communicate with each other has undergone a fundamental transformation due, in large part, to the explosion of social media. Social networking sites like Facebook, Twitter, Instagram, LinkedIn, and YouTube easily allow users to convey their thoughts and ideas and communicate with others through posts, "likes," photos, videos, "tweets", blogs, and/or podcasts. Given its central societal presence, issues regarding social media were quick to spill over into the workplace. For that reason, arguably no other employment/labor relations issue has drawn the NLRB's attention over the past five to seven years as social media. Indeed, in the span of less than one year, the NLRB's then Acting General Counsel released three reports regarding social media cases on August 11, 2011, January 25, 2012, and May 30, 2012, respectively.[40]

Generally speaking, cases involving social media before the NLRB primarily involve two issues: (1) whether employee statements on social media constitute protected concerted activity protected by Section 7; and/or (2) whether the employer's social media policy is overbroad in violation of Section 8(a)(1).

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38 Id.

39 Id. at 647.

40 A link to the three reports, as well as the NLRB's commentary regarding each, is available at: https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

Employee Social Media Posts

One of the NLRB's first forays into the social media realm came in December 2012 when it decided Hispanics United of Buffalo, Inc.[41] In this case, an employee, Lydia Cruz, sent her fellow co-worker a text message in which she threatened to tell company management that the co-worker and several employees were not performing their jobs. The next day, the co-worker that received the text posted the following message on her Facebook page: "Lydia Cruz, a coworker feels we don't help our clients enough at [Hispanics United]. I about had it! My fellow coworkers how do you feel?" Four off-duty employees responded by posting messages on the co-worker's Facebook page in which they objected to Cruz's claim of poor job performance. After Cruz complained to Company management about her coworkers' Facebook posts, the five employees were terminated.

The NLRB found that the employer violated Section 8(a)(1) of the Act because it terminated the employees for engaging in protected, concerted activity. To prove a violation of Section 8(a)(1), the following four elements must be established: "(1) the activity engaged in by the employee was 'concerted' within the meaning of Section 7 of the Act; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee's protected concerted activity."[42] There was no dispute that factors two and four were met. As to factors one and three, the NLRB reasoned that the co-worker's communication with her fellow employees – which immediately followed her learning that Cruz was planning to complain to management – was concerted because it had "the clear 'mutual aid' objective of preparing her coworkers for a

[41] 359 NLRB 368 (2012). See also Karl Knauz Motors, Inc., 358 NLRB No. 1754 (2012) (upholding a care salesman's termination for posting a picture of a car accident at an adjacent car dealership with the caption 'This is your car: This is your car on drugs" because the post did not involve protected concerted activity).

[42] Hispanic's United, 359 NLRB at 369.

group defense to those complaints."[43] Similarly, the NLRB found such communications to be protected because they involved discussions about their job performance.

In 2014, the NLRB decided Three D LLC, which involved two employees at a sports bar in Connecticut who took to Facebook to criticize their employer and the manner in which the employer withheld their payroll taxes (after learning they owed more in state income taxes than they had anticipated).[44] The post that sparked the discussion, and which another employee from the sports bar "liked" read:

> 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!!!![45]

After learning of the Facebook postings, the employer discharged the two employees who were involved. Notably, the employer did not dispute the fact that Facebook activity was concerted, or that its employees had a right to discuss a term and condition of employment – namely, the tax withholding calculations. Rather, the employer alleged that the employees' conduct was so disloyal, reckless and defamatory that they lost the Act's protections. The NLRB disagreed, reasoning that the comments did not disparage the employer's products or services, nor were the comments made with knowledge of their falsity or with reckless disregard for their truth or falsity.

Finally, this past April, in the case N.L.R.B. v. Pier Sixty, LLC, the Second Circuit defined what it called the "outer-bounds of protected, union related comments."[46] Two days before a highly contentious union election, Hernan Perez was working his job as a server at the catering company Pier Sixty when his supervisor, in a harsh tone, directed Perez and two other

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43 Id. at 370.

44 Three D, LLC, 361 NLRB No. 31, *1-*2 (2014), affirmed by Three D, LLC v. N.L.R.B., 629 Fed.Appx. 33, 38 (2nd Cir. 2015).

45 Id. at *2.

46 855 F.3d 115, 118 (2nd Cir. 2017).

servers to go perform their jobs. Viewing this directive as disrespect by management, Perez took to his Facebook page during a break and posted the following expletive-laced message which could be viewed by his Facebook friends – 10 of whom were Pier Sixty employees – and the general public:

> Bob is such a NASTY M***** F***** don't know how to talk to people! ! ! ! ! ! F*** his mother and his entire f****** family! ! ! ! What a LOSER! ! ! ! Vote YES for the UNION! ! ! ! ! ! ![47]

Unsurprisingly, Pier Sixty terminated Perez's employment. The Administrative Law Judge, the NLRB, and the Second Circuit, however, all found that Perez's discharge violated the Act.[48] Despite being vulgar and inappropriate, the court noted three factors for why Perez retained the Act's protections: (1) the post referenced workplace concerns – namely, treatment of employees and the union election; (2) profanity was consistently tolerated among its workers and employees had not been previously disciplined for such use; and (3) the comments were not made in the presence of customers, nor they did not disrupt the catering event.

Social Media Policies

As noted above, the second area of focus for the NLRB in the social media context is employer social media policies, which are often challenged as violating Section 8(a)(1). In one of the more recent – and notable – decisions on this issue, the NLRB invalidated two sections of

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[47] Id. at 118. Note that Perez's original post did not contain any asterisks.

[48] In the analysis, the Administrative Law Judge applied a "totality of the circumstances" test to determine whether Perez's comments "were so egregious as to take them outside the protections of the Act." Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez, 362 NLRB No. 59, *3 (2015). These factors were: "1) whether the record contained any evidence of the Respondent's antiunion hostility; (2) whether the Respondent provoked Perez's conduct; (3) whether Perez' conduct was impulsive or deliberate; (4) the location of Perez' Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the Respondent considered language similar to that used by Perez to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon Perez was typical of that imposed for similar violations or disproportionate to his offense." Id. Although the totality of the circumstances test has been employed in other social media cases, it is important to note that this test is not the "exclusive framework through which the Board has evaluated whether employee conduct is entitled to NLRA protection." Pier Sixty, LLC, 855 F.3d at 123, n. 38.

the popular restaurant Chipotle's former social media policy.[49] The two provisions in question read:

- (1) "If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information." [50]

- (2) "You may not make disparaging, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors." [51]

The NLRB invalidated provision (1) of Chipotle's social media policy because the policy failed to define what it considered to be "confidential" information. Specifically, while Chipotle had a valid interest in protecting its private information, it had an obligation to define what information was "confidential" for purposes of the policy. An outright ban on postings about "confidential" information could plausibly interfere with an employee's rights under the NLRA, including engaging in concerted activities for mutual aid or protection.

Regarding provision (2) above, the NLRB held that Chipotle could not prohibit postings that are merely false, misleading, inaccurate and incomplete statements; instead, it could only prohibit postings made with malicious intent (i.e., the employee knew the statement to be false or made the statement with reckless disregard for its truth or falsity). The NLRB also found that a ban on "disparaging" statements was invalid as being overbroad because it could plausibly encompass statements protected by the Act, such as statements critical of supervisors or managers. Notably, the NLRB upheld the policy's prohibitions on "harassing or discriminatory" statements, citing prior precedent for the same.

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49 Chipotle Services LLC, 364 NLRB No. 72 (2016).
50 Id.
51 Id.

Shortly following its Chipotle decision, the NLRB invalidated another social media policy that read:

> Anything that an employee posts online that potentially can tarnish the Company's image ultimately will be the employee's responsibility…. [T]aking public positions online that are counter to the Company's interest might cause conflict and may be subject to disciplinary action.[52]

The foregoing policy was held invalid because it used "overly broad language" and "threaten[ed] employees with discipline for posting messages that may 'potentially' or might conflict with the Company's position."[53] Indeed, it would be reasonable for an employee to construe the policy to prohibit activity – such as protesting unfair labor practices – that could "potentially tarnish" or "cause conflict" with the Company's image, but is nonetheless protected by Section 7. For that reason, the social media policy violated Section 8(a)(1).[54]

Confidentiality Rules

Although the NLRB has primarily used cases involving social media as the vehicle for expanding employees' Section 7 rights to engage in protected concerted activity, over the past few years, the NLRB has also begun addressing the legality of employee confidentiality rules. Indeed, in March 2015, then NLRB General Counsel Richard Griffin, Jr. issued a memorandum entitled "Report of the General Counsel Concerning Employer Rules" in which he discussed recent case developments at the NLRB regarding certain employee handbook rules. Among the employer rules discussed in the memorandum were rules prohibiting employees from revealing, discussing, publishing and/or disclosing confidential information.

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52 Novelis Corporation, 364 NLRB No. 101 (2016).

53 Id.

54 See also BCG Partners, Inc. d/b/a Newmark Grubb Knight Frank, 2017 WL 1953655 (N.L.R.B. Div. of Judges, May 10, 2017) (social media policy that mandated employees obtain consent before posting about the company on social media was unlawful because it "over-broadly limit[ed] employees' Section 7 rights to engage in collective activities online.")

According to the Memorandum, "an employer's confidentiality policy that either specifically prohibits employee discussions of terms and conditions of employment – such as wages, hours, or workplace complaints – or that employees would reasonably understand to prohibit such discussions, violates the Act."[55] Similarly, policies prohibiting communications concerning "employee" or "personnel" information will be reasonably construed by employees as restricting Section 7 – protected communications because such policies fail to clarify what the employer means by the terms "employee" or "personnel."[56]

By way of example, the General Counsel's Memorandum deemed the following confidentiality rules unlawful:

- Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses."[57]

- "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)."[58]

- "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."[59]

- Prohibiting employees from "[d]isclosing…details about the [Employer]."

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55 NLRB General Counsel Memorandum GC 15-04, pg. 4, available at: https://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf.

56 Id.

57 According to the Memorandum, "… in addition to the overbroad reference to 'employee information,' the blanket ban on discussing employee contact information, without regard for how employees obtain that information, is also facially unlawful." Id.

58 The Memorandum deemed this rule "unlawfully overbroad because a reasonable employee would not understand how the employer determines what constitutes a 'lawful Company policy.'" Id. at 5.

59 The Memorandum concedes that, although an employer may prohibit disclosure of its own confidential information, "a broad reference to 'another's' information, without further clarification, as in the above rule, would reasonably be interpreted to include other employees' wages and other terms and conditions of employment." Id.

- "Sharing of [overheard conversations at the work site] with your co-workers, the public, or anyone outside of your immediate work group is strictly prohibited."

- Discuss work matters only with other [Employer] employees who have a specific business reason to know or have access to such information.... Do not discuss work matters in public places.[60]

- [I]f something is not public information, you must not share it.[61]

Although the General Counsel looks at employer confidentiality rules with a healthy dose of skepticism, his memorandum does recognize instances where confidentiality rules do not violate Section 8(a)(1). These cases, however, are limited to rules that: "do not reference information regarding employees or employee terms and conditions of employment [;]" define the term "confidential" in a limited manner; and "do not otherwise contain language that would reasonably be construed to prohibit Section 7 communications."[62] In this regard, the following rules were deemed valid:

- "No unauthorized disclosure of business secrets or other confidential information."

- "Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors or customers."[63]

In similar regard, the D.C. Circuit approved a hospital's rule barring employees from discussing information it acquired in confidence concerning patients or employees. In so holding, the court reasoned that a "reasonable employee would not believe that a prohibition upon disclosing [such] information… would prevent him from saying anything about himself or

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60 The above three rules were unlawful because they "contained broad restrictions and they did not clarify, in express language or contextually, that they did not restrict Section 7 communications." Id.

61 The Memorandum deemed this rule unlawful because "not public information" could reasonably be construed to encompass wages, benefits, and other terms and conditions of employment. NLRB General Counsel Memorandum GC 15-04, pg. 5.

62 Id. at 6.

63 Id.

his own employment."[64] Since the General Counsel's Memorandum, the Board has decided several noteworthy cases involving confidentiality rules.

In Caesars Entertainment,[65] decided on August 27, 2015, the Board reviewed several handbook rules including one that prohibited employees from disclosing to "anyone outside the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public" including information about "salary structures" and "policy and procedures manuals." [66] The Board found this policy "extraordinarily broad in scope" because it "clearly implicates terms and conditions of employment... protected by Section 7" such as salaries, disciplinary information and terminations. [67] The Board was quick to note, however, that once the employer struck the overbroad language, the revised rule – prohibiting disclosure of legitimately protected information, such as company financial data, plans and strategies, research and analyses, and customer or supplier lists – would comply with the NLRA.

In August 2016, the U.S. Court of Appeals for the D.C. Circuit affirmed a decision by the NLRB which had held that certain aspects of Quicken Loans, Inc.'s Mortgage Bank Employment Agreement violated the Act – namely, its confidentiality and non-disparagement provisions.[68] The confidentiality provision prohibited employees from disclosing personnel information, "including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executive and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses."[69] In its decision,

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64 Community Hospitals of Central California v. NLRB, 335 F.3d 1079, 1089 (D.C. Cir. 2003).
65 362 NLRB No. 190 (2015).
66 Id. at *2.
67 Id.
68 Quicken Loans, Inc. v. N.L.R.B., 830 F.3d 542, 548, 550 (D.C. Cir. 2016), and cases cited therein including NLRB v. Northeastern Land Services, Ltd., 645 F.3d 475, 478, 483 (1st Cir. 2011), and Lily Transportation Corp., 362 NLRB No. 54, 1 & n. 3 (2015).
69 Quicken Loans, Inc. 830 F.3d at 546.

the D.C. Circuit held that the information employees were prohibited from sharing – namely, personnel lists, employee rosters, and employee contact information – has long been recognized "as information that employees must be permitted to gather and share among themselves and with union organizers in exercising their Section 7 rights."[70]

Just recently, in March 2017, the D.C. Circuit decided Banner Health System v. N.L.R.B.,[71] in which it struck down a confidentiality agreement "explicitly direct[ing] employees not to discuss co-workers' '[p]rivate employee information (such as salaries, disciplinary action, etc.)' unless the information was 'shared by the employee.'" In doing so, the court reasoned that a reasonable employee "could well understand Banner's rule to prohibit the very discussion of terms and conditions of employment that Section 7 protects."[72]

III. State Law Regarding Protected Concerted Activity

By its express terms, the NLRA does not apply to public sector employment.[73] Many states, however, have enacted their own labor relations statutes explicitly governing public employment. Indeed, a number of these states' statutes are modeled after the NLRA and, therefore, protect public employees' rights to engage in concerted activity for mutual aid or protections. Several of these states have also specifically addressed protected concerted activity in the context of social media but, overall, it appears that the NLRB has been more aggressive in expanding the scope of protected concerted activity.

Michigan

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70 Id. at 548. The court also held that the bans on discussing information from "handbooks" and "personnel files" "directly interferes with mortgage bankers' ability to discuss their wages and other terms and conditions of employment with their fellow employees or union organizers, which is a core Section 7 right." Id.

71 851 F.3d 35, 41 (D.C. Cir. 2017), and cases cited therein including Double Eagle Hotel & Casino v. NLRB, 414 F.3d 1249, 1260 (10th Cir. 2005), and Flex Frac Logistics, L.L.C. v. NLRB, 746 F.3d 205, 209 (5th Cir. 2014).

72 Banner, 851 F.3d at 42.

73 "The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof…." 29 U.S.C. §152(2).

Michigan's Public Employment Relations Act ("MPERA") substantially mirrors the NLRA by stating that it shall be lawful for public employees to:

> [o]rganize together or form, join or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice.[74]

"Concerted activity protected by Section [423.209] 'encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bring truly group complaints to the attention of management.'"[75]

Under the MPERA, a public employer commits an unfair labor practice if it "interfere[s] with, restrain[s] or coerce[s] public employees in the exercise of their rights guaranteed in [Section 423.209]."[76] According to the Court of Appeals of Michigan, because Section 423.209 "basically adopted analogous provisions in the… NLRA… federal precedent can be considered as guidance in applying the statute."[77]

The Michigan Employment Relations Commission's ("MERC") first decision involving social media appears to have come in 2012 when it decided Mid-Michigan Community College.[78] Six years earlier, however, the MERC issued a decision involving electronic

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74 MPERA §423.209.

75 City of Detroit (Department of Transportation) and Pamela King, 30 MPER ¶ 69 (2017), citing Meyers Industries (Meyers II), 281 NLRB 882 (1986) (citation omitted).

76 Id. at §423.210(1)(a).

77 City of Detroit v. Detroit Police Officers Association, 2007 WL 4248562, * 2 (Mich. Ct. App. 2007)

78 26 MPER ¶ 4 (2012). In this decision, an at-will adjunct professor was discharged for "unprofessional conduct" after he posted negative comments about students on his Facebook page. The professor claimed, however, that his termination was the result of his union organizing activities. With respect to the professor's Facebook posts, the evidence established that the employee had "used Facebook to insult and invite others to make fun of a student who was failing his class, to make fun of the college itself, and to mock its student body for making use of food stamps/bridge cards." Id. Although the employee's union activity was deemed protected, concerted activity by MPERA and was followed closely by his discharge, the evidence demonstrated that such activity did not factor in the employer's decision to terminate his employment and, therefore, his discharge did not violate § 423.210(1)(a). Although this case appears to be the first "Facebook" case before the MERC, the facts did not present the question of whether the professor's Facebook posts were protected, concerted activity.

communications and protected concerted activity.[79] In the case, a police officer was operating a website – on his own time and with his own funds – that gave fellow officers the ability to "air their concerns about the police department[,]" and to "provide a source of information for the wider community regarding issue of leadership and accountability in the City of Detroit."[80] In addition, the website contained discussions about wage comparisons, complaints about equipment and staffing, and grievances, arbitrations, and union elections. Indeed, at least two officers from the police department listed their names, and several others made comments on the website which made clear that they were police department employees. The website also had elements of satire, caricatures, and fictional characters for the purpose of providing comic relief. Although he called the website "great," and claimed to "not [be] bothered by it at all," Detroit's police chief ultimately suspended the officer for operating the website on the grounds that the site "contained racial slurs that were detrimental to the department…."[81]

In response, the union filed an unfair labor practice charge alleging that the city had violated §423.210(1)(a) of the MPERA by directing the officer to shut down the website and suspending the officer when he failed to do so. The administrative law judge found that the officer engaged in protected concerted activity for mutual aid or protection because the website contained information and discussions by officers about workplace issues, such as wages and equipment and staffing.[82] Because the officer's suspension was directly attributable to his protected concerted activity, the MERC concluded the city violated the MPERA.[83]

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79 City of Detroit and Detroit Police Officers Association, 19 MPER ¶ 15 (2006).

80 Id.

81 Id.

82 In adopting the administrative law judge's order, the MERC did not explicitly address this point.

83 The City argued that some elements of the website were sexually harassing, racist, or otherwise offensive, and therefore, the website was not protected by the MPERA. The MERC disagreed, noting that it will "not allow the suppression of [M]PERA protected speech simply because it occurs in conjunction with speech that is not protected by [M]PERA, where there has been no showing of actual harm or adverse impact flowing from that speech." Id.

Illinois

Illinois's Public Labor Relations Act ("IPLRA") provides that "[e]mployees of the State and any political subdivision of the State… have…" the right "to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion."[84] The Illinois Labor Relations Board ("ILRB") has interpreted "concerted activity" [a]s activity undertaken jointly by two or more employees, or by one employee on behalf of others.[85] "To be protected, concerted activity must be for the purposes of collective bargaining, 'other mutual aid or protection,' or aimed at improving the wages, terms, and conditions of employment."[86] Illinois public sector labor agencies generally take a broad interpretation of what it means to engage in protected concerted activity.[87]

Section 10(a)(1) of the IPLRA makes it an unfair labor practice for an employer or its agents to "interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act…."[88] To prove a violation under the IPLRA, the employee must demonstrate that "(1) [he or she] engaged in protected, concerted or union activity, (2) the employer was aware of the employee's protected activity, (3) the employer took an adverse

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84 5 ILCS 315/6(a).
85 Levita Jones, 31 PERI ¶ 80 (IL LLRB GC 2014), citing County of Cook (Mgmt. Info Services.), 11 PERI ¶ 3012 (IL LLRB 1995).
86 Id.
87 Village of New Athens, 29 PERI ¶ 27 (IL LRB-SP 2012).
88 5 ILCS 315/10(a)(1).

employment action against the employee, and (4) the employer's action was motivated, in whole or in part, by the employer's animus toward the employee's protected activity."[89]

Until February 2017, no Illinois court had addressed the issue of whether "a social media policy – or any work rule, for that matter – violates section 10(a)(1) of the Act… because it is overbroad on its face."[90] In International Brotherhood of Teamsters, Local 700, however, the ILRB examined whether a social medial policy ran afoul of section 10(a)(1) of the IPLRA for stating that employees shall:

> Conduct themselves on and off-duty in such a manner to reflect favorably on the [Cook's County Sheriff's Office]. Employees, whether on or off-duty, will not engage in conduct which discredits the integrity of the CCSO, its employees, the employee him/herself, or which impairs the operations of the CCSO. Such actions shall constitute conduct unbecoming of an officer or employee of the CCSO.[91]

The policy further provided that employees should "[b]e aware that conduct on and off duty extends to electronic social media and networking sites and that all rules of conduct apply when engaging in any Internet Activity."[92]

The union argued that the social media policy was unlawful under the test set forth in the NLRB's decision in Lutheran Heritage because when the two provisions are read together, an employee would reasonably believe the social media policy to prohibit protected activity. Given the lack of state jurisprudence on the issue, the ILRB looked to the NLRB for decisions construing similar provisions of the NLRA, which it viewed as persuasive authority.[93] The ILRB, however, rejected the union's argument, noting that, although an employee could interpret

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89 Levita Jones, 31 PERI ¶ 80 (IL LLRB GC 2014) (citations omitted).

90 International Brotherhood of Teamsters, Local 700 v. The Illinois Labor Relations Board, 33 PERI ¶ 92, ¶46 (IL App. Ct. 1st Dist. 2017).

91 Id. at ¶ 5.

92 Id.

93 Indeed, Illinois's Supreme Court has "recognized the close parallel between section 10(a) of the [Illinois Public Relations Act] and the National Labor Relations Act." Id. at ¶ 46, citing City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335, 345 (1989). Notably, however, ILRB did not consider the General Counsel memos regarding social media to be persuasive authority. Id. at ¶ 59.

the policy to prohibit protected activity, the mere possibility of an employee interpreting the policy in such a way is not enough to violate 10(a)(1) of the IPLRA.

Florida

Florida's Public Employee Relations Act ("FPERA") provides that "[p]ublic employees shall have the right to *engage in concerted activities not prohibited by law, for the purpose of collective bargaining or other mutual aid or protection.*"[94] A Florida public employer commits an unfair labor practice by "interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this part."[95]

The Florida Public Employees Relations Commission ("FPERC") has observed that Florida's legislature intended to "afford public employees 'a very broad scope of protection' for any concerted activity relating to employees' employment relationship with their employer."[96] Activity is considered concerted under FPERA if the activity encompasses "the well-being of fellow employees."[97] As with the NLRA, when "an employee engages in activities for his benefit alone, such conduct is not concerted, and thus, not protected."[98]

Somewhat unique to Florida is the fact that FPERA also includes a First Amendment-like provision that states, "the parties' rights of free speech shall not be infringed, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair employment

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94 FPERA § 447.301(3).
95 FPERA § 447.501(1)(a).
96 Southwest Florida Police Benevolent Association, Inc. et. al v. City of North Port, 15 FPER ¶ 20179 (1989), quoting America Federation of State County and Municipal Employees v. City of Venice, 4 FPER ¶ 4059 (1978).
97 John Enrico v. City of Cape Coral, 39 FPER ¶ 185 (2012) (citations omitted).
98 Id. (citations omitted).

practice or of any other violation of this part, if such expression contains no promise of benefits or threat of reprisal of force."[99] Indeed, FPERA's free-speech provision was the subject of what appears to be FPERC's first decision involving a social media policy.

In Orange County Professional Fire Fighters v. Board of County Commissioners,[100] the county received complaints from citizens about firefighters who were posing for photos during an emergency. The photos were later posted on a website. The county also received additional complaints about photos taken by firefighters at accident scenes which were later posted online. The photos were taken by on-duty employees using personal cameras. In response to the photo postings, the county implemented a "Standard Operating Procedure" for social media for the purpose of "protect[ing] Fire Rescue employees, the Department and its property, reputation, and image from the negative effects and consequences of social media." [101] To accomplish its purpose, the policy provided, in part, that:

> 4.1 Employees of the Department shall not criticize or ridicule or debase the reputation of the Department, its policies, its officers or other employees through speech, writing or other expression when such speech, writing or expression:
>
> a. Is defamatory, obscene, slanderous or unlawful; and/or
>
> b. Tends to interfere with the maintenance of proper discipline; and/or
>
> c. Damages or impairs the reputation and efficiency of the Department or its employees.[102]

The FPERC held that §4.1(a) of the policy was lawful because the FPERA prohibits employees from using threatening language, libelous speech, language constituting extortion or bribery, and defamatory speech. FPERC found §§4.1(b) & (c) unlawful in violation of Section

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99 FPERA § 447.501(3).

100 38 FPER ¶ 131 (2011).

101 The policy defined social media as "any form of computer and or networking sites or processes including, but not limited to, Facebook, Twitter, YouTube and MySpace." Id.

102 Id.

447.501(1)(a) because these provisions interfered with and restrained employees from exercising "rights… to speak freely and to engage in protected concerted activity under §447.301(3), especially in view of statutory and policy considerations encouraging robust and open discussion of labor relations matters."[103] Indeed, three employees credibly testified that they refrained from discussing working conditions or making critical comments about the department in fear of receiving disciplinary action.[104]

Washington

Unlike the previous states' laws, which expressly protect public employees' rights to engage in concerted activity for mutual aid or protection, Washington's Educational Employment Relations Act – governing labor relations of school district employees – only affords school district employees:

> [T]he right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.[105]

Indeed, noticeably absent from such statutory language is any reference to "concerted activities," which are defined as "activities undertaken by employees, jointly with one another, for the purpose of improving their working conditions."[106] This omission has not gone

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[103] Id., quoting United Faculty of Palm Beach Junior College v. District Board of Trustees of Palm Beach Junior College, 11 FPER ¶ 16101 at 327 (1985). See also Dickey v. David Gee, Sheriff of Hillsborough County, Florida, 35 FPER ¶ 191 (2009).

[104] In addition to §4.1(b) & (c), FPERC also found unlawful a portion of §3.2 of the policy, which restricted employees from using their own personal devices with access to the internet, because it did not limit "employees from using their own personal devices to access social media website during working hours or work areas." 38 FPER ¶ 131. FPERC did, however, uphold a provision restricting employees from communicating through social media *while using fire department property and resources* because such a rule did not restrain, coerce, or interfere with employees' right to exercise their rights but, rather, was intended to protect employees and the department from "negative effects and consequences of social media." Id.

[105] West's RCWA § 41.59.060(1).

[106] Teamsters Local Union No. 117 v. State Dept. of Corrections, 179 Wash. App. 110, 113, n. 1 (2014), citing Bravo v. Dolsen Cos., 125 Wash.2d 745, 752 (1995).

unnoticed by Washington's Public Employment Relations Commission ("WPERC").[107] Accordingly, there is a strong argument to be had that school district employees concerted activities unrelated to unionization are not protected from interference, restraint or coercion from a school district.

In 2014, the WPERC addressed this very issue, albeit in the context of state employees (who are, nonetheless, still public employees).[108] In the case, a state employee sent two "unprofessional" emails to her fellow staff members. Notably, however, neither email sent related to any union activity. As a result of her sending these messages, her employer issued her a letter of reprimand that was placed in her personnel file and suspended her employee email and intranet account. The employee thereafter filed an unfair labor practice complaint with the WPERC in which she alleged that her employer interfered with her employee rights and discriminated against her. The WPERC held that the employee's emails were not actions protected by the applicable statute because her emails were not "related to matters that the union had discussed with the employer or anticipated discussing with the employer" did not concern "the administration of a collective bargaining agreement" nor did they involve "union-employer negotiations."[109] Simply put, there was no nexus between the emails and the union which would have implicated the statute.

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[107] See Upper Skagit Valley Education Assn v. Concrete School District, 1980 WL 317277, *1 (Wash Pub. Emp. Rel. Com. 1980); Spokane Education Assn v. Spoke School District, 1978 WL 182682, *1 (Wash. Pub. Emp. Rel. Com. 1978).

[108] Teamsters Local Union No. 117, 179 Wash App. at 118-119. The laws at issue in this case – West's RCWA § 41.80.050 & 41.56.040 – essentially mirror Washington's law regarding public school employees, as they provide employees with the: "right to self-organization, to form, join, or assist employee organizations, and to bargain collectively through representatives of their own choosing for the purpose of collective bargaining free from interference, restraint or coercion. Employees shall also have the right to refrain from any or all such activities…." West's RCWA § 41.80.050. Similarly, Washington state law prohibits "public employers from interfering with public employees' exercise of their right to organize and designate representatives for the purpose of collective bargaining." Teamsters Local Union No. 117, 179 Wash. App. at 119.

[109] Id. at 117, n. 4.

The Court of Appeals of Washington affirmed the WPERC's decision reasoning that the plain language of Washington's public employee rights statute does not mention "concerted activities." In its opinion, the court explicitly contrasted the statute from the NLRA, noting that the NLRA "expressly protects private sector employees' 'concerted activities' and their right to 'engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'"[110] The court further stated that, notwithstanding the fact that Washington borrowed text from the NLRA in crafting its own labor relations statute, it chose not to "incorporate the NLRA language specifically protecting 'concerted activities' of Washington's public employees."[111]

New York

New York's law is similar to Washington's law. Under New York law, an "employee's conduct is considered to be concerted activity when he or she acts with or on the authority of other employees and not solely on behalf of himself or herself…."[112] However, § 202 of New York's Public Employees' Fair Employment Act, known as the Taylor Law, only provides that "[p]ublic employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their choosing."[113] As noted by New York's highest court – the Court of Appeals – in its decision in Rosen v. Public Employment Relations Board, "[c]conspicuously absent from the formulation of a public employee's right to organize in section 202 is the additional right guaranteed in the NLRA 'to

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110 Id. at 119, quoting 29 U.S.C. §157.
111 Id. at 120.
112 In the Matter of Village of Scotia v. New York State Public Employment Relations Board, 241 A.D.2d 29 (App. Div. 3rd Dep. 1998) (citation omitted).
113 McKinney's Civil Service Law § 202.

engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'"[114]

Given this omission, the Court concluded that New York's legislature intended only to protect public employees' rights relative to forming, joining, or participating in an employee organization – short of the broader protections afforded to private employees under the NLRA. Simply put, the Taylor Law was not "intended to protect unorganized – though concerted – activity" by public employees.[115] Thus, because the employee's grievances in Rosen did not involve a union, her employer did not violate the Taylor Law when, following her airing of grievances, it reduced the employee's workload, and thereby her income.

Notwithstanding the foregoing, the following employee activities are likely to receive the protections of the Taylor Law:

> Employee statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity for purposes of the [Taylor Law]. The wide scope of protected concerted activities under the [Taylor Law] includes statements and activities by a unit employee as part of an employee organizational activity, relates to an employee organization policy, involves employee organizational representation or stems from a dispute emanating from a collectively negotiated agreement.[116]

IV. Conclusion & Recommendations

Advising a public school client on employees' First Amendment and protected concerted activity rights is no easy task, and one that requires several layers of analysis. Recall from Part I of the paper that, for purposes of First Amendment analysis, a school district must first determine whether the teacher is speaking as a citizen or whether the speech is ordinarily within the scope of an employee's duties. If the employee's speech is made as part of the employee's ordinary

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114 Rosen v. Public Employment Relations Board, 72 N.Y.2d 42, 49 (1988).
115 Id. at 50.
116 In the Matter of Civil Service Employees Association, Inc., Local 1000, and County of Tioga, 44 PERB ¶3016 (2011).

job duties, it will not receive First Amendment protections.[117] If, however, the employee is speaking as a citizen, the question becomes whether the speech is about a matter of public concern. If it is not, the speech is not protected by the First Amendment. If, to the contrary, the speech does involve a matter of public concern, the school district must then determine if it would be adequately justified in disciplining the employee because of his/her speech.[118]

Following the First Amendment analysis, a school district must consider the scope of its public sector collective bargaining law. In doing so, a school district must first determine whether the activity in question is concerted, i.e., whether it involves more than one employee, or one employee speaking on behalf of several others. Thereafter, the school district will need to analyze whether the speech is protected. This will require reviewing the specific state law to determine whether protected activity includes speech about working conditions and/or union activities, or whether the speech must concern only union activities to receive protection.

Recall the fact pattern in the Connick v. Myers case discussed at Part I(2) of this paper: ADA Myers was terminated after she prepared and distributed to 15 co-workers a questionnaire soliciting their views regarding the "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." If Myers were to bring a suit today against the District Attorney's Office, it's likely that, in addition to filing a First Amendment claim, she would file a claim under her state's public employee labor relations statute on the grounds that she was terminated in retaliation for engaging in protected, concerted activity. Unlike her First Amendment claim,

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[117] Recall that there is a jurisdictional split as to whether the Garcetti analysis applies to public educators, or whether the Pickering test should apply. Supra, Part I(3) and footnotes 14 - 18.

[118] Practitioners should also be cognizant of their respective state constitutions when analyzing potential free speech issues.

however, Myers would likely succeed on her protected concerted activity claim.[119] In that regard, Myers' conduct would be protected because it specifically addressed the terms and conditions of her employment. Furthermore, Myers' conduct would be concerted because it involved distributing the questionnaire to fifteen of her fellow ADA's for the purpose of seeking their aid in addressing and correcting certain workplace issues she identified.

Given the overlapping nature of First Amendment free speech issues and protected concerted activity, counsel must evaluate the speech under both layers of analysis to ensure any action taken complies with the First Amendment and the state's public employee labor relations law. The following recommendations should prove useful in managing public school employee speech. For starters, a public school district with a social media and/or confidentiality policy that runs afoul of the First Amendment and/or the state's labor law has lost the battle before it has even begun. For that reason, it is crucial that school districts maintain compliant social media and confidentiality policies. Although it is necessary to tailor such policies to the law of the state in which you practice, counsel should, nonetheless, keep in mind the following guidelines when drafting social media policies:

- Prohibitions against making discriminatory remarks, bullying, threats of violence and/or other forms of harassment on social media stand a good chance of being held lawful.

- Prohibitions against the disclosure of confidential information should be limited in scope. In that regard, information defined to be "confidential" under a policy should not include wages, benefits, employee discipline and other terms and conditions of employment. Instead, in the context of a school district, confidential information should be defined to include student education records,[120] contact information, medical information, licensing agreements, information exchanged or provided by students, and communications with parents, guardians, and members of the public. Counsel is also wise to consider the scope of the applicable public records law of the state as confidentiality clauses that exceed such laws are

[119] This assumes that the state has a law similar to Michigan, Illinois and Florida FL, and not New York or Washington.

[120] Education record is defined by 34 C.F.R. §99.3 as all records, files, documents and other materials with information that relates to a student, which is maintained by the school district.

generally of limited utility and may serve to undercut the enforceability of the policy as a whole.

- A policy that prohibits employees from making comments that could damage or discredit the school district's reputation or disrupt the workforce may also be subject to challenge, as is a policy that prohibits employees from making disparaging, disrespectful or offensive remarks about the school district.

- At the end of a policy, it is advisable to include a "savings clause" or "disclaimer" such as:

> This policy is not intended to interfere with employee rights under the state's public employee labor relations law or the First Amendment. As such, this policy will not be interpreted or be applied in a manner that interferes with employee rights under such laws including the right to self-organize, to join or assist a labor union, or to engage in other concerted activities for the purpose of mutual aid or protection, including the right to discuss wages and other conditions of employment with other employees or individuals, or to refrain from engaging in such activities. [121]

After drafting a social media policy, it is necessary for the school district to conduct training on the policy for supervisors and any other individuals with disciplinary authority.

Assuming a school district has drafted and implemented a social media policy on which its decision-makers have been trained, the next issue will inevitably involve (i) analyzing whether an employee has violated that policy by his or her conduct and, if so, (ii) determining an appropriate level of discipline. Certainly, basic principles of risk management should be considered by a school district when analyzing a fact pattern and making any determination.

[121] To the extent a school district includes such a clause in a policy, it should consider whether to specifically reference the rights not affected by the policy. For context, in the NLRB's Chipotle decision, the NLRB found a savings clause stating that "[t]his code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws or other privacy concerns" did not "save" the policy from violating the NLRA because it did not specifically identify those rights unaffected by the policy. The counterbalance is the concern that by specifically identifying certain rights, employees may become more aware of their rights and more actively assert them. Whether to specify the rights not affected by the policy is a decision best made after discussing this issue with a specific district.

By way of example, if an employee takes to social media and writes: "It's incredible how little my students know about science: #AmericasFutureIsInBigTrouble," a school district can, with confidence, deem the teacher to have violated the social media policy because the teacher's activity does not relate to working conditions and, therefore, is neither protected nor concerted.[122] Discipline can be imposed within the bounds of the applicable collective bargaining agreement or state law.

To the contrary, a school district will have a more difficult decision to make if a teacher posts a comment similar to the following: "The pace that the district expects us to teach the curriculum is not possible!!! I feel like I'm up all night preparing for class and when I get there in the morning, I'm ready to fall asleep!!! It's obvious that administration doesn't give a flying f*** about the teachers. Anybody else have this problem?!!"[123] On the one hand, an argument can be made that the teacher engaged in protected concerted activity when she references the pace at which the curriculum is taught, and enlisted her colleagues' support. On the other hand, however, the teacher made a vulgar statement that will certainly reflect poorly on her and the school district, and which may call into question the teacher's credibility in the eyes of her students' parents.[124] If a school district decides to issue discipline, the discipline should be comparatively minor to lessen the risk of the employee filing a claim.[125]

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[122] The teacher is also unlikely to succeed on a First Amendment claim, as the school district can demonstrate a strong interest in preventing a teacher from openly criticizing his/her students.

[123] Assume multiple teachers commented on the post to express their solidarity.

[124] The First Amendment analysis is equally challenging.

[125] Before issuing discipline, the school district should also take into consideration how "friendly" the relevant administrative state agency is to employees and/or unions.