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Marc Cote

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GETTING DOOCED: EMPLOYEE BLOGS AND EMPLOYER BLOGGING POLICIES UNDER THE NATIONAL LABOR RELATIONS ACT

Marc Cote

Abstract: Statistics show that a growing percentage of American workers maintain personal blogs. The fact that employees use personal blogs to discuss their experiences at work creates concerns for employers and the employees themselves. Employers worry that employee bloggers will make disparaging remarks about their companies, divulge trade secrets, or simply embarrass their companies. Employees worry about job security and their ability to communicate with fellow employees about job-related concerns. Analysis of the legal rights possessed by employee bloggers reveals that the National Labor Relations Act (NLRA) provides employees with protection from adverse employment actions in certain circumstances. The NLRA protects employee “concerted activity” for “mutual aid or protection.” Based on the text and purpose of the NLRA, as well as case law interpreting this statute, courts should adopt a two-part test to determine whether an employee blogger receives legal protection. First, courts should require that the blog constitute a “collective” blog or “spokesperson” blog to be protected. Second, courts should also require that the blog discussion reveal an intent to spur protected group activity. In addition to this two-part test, courts should hold that under the NLRA, employers may not create policies with overbroad restrictions concerning the material on the personal blogs of employees because such restrictions infringe on employee rights to engage in “concerted activity” for their “mutual aid or protection.”

An office employee works alone in a cubicle five days a week, rarely communicating with co-workers.¹ She has not received a pay raise in two years and after talking with friends outside of work, she realizes that her earnings are far below the market rate. She is curious about the wages of co-workers, but never has the opportunity to discuss her concerns with them—her lunch break is only a half-hour long, and the breakroom lacks privacy due to the assistant manager’s frequent eavesdropping on employee conversations. In addition to her low wages, she just learned that fringe benefits are being cut because of a downturn in business, and she will now be required to work weekend overtime. Frustrated by this apparent lack of control over her work life, she begins expressing her thoughts on a personal internet website, also known as a “weblog” or “blog.”² She emails co-workers and friends to invite them

1. Hypothetical created by the author for illustrative purposes.

2. A blog is “an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2005),

to read the blog. After the assistant manager hears two co-workers discussing the blog, he reports it to the manager. The manager then fires the employee blogger. The reason for the firing: Company policy prohibits employees from discussing employment-related issues in internet chat rooms or on any publicly available websites.

As an increasing number of employees find themselves in front of computers throughout the workday, many have begun discussing working conditions on personal blogs.³ Recent studies reveal both the pervasiveness of employee blogging and a lack of employer policies specifically addressing blogging. In a telephone survey of 1000 adults, 5% of American workers reported that they maintained personal blogs, but only 15% of the respondents' employers had specific policies concerning work-related blogging.⁴ Of employees who work for companies with blogging policies, 62% say the policies prohibit posting any employer-related information on personal blogs.⁵ Sixty percent say the policy discourages employees from criticizing or making negative comments about the employer.⁶ Another study found that 85% of employers do not have a written policy outlining appropriate employee blogging material, while 8% of employers do have such policies in place.⁷

The issue of employee blogging has become popular in the media.⁸ The increased attention to employee blogging is largely attributable to a few popular blogs.⁹ Blogger Heather Armstrong was fired from her web-

available at <http://www.m-w.com/dictionary/blog>.

3. See generally Amy Joyce, *Blogged Out of a Job: Few Firms Have Rules but Posters Be Warned*, WASH. POST, Feb. 19, 2006, at F6 (discussing employees blogging about working conditions and the consequences for such actions).

4. Press Release, Steve Hirschfeld, Chief Executive Officer, Employment Law Alliance, *Blogging and the American Workplace - As Work-Related Web Blogs Proliferate, New National Survey Finds Few Employers are Prepared for the Impact* (Feb. 6, 2006), http://fm.employmentlawalliance.com/ela/FMPro?-DB=ela_articles.fp5&-Format=article.html-&-RecID=33678&-Find (finding also that among those maintaining a blog, 16% have posted employer-related information).

5. *Id.*

6. *Id.*

7. Joyce, *supra* note 3, at F6 (citing survey done by the Society for Human Resource Management, and referencing an additional study performed by the same group, which found that 3% of 278 surveyed human resource professionals had disciplined employees for blogs).

8. See, e.g., Joyce, *supra* note 3, at F6; Matt Villano, *Blogging the Hand That Feeds You*, N.Y. TIMES, Sept. 27, 2006, at G5 (discussing employee blogs and "business blogs").

9. See, e.g., Heather B. Armstrong, Dooce, <http://www.dooce.com> (last visited Dec. 30, 2006); Ellen Simonetti, *Diary of a Fired Flight Attendant*, <http://queenofsky.journalspace.com/> (last visited

design job in 2002 for writing about work colleagues on her blog.¹⁰ Based on Armstrong's experience, many bloggers now refer to getting fired for what one posts on a blog as getting "dooiced"—a reference to the name of Armstrong's blog, Dooce.com.¹¹ Other examples of employees being terminated for their work-related musings on personal blogs include a Delta flight attendant who posted pictures of herself posing provocatively in a company uniform¹² and a Microsoft employee who posted pictures of Apple computers the company had purchased.¹³

In response to employer fears that employee bloggers will make disparaging remarks about the company, divulge trade secrets, or simply embarrass the company, many companies have begun instituting policies to regulate employee blogging activity.¹⁴ For example, Yahoo! warns its employees in its Personal Blog Guidelines that "[a]ny confidential, proprietary, or trade secret information is obviously off-limits for your blog per the Proprietary Information Agreement you have signed with Yahoo!"¹⁵ Viacom has instituted a much more sweeping policy, which states that employees are "discouraged from publicly discussing work-related matters, whether constituting confidential information or not, outside of appropriate work channels, including online in chat rooms or 'blogs.'"¹⁶ Such a policy implies to employees that discussing work-related matters in a blog may result in discipline, possibly even termination.¹⁷ The question then arises whether such company blogging restrictions violate employment laws.

Dec. 30, 2006).

10. See Heather B. Armstrong, *About This Site*, <http://www.dooce.com/about.html> (last visited Dec. 30, 2006) (discussing the blogger's termination for blogging about colleagues).

11. See Urban Dictionary, <http://www.urbandictionary.com/define.php?term=dooiced> (last visited Dec. 30, 2006) (listing seven definitions for "dooiced," all with the general theme of being fired for material written on a blog).

12. See William A. Clineburg Jr. & Peter N. Hall, *Addressing Blogging by Employees: Employers Should Set and Widely Disseminate Reasonable Policies*, NAT'L L.J., June 6, 2005, at S1 (discussing Ellen Simonetti's Diary of a Fired Flight Attendant, <http://queenofsky.journalspace.com/> (last visited Dec. 30, 2006)).

13. See Joyce, *supra* note 3.

14. See Clineburg Jr. & Hall, *supra* note 12.

15. Yahoo! Personal Blog Guidelines: 1.0, <http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf> (last visited Nov. 3, 2006) (policy posted on personal blog of Yahoo! employee Jeremy Zawodny).

16. See Anna Bahney, *Interns? No Bloggers Need Apply: Companies Clamp Down on Posting Office Secrets*, N.Y. TIMES, May 25, 2006, at G1.

17. See *id.*

No federal laws specifically include employment protections for employee bloggers or regulate blog content, but commentators have suggested that various constitutional provisions and federal laws may nonetheless apply to bloggers.¹⁸ Under the employment at-will doctrine, an employer may generally terminate an employee for any reason or no reason at all, so long as the termination does not violate a state or federal statute, a contractual agreement, or certain public policy exceptions.¹⁹ Although the National Labor Relations Act (NLRA)²⁰ does not expressly address employee blogging, longstanding principles underlying that Act may require courts to strike down overly restrictive employee blogging policies.²¹

This Comment argues that employers may not restrict the content of employee personal blogs in a manner that infringes on employee rights to engage in concerted activity for their mutual aid or protection—activity protected under the NLRA.²² This limitation of employer power should extend both to pre-emptive policies discouraging blogging and individual adverse employment actions against employees who engage in protected employee blogging. Extending NLRA protection to employee bloggers conforms to both the statutory language of the NLRA's provisions concerning unfair labor practices by employers²³ and case law analyzing analogous claims made prior to the proliferation of employee blogs.²⁴ The proposed rule also finds support in the original purposes of the NLRA, as applied to the modern workforce. Because employees now often communicate through email and the internet,

18. See, e.g., Clineburg Jr. & Hall, *supra* note 12. The authors discuss the possible application of numerous laws and doctrines, including the Uniform Trade Secrets Act, work-for-hire doctrine under copyright law (17 U.S.C. § 201(b) (2000)), securities laws, defamation, whistleblower protection under the Sarbanes-Oxley Act (29 C.F.R. § 1980.102 (2004)), and discrimination laws (if an employee discusses religion, for example, on a blog) such as Title VII, 42 U.S.C. § 2000e-2 (2000).

19. See generally Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R.4th 544 (1982) (discussing at-will employment rule and challenges to its validity).

20. 29 U.S.C. §§ 151–169 (2000).

21. See *infra* Parts I–II.

22. National Labor Relations Act (NLRA) §§ 7–8(a)(1), 29 U.S.C. §§ 157–158(a)(1).

23. See *id.* § 8(a)(1).

24. See, e.g., NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–15 (1962) (holding that employees who protested cold working conditions did not lose the right to engage in protected concerted activities “merely because they d[id] not present a specific demand upon their employer”); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (outlining requirements for concerted activity but finding that those requirements were not met by employee).

opportunity for employee organization and concerted activity through such media should receive legal protection.²⁵

Part I of this Comment provides an overview of the NLRA, particularly the provisions relating to employer infringement of protected employee action for mutual aid or protection. Part II examines case law interpreting the relevant provisions of the NLRA. Part III discusses case law applying the NLRA to confidentiality and wage secrecy policies of employers. Part IV proposes a test to determine whether employee blogging constitutes “concerted activity” for “mutual aid or protection” under the NLRA. Based on precedent concerning the applicability of the NLRA to confidentiality and pay secrecy rules, Part IV further argues that overbroad company blogging policies restricting employee blogging constitute unfair labor practices.

I. THE NLRA ALLOWS EMPLOYEES TO WORK TOGETHER TO IMPROVE WORKING CONDITIONS

One of Congress’s main purposes for enacting the NLRA was “to protect the right of workers to act together to better their working conditions.”²⁶ This worker protection policy is reflected in specific provisions concerning the rights of workers to organize and participate in “concerted activities” for “mutual aid or protection.”²⁷ Furthermore, Congress explicitly stated this goal in the NLRA’s findings and declaration of policy.²⁸ The NLRA protects not only those workers engaged in union activities or collective bargaining,²⁹ but all workers, regardless of whether or not they are members of a union.³⁰

25. See Kevin C. Brodar, Associate General Counsel, United Transportation Union, *New Frontiers of the Electronic Age: Blogging, the Internet, and Email* 2–3, 7 (2006), <http://www.bna.com/bnabooks/ababna/eec/2006/brodar.pdf> (presented at the National Conference on Equal Employment Opportunity Law, American Bar Association Section of Labor and Employment Law (March 22–25, 2006)) (noting that “[a]lthough technology now present[s] [a] more open, faster, and perhaps a more unforgiving method of communication it does not appear that any standard principle has changed”).

26. *Wash. Aluminum*, 370 U.S. at 14.

27. NLRA §§ 7, 8(a)(1).

28. *Id.* § 1; see *infra* Part I.B.

29. NLRA § 7.

30. See *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249–50 (1997) (finding non-union member’s email complaint about vacation policy to be protected).

A. *The NLRA Protects Employees' Right to Organize and Engage in "Concerted Activities" for "Mutual Aid or Protection"*

The NLRA provisions most relevant to employee blogging are found in sections 7 and 8, which are codified at 29 U.S.C. §§ 157 and 158, respectively. These provisions concern the rights of employees to work together to improve working conditions.³¹ According to section 7 of the NLRA, "[e]mployees 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"³² Section 8(a)(1) adds, "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."³³

Nothing in the legislative history of the NLRA specifically defines what Congress intended the term "concerted activities," as used in section 7, to include.³⁴ In *NLRB v. City Disposal Systems, Inc.*,³⁵ the Court observed that Congress first used the term "concert" in labor relations law in sections 6 and 20 of the Clayton Act,³⁶ which exempted certain types of peaceful union activities from antitrust laws.³⁷ The Court further noted use of the term "concerted activity" by the 1932 Norris-La Guardia Act.³⁸ These two statutes thus appear to be the source of the language in section 7.³⁹ Like the NLRA, however, neither expressly defines the term "concerted activity."⁴⁰

31. See NLRA §§ 7, 8(a)(1).

32. *Id.* § 7 (emphasis added).

33. *Id.* § 8(a)(1).

34. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 834 (1984).

35. 465 U.S. 822 (1984).

36. *Id.* at 834 (citing Clayton Act, § 6, 15 U.S.C. § 17 (1934); Clayton Act § 20, 29 U.S.C. § 52 (1934)).

37. See *id.*

38. *Id.*; see also *City Disposal Sys.*, 465 U.S. at 834–35 (citing Norris-La Guardia Act of 1932 § 2, 29 U.S.C. § 102)).

39. *City Disposal Sys.*, 465 U.S. at 834–35 (citing Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 331–46 (1981)).

40. Both the National Labor Relations Board (NLRB) and courts interpreting the NLRA have defined "concerted activity." See *infra* Part II.

Although much of its language concerns labor unions, the NLRA applies to the activities of non-union employees as well.⁴¹ Employees need not have the goal of forming a union in order to receive protection from unfair labor practices under the NLRA.⁴²

B. The Findings and Declarations of Policy in the NLRA Emphasize Worker Protection

Congress intended the NLRA to eliminate obstructions to the free flow of commerce by protecting employees' right to organize with each other for "mutual aid or protection."⁴³ The U.S. Supreme Court has recognized that Congress, in enacting the NLRA, "sought generally to equalize the bargaining power" between employees and employers.⁴⁴ In the text of the statute, Congress specifically detailed the problems that arise when the bargaining power of employees is compromised:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.⁴⁵

Thus, both the policies underlying the NLRA and its specific provisions support the protection of employees who work together to improve working conditions.

41. See *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249–50 (1997) (finding non-union employee's email complaint about vacation policy to be protected); Gorman & Finkin, *supra* note 39, at 286–88.

42. Cf. Gorman & Finkin, *supra* note 39, at 286–88 (discussing scenarios in which non-union employees may claim protection under section 7).

43. NLRA § 1, 29 U.S.C. § 151 (2000) provides:

It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

44. *City Disposal Sys.*, 465 U.S. at 835.

45. NLRA § 1.

II. COURTS AND THE NLRB BROADLY INTERPRET “CONCERTED ACTIVITIES” FOR “MUTUAL AID OR PROTECTION”

No court has specifically addressed the question of whether employee blogging is protected under the NLRA. Traditionally, courts have interpreted “concerted activities” for “mutual aid or protection” broadly in order to protect the rights of workers in both union and non-union environments.⁴⁶ In applying the NLRA in traditional settings, courts have developed principles that can be applied to any communication method. Generally, “concerted activities” include discussion that an objective observer could determine was intended to lead to group action.⁴⁷ Such discussion need not necessarily be one in which two or more employees are active;⁴⁸ courts have, under certain circumstances, protected individual activity.⁴⁹ Furthermore, courts have interpreted “mutual aid or protection” broadly to include a range of activities in addition to self-organization and collective bargaining.⁵⁰

A. *Individual Discussion Regarding Matters of Common Concern May Constitute “Concerted Activity” Under the NLRA if Intended To Spur Group Action*

“Concerted activity” by both groups and individual actors has been protected by courts and the National Labor Relations Board (NLRB). Generally, “concerted activities” include discussion among employees of matters of common concern.⁵¹ Activity that consists of mere talk may constitute “concerted activity” provided that it is intended to spur group

46. See, e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962) (“concerted activities”); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–67 (1978) (“mutual aid or protection”).

47. See *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

48. *City Disposal Sys.*, 465 U.S. at 831.

49. E.g., *id.* (stating “an individual employee may be engaged in concerted activity when he acts alone”).

50. See *Eastex*, 437 U.S. at 565–70 & n.20. The Court found that the range of activities protected under the “mutual aid or protection” clause for employees who “seek to improve terms and conditions of employment or otherwise improve their lot as employees” includes resorting to administrative and judicial forums, making appeals to the legislature to protect the interests of workers, and distributing newsletters containing references to political issues concerning the rights of workers, although distribution of some “purely political” material may not be protected. *Id.*

51. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 362 (5th Cir. 1990) (citing *Wash. Aluminum*, 370 U.S. at 17).

action.⁵² In some instances, even individual action meets the requirements for “concerted activity.”⁵³

1. “*Concerted Activities*” Includes Discussion of “*Matters of Common Concern*”

Courts generally consider employee discussion of “matters of common concern” to be “concerted activity” and therefore protected by section 7 of the NLRA.⁵⁴ Employees do not lose the protection afforded such “concerted activity” merely because they do not present specific demands to their employer to remedy objectionable conditions.⁵⁵ Rather, “concerted activities” are protected when employees discuss matters of common concern, regardless of whether they demand concessions from their employer.⁵⁶

Although courts have not specifically defined “matters of common concern,” case law nonetheless provides useful examples of topics that constitute protected “concerted activity.” For example, in *NLRB v. Brookshire Grocery Co.*,⁵⁷ the U.S. Court of Appeals for the Fifth Circuit noted that employee discussion of wages falls within the definition of protected “concerted activity.”⁵⁸ Similarly, in *NLRB v. Waco Insulation, Inc.*,⁵⁹ the U.S. Court of Appeals for the Fourth Circuit held that it was “concerted activity” for employees to discuss seeking a pay raise and, later, another employee’s termination.⁶⁰

With certain limited exceptions, “concerted activity” is protected regardless of that activity’s “reasonableness.”⁶¹ For example, the NLRB

52. *Mushroom Transp.*, 330 F.2d at 685.

53. See *City Disposal Sys.*, 465 U.S. at 831 (enumerating two situations in which individual action is concerted activity: “(1) that in which the lone employee intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee”).

54. *Brookshire Grocery*, 919 F.2d at 362 (citing *Wash. Aluminum*, 370 U.S. at 17).

55. *Wash. Aluminum*, 370 U.S. at 14 (reasoning that concerted activities need not include making a demand of an employer; the activities can come before or after such a demand).

56. See *id.*

57. 919 F.2d 359 (5th Cir. 1990).

58. *Id.* at 362 (citing *D & D Distribution Co. v. NLRB*, 801 F.2d 636, 639–40 (3d Cir. 1986)).

59. 567 F.2d 596 (4th Cir. 1977).

60. *Id.* at 600–01.

61. *Wash. Aluminum*, 370 U.S. at 16 & n.12 (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 344 (1938)). But see *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (finding that employee was deprived of the protection of the NLRA when he made comments that were “detrimentally disloyal” to the company on a newspaper’s public forum website).

has ruled in favor of an employee who wrote letters characterizing his supervisors as “a-holes.”⁶² The NLRB has also ruled in favor of an employee who wrote a letter describing management as “hypocritical,” “despotic,” and “tyrannical.”⁶³ In *Timekeeping Systems, Inc.*,⁶⁴ a case concerning an employee who sent an email criticizing a vacation policy change to all his co-workers, the NLRB explained that if activity is concerted, it may even include impropriety so long as such activity does not render the employee unfit for service.⁶⁵ The NLRB stated that “unpleasantries uttered in the course of otherwise protected concerted activity do not strip away the Act’s protection.”⁶⁶

Nevertheless, not all “concerted activity” receives protection under the NLRA. The NLRB’s decision in *Timekeeping Systems* generally acknowledged that “[s]ome concerted conduct can be expressed in so intolerable a manner as to lose the protection of Section 7.”⁶⁷ In order to lose such protection, however, the activity must be so extremely intolerable as to be abusive.⁶⁸ In addition, activity which is unlawful, violent, or in breach of contract does not constitute protected concerted activity.⁶⁹ Finally, the NLRA also does not protect activity that impairs “production or discipline.”⁷⁰

62. U.S. Postal Serv., 241 N.L.R.B. 389, 390 (1979), *cited in* *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249 (1997).

63. Harris Corp., 269 N.L.R.B. 733, 738–39 (1984) (finding letter protected despite its “boorish, ill-bred, and hostile tone”), *cited in* *Timekeeping Sys.*, 323 N.L.R.B. at 249.

64. 323 N.L.R.B. 244 (1997).

65. *Id.* at 249 (citing *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976)).

66. *Id.* (finding that “arrogant overtones” are not sufficient to strip protection); *see also* *Dreis & Krump*, 544 F.2d at 329 (“[C]ommunications occurring during the course of otherwise protected activity remain likewise protected unless found to be ‘so violent or of such serious character as to render the employee unfit for further service.’” (quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946))).

67. *Timekeeping Sys.*, 323 N.L.R.B. at 248. The Board nevertheless found that the employer’s termination of the employee for emailing co-workers in an attempt to elicit support against the employer’s announced vacation policy change was an unfair labor practice. *Id.* at 250; *see also* *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537–38 (D.C. Cir. 2006) (making comments “detrimentally disloyal” to the employer on a newspaper’s public forum website was not protected).

68. *See* *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984).

69. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962).

70. *NLRB v. Motorola, Inc.*, 991 F.2d 278, 284 (5th Cir. 1993) (observing that the employer had not shown that employee distribution of literature “in non-work areas during non-work times would impair ‘production or discipline,’ as employers have been required to show in order to prohibit this type of distribution since the Supreme Court decided *Republic Aviation Corp. v. NLRB*,” 324 U.S. 793, 803 n.10 (1945)).

2. *To Constitute Protected “Concerted Activity,” Discussion Must Be Engaged in To Initiate, Induce, or Prepare for Group Action*

Preliminary discussions consisting of “mere talk” may be protected as concerted activity even if the discussions have not resulted in organized action or demands.⁷¹ However, in order for such employee discussion to qualify for protection under section 7, it must objectively appear to be intended to initiate, induce, or prepare for group action of some kind.⁷² In *Mushroom Transportation Co. v. NLRB*,⁷³ the Third Circuit summarized the ingredients necessary for an informal discussion to be protected:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees.⁷⁴

Building further on the *Mushroom Transportation* rule, the U.S. Supreme Court has noted that if an employer discharges an employee for purely personal “gripping,” the employee may not claim the protection of the NLRA.⁷⁵ The Court explained that “at some point an individual employee’s actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity.”⁷⁶ Thus, whether mere talk meets the concerted activity test or simply constitutes gripping depends on whether and to what extent the individual discussion is related to the activities of other employees.⁷⁷

71. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

72. *Id.*

73. 330 F.2d 683 (3d Cir. 1964).

74. *Id.* at 685; see also *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986) (observing that protected concerted activity may extend to “activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization” (quoting *In re Root-Carlin, Inc.*, 92 N.L.R.B. 1313, 1314 (1951))).

75. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 833 n.10 (1984) (citing *Capitol Ornamental Concrete Specialties, Inc.*, 248 N.L.R.B. 851 (1980)).

76. *Id.*

77. See *id.*

3. *Individual Activity May Be Protected as “Concerted Activity” if Undertaken in a Representative Capacity or with Intent To Induce Group Action*

While the quintessential context for “concerted activities” involves two or more employees,⁷⁸ the U.S. Supreme Court has held that some individual activity may also qualify for protection as concerted activity.⁷⁹ In *City Disposal Systems*, the Court explained:

Although one could interpret the phrase, “to engage in other concerted activities,” to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning.⁸⁰

The Court emphasized that it could find “no indication” that Congress intended a limited construction of the “concerted activities” clause that excludes all individual activity.⁸¹ The Court further offered two examples of individual activity that could constitute “concerted activity.”

First, an employee acting as a representative of at least one other employee may be engaged in concerted activity.⁸² Lower courts and the NLRB have accordingly found the NLRA to protect employees filing workplace safety complaints⁸³ or presenting demands to management on behalf of co-workers.⁸⁴ In finding such individual activity to be

78. See, e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 15 (1962) (finding concerted activity when seven employees walked off their jobs to protest cold temperatures at work).

79. *City Disposal Sys.*, 465 U.S. at 832 (holding that a “lone employee’s invocation of a right grounded in his collective-bargaining agreement” is concerted activity when a truck driver refused to drive a truck with faulty brakes); see also *NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 597–601 (4th Cir. 1977) (finding concerted activity when employee “acted as a spokesman for a group of employees demanding a pay raise, and shortly thereafter was discharged”).

80. *City Disposal Sys.*, 465 U.S. at 831.

81. *Id.* at 835 (“There is no indication that Congress intended to limit this protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.”).

82. *Id.* at 831 (citing *ARO, Inc. v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979) and *NLRB v. N. Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971)).

83. *Cf. Esco Elevators, Inc.*, 276 N.L.R.B. 1245, 1245–46 (1985) (finding that termination of union officer who repeatedly raised safety complaints violated section 8(a)(3), and thus also section 8(a)(1), of the NLRA), *enforced*, 794 F.2d 1078 (5th Cir. 1986).

84. See, e.g., *Waco Insulation*, 567 F.2d at 598–600 (finding concerted activity under section 7 when employee presented a collective demand for wage increases).

concerted, the NLRB has required that the individual employee act “with or on the authority of other employees, and not solely” for personal benefit.⁸⁵

Second, an employee may also be engaged in concerted activity when acting with intent to induce group activity.⁸⁶ Accordingly, lower courts have deemed an employee’s individual activity protected where it induces, initiates, or prepares for group action.⁸⁷ Therefore, in order to find concerted activity, group action of some kind must be “intended, contemplated, or . . . referred to.”⁸⁸ If the individual act or statement “looks forward to no action at all, it is more than likely to be mere ‘griping.’”⁸⁹

Finally, even if an employee’s action is not concerted activity, the discharge of that employee is still an unfair labor practice if the result is to restrain or interfere with concerted activity.⁹⁰ According to the U.S. Supreme Court, under section 8(a)(1), “an employer commits an unfair labor practice if he or she ‘interfere[s] with, [or] restrain[s]’ concerted activity.”⁹¹ For example, it is an unfair labor practice for an employer to prohibit employee discussion of salary details because such a rule would interfere with employee attempts at collective bargaining or other concerted activity.⁹²

B. The U.S. Supreme Court Has Interpreted “Mutual Aid or Protection” Broadly

To be protected under the NLRA, activity must not only be “concerted” but must also be performed for “mutual aid or protection.”⁹³ In *Eastex, Inc. v. NLRB*,⁹⁴ the U.S. Supreme Court addressed the scope

85. *Meyers II*, 281 N.L.R.B. 882, 885 (1986) (quoting *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 497 (1984)).

86. *City Disposal Sys.* at 831 (citing *ARO*, 596 F.2d at 717 and *N. Metal*, 440 F.2d at 884).

87. *See, e.g., Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (explaining that a conversation involving one speaker and one listener may constitute concerted activity if “engaged in with the object of initiating or inducing or preparing for group action”).

88. *Id.*

89. *Id.*

90. *See City Disposal Sys.* at 833 n.10.

91. *Id.* (alteration in original) (quoting NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982)).

92. *See Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1260 (10th Cir. 2005); *infra* Part III.

93. *See* NLRA § 7.

94. 437 U.S. 556 (1978).

of activities protected by the “mutual aid or protection” clause.⁹⁵ The case involved employees who sought to distribute a union newsletter urging co-workers to support the union and discussing two political issues relevant to worker rights.⁹⁶ One section of the newsletter discussed a proposal to incorporate the state’s right-to-work statute into the state constitution, and another section addressed the recent presidential veto of an increase in the federal minimum wage.⁹⁷ When the employer refused to allow its employees to distribute the newsletter, the union filed an unfair labor practice charge, alleging that the employer had “interfered with, restrained, and coerced employees’ exercise of their § 7 rights in violation of § 8(a)(1).”⁹⁸ In its analysis, the Court defined “mutual aid or protection” broadly, reasoning that Congress intended the clause to include activities other than those associated with self-organization and collective bargaining.⁹⁹ The Court based its reasoning on the plain language of the statute—Congress chose “to protect concerted activities for the somewhat broader purpose of ‘mutual aid or protection’ as well as for the narrower purposes of ‘self-organization’ and ‘collective bargaining.’”¹⁰⁰ Nevertheless, the Court refused to create a test to determine when activity is performed for mutual aid or protection.¹⁰¹ Applying a broad construction in *Eastex*, the Court found that the NLRB did not err in finding that distribution of newsletters referring to political issues of importance to workers “bears” a sufficient “relation to employees’ interests” to fall within the realm of “mutual aid or protection.”¹⁰²

Employees do not lose protection under the “mutual aid or protection” clause when they attempt to improve terms and conditions of employment “through channels outside the immediate employee-employer relationship.”¹⁰³ Courts have thus held, for example, that the

95. *Id.* at 563–70.

96. *Id.* at 559–60.

97. *Id.*

98. *Id.* at 560–61.

99. *See id.* at 565–67.

100. *Id.* at 565 (noting also that “[t]he 74th Congress knew well enough that labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context”).

101. *Id.* at 568 (“It is neither necessary nor appropriate, however, for us to attempt to delineate precisely the boundaries of the ‘mutual aid or protection’ clause.”).

102. *Id.* at 569.

103. *Id.* at 565.

“mutual aid or protection” clause shields employees who make appeals to the legislature to protect their interests as employees.¹⁰⁴ However, the relationship between the concerted activity and the employees’ interests may become so attenuated that the activity cannot fairly be deemed to fit within the mutual aid or protection clause.¹⁰⁵

C. Courts and the NLRB Have Not Limited the Protection of Federal Labor Law to Particular Methods of Communication

Congress enacted the NLRA in an era before the proliferation of electronic communication.¹⁰⁶ In 1935, when the NLRA was enacted, workplace communication between employees consisted of word of mouth, posted bulletins, or printed flyers.¹⁰⁷ By contrast, as one commentator explained, “[c]ourts are now being faced with applying labor laws enacted over seventy-five years ago to the modern issues that have been generated by the rapid advance of technology and its radical effect on the traditional notions of the ‘workplace.’”¹⁰⁸

Courts and the NLRB have not limited protection under federal labor law to those modes of communication engaged in by employees at the time that the NLRA was enacted. To the contrary, recognizing that many workers now communicate with each other over email and secure websites, both courts and the NLRB have found that electronic communications by employees who seek to improve working conditions are normally protected.¹⁰⁹ For example, in *Timekeeping Systems*, the NLRB held that the NLRA protected an employee who sent all his co-

104. *See id.* at 566 (citing *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930, 937 (1st Cir. 1940), *dismissed on motion of petitioner*, 312 U.S. 710 (1941)).

105. *Id.* at 568 (declining, nevertheless, to describe how attenuated employee interests must be to lose protection or “to delineate precisely the boundaries of the ‘mutual aid or protection’ clause”); *see also* *Local 174, UAW v. NLRB*, 645 F.2d 1151, 1154–55 (D.C. Cir. 1981) (finding distribution of political leaflet unprotected because “the principal thrust of the leaflet was to induce employees to vote for specific candidates, not to educate them on political issues relevant to their employment conditions”).

106. *See* Brodar, *supra* note 25, at 1.

107. *See* Brodar, *supra* note 25, at 1.

108. Brodar, *supra* note 25, at 1.

109. *See* *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249 (1997) (email); *Konop v. Hawaiian Airlines*, 302 F.3d 868, 882 & n.10 (9th Cir. 2002) (finding that secure website publication would generally receive protection under the Railway Labor Act and noting that while employers governed by the Railway Labor Act “are not subject to the provisions of the NLRA, courts look to the NLRA and the cases interpreting it for guidance”).

workers an email message complaining about a vacation policy.¹¹⁰ Similarly, in *Konop v. Hawaiian Airlines*,¹¹¹ the Ninth Circuit recognized that website publication “would ordinarily constitute protected union organizing activity” under the Railway Labor Act (RLA),¹¹² a statute analogous to the NLRA.¹¹³ *Konop* involved an airline pilot who argued that his employer violated the RLA by placing him on medical suspension after he posted on a secure website remarks critical of the employer’s position on labor concessions.¹¹⁴ Applying NLRA analysis, the court of appeals reversed the district court’s grant of summary judgment in favor of the employer.¹¹⁵ Although the Ninth Circuit found “no dispute” that website publication was generally protected under the RLA, the court reasoned that a triable issue remained as to whether the employee lost protection for posting “malicious, defamatory and insulting material known to be false.”¹¹⁶

While case law suggests that employers may impose reasonable restrictions on employee computer use in the ordinary course of business,¹¹⁷ few courts have addressed the rights of employees engaged in work-related electronic communication when not at work. Generally, employers are justified in monitoring computer use on company time if employees have actually or impliedly consented to such monitoring.¹¹⁸

110. *Timekeeping Sys.*, 323 N.L.R.B. at 248–49.

111. 302 F.3d 868 (9th Cir. 2002).

112. *Id.* at 882 (citing 45 U.S.C. §§ 151–188 (2000)).

113. Although *Konop* involved the Railway Labor Act (RLA), the court utilized NLRA principles and NLRA case precedent in its analysis of whether the employee’s actions constituted protected activity. *Id.* at 882 & n.10. The RLA and NLRA address similar problems. See *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 445 (1989) (stating that “a fundamental command of the RLA and the NLRA alike” is that “the employer may not engage in discrimination among its employees . . . on the basis of their degree of involvement in protected . . . activity”).

114. *Id.* at 872–73.

115. *Id.* at 882–83, 886.

116. *Id.* at 882–83 & n.10 (emphasizing that courts often look to the NLRA and cases interpreting it for guidance in RLA claims).

117. *Cf. In re Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943) (“The [NLRA], of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time.”), cited in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–04 n.10 (1945).

118. *Cf. Electronic Communications Privacy Act*, 18 U.S.C. § 2511(2)(c) (2000) (providing that interception of electronic communication is not unlawful if “one of the parties to the communication has given prior consent”); see also *United States v. Ziegler*, No. 05-30177, 2007 WL 222167, at *6 (9th Cir. Jan. 30, 2007) (finding that under the Fourth Amendment, an employee could not reasonably expect his office computer to be “free from any type of control by his employer” when

Thus, most company policies regarding computer use during work hours are likely valid, particularly when employers are simply monitoring computer terminals for work performance.¹¹⁹ Nevertheless, the General Counsel of the NLRB has issued an opinion stating that an employer policy prohibiting “all non-business use of electronic mail (E-mail), including employees’ messages otherwise protected by Section 7, is overbroad and facially unlawful.”¹²⁰

III. OVERBROAD COMPANY CONFIDENTIALITY RULES VIOLATE THE NLRA

No court has yet analyzed confidentiality rules included in employee blogging policies, but courts have outlined general principles for determining when confidentiality rules violate the NLRA. Although a company may have a significant interest in maintaining confidentiality, that interest is not broad enough to require that the employee keep confidential the terms and conditions of employment.¹²¹ For example, a confidentiality agreement is too broad and constitutes an unfair labor practice under the NLRA if it prohibits the discussion of general working conditions.¹²² The same is true if a confidentiality agreement defines “confidential information” to include salary information, salary grade, and types of pay increases.¹²³

the company apprised newly hired employees both through training and its employment manual that it monitored employee internet usage and that company-owned computers were not to be used for personal reasons).

119. Cf. *In re Peyton*, 49 N.L.R.B. at 843–44 (explaining that “[w]orking time is for work” and that rules governing the conduct of employees are reasonable if necessary “to maintain production or discipline”).

120. *Pratt & Whitney*, Nos. 12-CA-18446, 12-CA-18722, 12-CA-18745, & 12-CA-18863, 1998 WL 1112978, at *2 (NLRB Gen. Counsel Feb. 23, 1998); see also Adam S. Forman, *He’s a Blogger, She’s a Blogger, Wouldn’t You Like To Be a Blogger Too?* 12 (2006), <http://www.bna.com/bnabooks/ababna/eo/2006/forman.pdf> (presented at the National Conference on Equal Employment Opportunity Law, American Bar Association Section of Labor and Employment Law (March 22-25, 2006)) (discussing *Pratt & Whitney* opinion).

121. See *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259–60 (10th Cir. 2005).

122. *Id.* at 1260.

123. *Id.*

A. *Confidentiality Rules that Prohibit Discussion of Wages, Hours, and Working Conditions Violate the NLRA*

Confidentiality rules that prohibit discussion of wages, hours, and working conditions are unlawful labor practices under the NLRA because “wages, hours, and working conditions” are “the very stuff of collective bargaining.”¹²⁴ A confidentiality provision in an employment agreement or employment handbook that prohibits employees from discussing working conditions is thus unlawful under the NLRA.¹²⁵ According to the D.C. Circuit, “[t]here can be no quarrel with the claim that, under the NLRA, employees are generally free to discuss the terms and conditions of their employment with family members and friends.”¹²⁶ The court also indicated that employers may not “restrict employees from discussing grievances among themselves.”¹²⁷ A company may prevent employees from speaking about their working conditions only when valid concerns such as patient privacy¹²⁸ or trade secret protection¹²⁹ are present. Not only are policies prohibiting discussion of working conditions generally invalid, but courts also strike down pay secrecy rules that prevent employees from discussing wages and hours.¹³⁰ Thus, a rule that clearly prohibits employees from discussing “confidential wage information” violates section 8(a)(1) because it interferes with employees’ section 7 rights.¹³¹

124. *Id.* (quoting *Brockton Hosp. v. NLRB*, 294 F.3d 100, 107 (D.C. Cir. 2002)).

125. *Id.* at 1259 (citing *IRIS, U.S.A., Inc.*, 336 N.L.R.B. 1013 (2001)).

126. *Aroostook County Reg’l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212 (D.C. Cir. 1996). The D.C. Circuit nevertheless permitted the challenged confidentiality agreement to stand “because the rule in question in no way precludes employees from conferring with or seeking support from family and friends with respect to matters directly pertaining to the employees’ terms and conditions of employment.” *Id.* Rather, the rule only prevented hospital employees from discussing patient medical information outside the office. *Id.* at 212–13. Furthermore, in finding that the hospital’s prohibition on discussing workplace complaints in front of patients was justified, the court noted the relevance of the hospital context and the resulting unique interest in protecting patients. *Id.* at 213.

127. *Id.* at 214.

128. *Id.*

129. See *Clineburg Jr. & Hall, supra* note 12 (“Under the Uniform Trade Secrets Act (UTSA), the disclosure of a trade secret in an employee’s blog would qualify as misappropriation While the disclosure of proprietary information that is not a trade secret may not be prohibited by statute, its publication may violate a written nondisclosure agreement signed by the employee, thus justifying termination.”).

130. See, e.g., *Double Eagle Hotel*, 414 F.3d at 1260 (finding a company’s confidentiality rule overbroad because it prohibited employees from discussing wages, hours, and working conditions with nonemployees or among themselves).

131. See *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) (finding that a

However, not all confidentiality rules related to wage information violate the NLRA. Court decisions concerning such rules often turn on whether the information at issue is the employee's own wage information or other employees' confidential information improperly obtained from private company records.¹³² Generally, company rules forbidding unauthorized disclosure of confidential company information to which an employee has access do not violate section 8(a)(1).¹³³ For example, the D.C. Circuit rejected an argument that a broadly worded company rule prohibiting the "release or disclosure of confidential information concerning patients or employees" constituted an unfair labor practice under section 8(a)(1).¹³⁴ Rather, the court found the company rule acceptable, explaining that a reasonable employee would not believe such a rule to prohibit discussion of one's own employment conditions or wages.¹³⁵ If a reasonable employee would believe the policy prevents discussion of wages, hours, or general working conditions—a prohibition which would have a chilling effect on employees' ability to organize and demand change—then the policy violates the NLRA.¹³⁶

B. Some Company Confidentiality Policies Specifically Address Employee Blogging

Companies have begun to address employee blogging with explicit policies and sections in employment manuals.¹³⁷ For example, Yahoo! has specific blogging guidelines.¹³⁸ Its policy, which is publicly available on the internet, states that "[a]ny confidential, proprietary, or trade secret information is obviously off-limits for your blog per the

company's confidentiality rule violated the NLRA, but that the employee was nonetheless lawfully terminated for unauthorized dissemination of information wrongfully obtained from employer's confidential files because such conduct is not protected activity).

132. *Id.*

133. *NLRB v. Certified Grocers of Ill., Inc.*, 806 F.2d 744, 746 (7th Cir. 1986).

134. *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088–89 (D.C. Cir. 2003).

135. *Id.* at 1089.

136. *See id.*

137. *Clineburg Jr. & Hall*, *supra* note 12.

138. *See* Yahoo! Personal Blog Guidelines: 1.0, <http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf> (last visited Nov. 3, 2006) (policy posted on personal blog of Yahoo! employee Jeremy Zawodny) ("Yahoo! believes in fostering a thriving online community and supports blogging as a valuable component of shared media.").

Proprietary Information Agreement you have signed with Yahoo!.”¹³⁹ Viacom’s more sweeping blogging policy is embedded in its general employment guidelines. It states that employees are “discouraged from publicly discussing work-related matters, whether constituting confidential information or not, outside of appropriate work channels, including online in chat rooms or ‘blogs.’”¹⁴⁰

IV. OVERBROAD RESTRICTIONS ON EMPLOYEE BLOGGING MAY CONSTITUTE UNFAIR LABOR PRACTICES

Rules preventing employees from discussing their employment on blogs infringe on modern employees’ opportunities to participate in “concerted activities” for “mutual aid or protection.”¹⁴¹ By infringing on this right of employees, such blogging prohibitions and restrictions violate section 8(a)(1) of the NLRA.¹⁴² Employee blogs that meet the criteria of “concerted activity” for “mutual aid or protection” are protected from undue restriction under the NLRA.¹⁴³ Under these criteria, discussion of wages or working conditions in an employee blog is protected under the NLRA provided that an objective observer could find that the discussion was intended to spur protected group action.¹⁴⁴ Moreover, the restrictions on blogging imposed by some employee policies are similar to the confidentiality rules that courts have traditionally struck down as violations of the NLRA.¹⁴⁵

139. *Id.*

140. *See* Bahney, *supra* note 16.

141. *Cf.* *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259 (10th Cir. 2005) (stating that “when a confidentiality provision is reasonably interpreted to prevent employees from discussing working conditions . . . that rule is unlawful”).

142. *Cf. id.* at 1259–60.

143. *Cf.* *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248 (1997) (addressing employee email sent over company listserv).

144. *Cf.* *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (explaining that activity involving only one speaker and one listener must have “the object of initiating or inducing or preparing for group action” in order to constitute concerted activity).

145. *See, e.g., Double Eagle Hotel*, 414 F.3d at 1259–60 (discussing confidentiality policy that prohibited discussion of “grievance/complaint information,” “salary information,” and “salary grade”); *Brockton Hosp. v. NLRB*, 294 F.3d 100, 106–07 (D.C. Cir. 2002) (affirming the NLRB conclusion that the employer’s confidentiality policy, which prohibited most discussion concerning nurses or “hospital operations . . . inside or outside the hospital,” violated the NLRA); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) (finding that company rule violated the NLRA but that the employee was nonetheless lawfully terminated for unauthorized dissemination of information from employer’s confidential files).

A. *Whether an Employee Communication Will Receive Protection Under the NLRA Depends on Its Substance, Not Its Form*

The method of communication by which an employee chooses to engage in “concerted activity” for “mutual aid or protection” is irrelevant to the determination of whether the communication receives protection under the NLRA.¹⁴⁶ So long as a blog meets the requirements for concerted activity for mutual aid or protection, an employee who blogs about working conditions or wages is protected under the NLRA.¹⁴⁷ Protection from unfair labor practices under the NLRA has already been extended to informal discussions,¹⁴⁸ newsletters,¹⁴⁹ and email;¹⁵⁰ there is no valid reason to exclude employee blogs from the same protection if used to engage in the type of communication whose content is protected by the NLRA.

An employee blog read by other employees or open to discussion from other employees is similar to the many other forms of communication that courts have found protected as concerted activity for mutual aid or protection.¹⁵¹ Such blogs are, for example, similar to emails sent over a company listserv.¹⁵² In *Timekeeping Systems*, the NLRB found that an employer engaged in an unfair labor practice by terminating an employee for emailing co-workers to elicit opposition to a vacation policy change.¹⁵³ The NLRB’s analysis of the employee’s action did not depend on the electronic form of the employee’s communication.¹⁵⁴ Rather, the analysis focused on the substance of the communication.¹⁵⁵ Thus, whether the complaints appear in an email or on a personal employee blog viewed by (or open to discussion with) other employees, the analysis remains the same, and the employer may

146. See, e.g., *Timekeeping Sys.*, 323 N.L.R.B. at 249 (email); cf. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 882 (9th Cir. 2002) (secure website).

147. Cf. NLRA § 7, 29 U.S.C. § 157 (2000). See *infra* Part IV.B.

148. *NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 600–01 (4th Cir. 1977).

149. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

150. *Timekeeping Sys.*, 323 N.L.R.B. at 249.

151. See, e.g., *Waco Insulation*, 567 F.2d at 600–01 (informal discussion); *Eastex*, 437 U.S. at 569 (newsletters).

152. See *Timekeeping Sys.*, 323 N.L.R.B. at 248–49.

153. *Id.* at 248–49.

154. See *id.*

155. See *id.*

not unduly restrict the employee's right to discuss terms and conditions of employment.

B. Courts Should Use a Two-Part Test To Determine Whether an Instance of Employee Blogging Is "Concerted Activity" for "Mutual Aid or Protection"

In deciding whether the NLRA protects an instance of employee blogging, courts should follow longstanding principles of NLRA case law and adopt a two-part test to determine whether the challenged blogging constitutes "concerted activity" for "mutual aid or protection."¹⁵⁶ This test would require courts to examine both the type of blog at issue and the goal of its authors in order to determine whether the communication constitutes protected activity under the NLRA. Specifically, protection of a blog under the NLRA would require: (1) that the blog is either a "collective" blog or a "spokesperson" blog;¹⁵⁷ and (2) that the blog is intended to spur protected group action.¹⁵⁸

1. Courts Should Require That the Blog Be Either a Collective Blog or a Spokesperson Blog

In order to find an instance of employee blogging protected under the NLRA, a court must first determine whether the blogging activity constitutes "concerted activity."¹⁵⁹ Both group blogging and individual blogging may satisfy the "concerted activity" test under the NLRA in certain circumstances.¹⁶⁰ Specifically, in order to receive protection

156. *Cf. NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (recognizing that "an individual employee may be engaged in concerted activity when he acts alone"); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (recognizing individual concerted activity if object is initiating, inducing, or preparing for group action).

157. *Cf. NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 598-600 (4th Cir. 1977) (finding concerted activity both when an individual employee acted as spokesperson for a group of employees and when another individual employee joined with co-workers and "collectively confronted" the foreman).

158. *Cf. City Disposal Sys.*, 465 U.S. at 831 (recognizing that concerted activity may occur when a "lone employee intends to induce group activity").

159. *See* NLRA § 7, 29 U.S.C. § 157 (2000).

160. *Cf. City Disposal Sys.*, 465 U.S. at 831 (explaining that the phrase "'to engage in other concerted activities' . . . does not confine itself to such a narrow meaning" as to only include "two or more employees . . . working together at the same time and the same place toward a common goal").

under the NLRA, the blog at issue must be either a “collective” blog or a “spokesperson” blog.¹⁶¹

A “collective” blog is one that involves two or more employees discussing matters of common concern.¹⁶² Employee bloggers participating in a collective work-related blog meet the protected activity requirement even if they do not use the blog to make specific demands of their employer.¹⁶³ Rather, a work-related blog constitutes protected “concerted activity” so long as multiple employees participate in and contribute to discussion of work-related matters.¹⁶⁴ Additionally, an employee blog constitutes protected “concerted activity” if one employee wrote the entries on the blog, but other employees viewed the entries.¹⁶⁵ Protected activity could include two or more employees discussing wages¹⁶⁶ or potential pay raises¹⁶⁷ on a blog. It could also include employees generally discussing working conditions on a blog.¹⁶⁸

The NLRA also protects “spokesperson” blogs.¹⁶⁹ Individual blogging qualifies as protected concerted activity if the work-related concerns posted on the blog are informally posted on behalf of other employees,¹⁷⁰ or if the blogger acts as a formal “spokesperson” for other

161. *Cf. Waco Insulation*, 567 F.2d at 598–600 (finding one employee engaged in concerted activity when he acted as spokesperson for group of employees, and another employee engaged in concerted activity when he and his co-workers “collectively confronted” the foreman to ask for a pay raise).

162. *Cf. NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 362 (5th Cir. 1990) (citing *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962)) (finding that “[c]oncerted activities include matters of common concern”).

163. *Wash. Aluminum*, 370 U.S. at 14.

164. *Cf. Waco Insulation*, 567 F.2d at 598–600 (discussing potential for pay raise and fact that another employee was fired).

165. *Cf. Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (explaining that a conversation involving one speaker and one listener can constitute concerted activity if its object is to initiate, induce, or prepare for group action or if the conversation had some relation to “group action in the interest of employees”).

166. *See Brookshire Grocery*, 919 F.2d at 362.

167. *See Waco Insulation*, 567 F.2d at 598–600.

168. *Cf. Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259 (10th Cir. 2005) (stating that “when a confidentiality provision is reasonably interpreted to prevent employees from discussing working conditions, the Board has held that rule is unlawful”).

169. *Cf. NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 832 (1984) (“lone employee’s invocation of a right”); *Waco Insulation*, 567 F.2d at 598 (one employee “acted as a spokesman”); *Mushroom Transp.*, 330 F.2d at 685 (group action “intended, contemplated, or even referred to”).

170. *See Esco Elevators, Inc.*, 276 N.L.R.B. 1245, 1246 (1985) (finding that safety complaints made by single employee constitute protected activity), *enforced*, 794 F.2d 1078 (5th Cir. 1986).

employees.¹⁷¹ Thus, if an individual blogger uses a blog as a forum to write about terms and conditions of employment on behalf of other employees, the blog meets the first requirement.¹⁷²

2. *Courts Should Require That the Blog Reveal Intent To Spur Protected Group Activity*

In order to find an instance of employee blogging protected under the NLRA, a court must also determine that the challenged content was written for “mutual aid or protection.”¹⁷³ To satisfy this requirement, courts must find that the employee authors of the blog intended to spur protected group activity. This element is not satisfied when employee blogging represents mere talk or griping about working conditions.¹⁷⁴ Rather, the blog’s content must initiate, induce, or prepare for group action.¹⁷⁵ Thus, the blogger must either explicitly refer to future group action,¹⁷⁶ or the potential for group action must be evident from the postings on the blog. However, the blog need not contain specific demands.¹⁷⁷

Courts must conclude that employee blogging is intended to spur protected group action if any one of three circumstances is present. First, employee blogging is intended to spur protected action if the objective is union organizing.¹⁷⁸ Second, employee blogging also meets the requisite test if the objective is organization of non-union employees for the purpose of seeking better working conditions, higher wages, or better employment benefits.¹⁷⁹ Third, employee blogging meets the test for intent to spur protected group action if it concerns political issues important to many workers in the same or similar field of employment.¹⁸⁰

171. *Cf. Waco Insulation*, 567 F.2d at 598–600 (finding concerted activity when individual employee acted as spokesperson for group of employees).

172. *Id.*

173. *See* NLRA § 7, 29 U.S.C. § 157 (2000).

174. *See Mushroom Transp.*, 330 F.2d at 685; *City Disposal Sys.*, 465 U.S. at 833 n.10.

175. *See Mushroom Transp.*, 330 F.2d at 685.

176. *Id.*

177. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962).

178. *See* NLRA § 7 (“[e]mployees shall have the right . . . to form, join, or assist labor organizations”).

179. *See* NLRB v. Brookshire Grocery Co., 919 F.2d 359, 362 (5th Cir. 1990) (explaining that “[c]oncerted activities include matters of common concern” including “the right to discuss wages”).

180. *Cf. Eastex, Inc. v. NLRB*, 437 U.S. 556, 564–67 (1978) (explaining that employees may

Political group action receives protection even if conducted “through channels outside the immediate employee-employer relationship.”¹⁸¹ Thus, blogging for mutual aid or protection is not confined to immediately improving the terms and conditions of one’s own employment.¹⁸² Additionally, blog discussions of political policies affecting workers and actions that will improve the lot of similarly situated workers constitute concerted activity for mutual aid or protection.¹⁸³ For example, in *Eastex*, the U.S. Supreme Court held that employee distribution of newsletters referring to political issues important to workers falls within the realm of mutual aid or protection.¹⁸⁴ Blogging about issues important to other employees parallels the act of distributing newsletters outside the workplace. The only difference between the two is the form of communication. Thus, under *Eastex*, employee bloggers who post material concerning terms or conditions of employment or political issues important to their rights as employees must receive protection under the NLRA.

C. Even if the Two-Part Test Is Met, Employers May Still Prohibit Particular Employee Communication on Blogs

Although some employee blogging fits within the category of concerted activity for mutual aid or protection, not all blogging engaged in by employees is protected by the NLRA. Blogging fails to receive NLRA protection if the content of the blog does not have a substantial connection to concrete employment interests.¹⁸⁵ Thus, “gripping” about common concerns without intending future group action is not protected under the NLRA.¹⁸⁶

seek to “improve their lot as employees through channels outside the immediate employee-employer relationship,” such as employee “appeals to legislators to protect their interests as employees,” because otherwise employees would be left “open to retaliation for much legitimate activity that could improve their lot as employees”).

181. *Id.* at 565.

182. *Cf. id.* at 565–66 (noting that the “mutual aid or protection” clause also protects employees who make appeals to the legislature to protect their interests as employees).

183. *Cf. id.* at 569.

184. *Id.* at 569–70.

185. *Cf. id.* at 568 (explaining that the relationship between the activity and employee’s interest may become “so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause”).

186. *See* *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (stating that “if it looks forward to no action at all, it is more than likely to be mere ‘gripping’”).

Furthermore, blogging that satisfies the requisite elements for “concerted activity” for “mutual aid or protection” may nonetheless be unprotected by the NLRA if it falls into a recognized exception. First, although the reasonableness of any discussion in a blog is generally irrelevant to the determination of whether employee participation constitutes concerted activity,¹⁸⁷ employers may prohibit blogging that is either extremely “abusive”¹⁸⁸ or that consists of unlawful activity or activity in breach of contract.¹⁸⁹ Thus, libel, slander, discussion of trade secrets, harassment, and other illegal activity do not receive protection—an employer may validly terminate or otherwise discipline an employee for such activities.¹⁹⁰ Second, employers may prohibit blogging that violates reasonable work-time restrictions on computer use.¹⁹¹ Employers may develop reasonable policies prohibiting employees from blogging during work because work-time blogging may impair “production or discipline,” and is thus not within the reach of the NLRA.¹⁹²

D. Overbroad Company Policies Prohibiting or Severely Restricting Employee Blogging Violate the NLRA

Employer policies that severely restrict employee blogging activity constitute unfair labor practices under the NLRA if the prohibited blogging satisfies the two-part test for “concerted activity” for “mutual

187. *Cf.* *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248–49 (1997) (explaining that even if activity includes impropriety, the employee is still protected unless the activity rendered the employee unfit for employment). *See supra* notes 61–66 and accompanying text.

188. *Cf.* *NLRB v. City Disposal Sys., Inc.* 465 U.S. 822, 837 (1984) (stating that “[a]n employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7”); *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (finding that employee was not protected by the NLRA because of his “detrimental disloyalty” when he was quoted in a newspaper as stating that there were “gaping holes” in his company’s business and later wrote on the newspaper’s public forum website that management was causing the business to be “tanked” and was going to “put it into the dirt”).

189. *Cf.* *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962) (explaining that activities in question did not fall into “the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract” (internal footnotes omitted)).

190. *Cf. id.*

191. *Cf. In re Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943) (“The [NLRA], of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time.”), *cited in* *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–04 n.10 (1945).

192. *Cf.* *NLRB v. Motorola*, 991 F.2d 278, 284 (5th Cir. 1993) (citing *Republic Aviation*, 324 U.S. at 803–04 n.10).

aid or protection.” Confidentiality rules are invalid under the NLRA if they prevent employees from discussing terms and conditions of employment, as such discussion is protected under section 7.¹⁹³ Policies that restrict the information that an employee may blog about are analogous to such confidentiality rules and thus violate the NLRA under the same circumstances.

Viacom’s blogging policy discourages discussion of even non-confidential “work-related matters” on a blog. Specifically, Viacom’s policy provides that employees are “discouraged from publicly discussing work-related matters, whether constituting confidential information or not, outside of appropriate work channels, including online in chat rooms or ‘blogs.’”¹⁹⁴ Thus, a Viacom employee who wishes to use a blog to communicate with co-workers in a union-organizing effort or even to simply discuss a potential pay raise is deterred from doing so by the restrictive policy. Such policies inhibit the employee’s opportunity to organize with fellow employees and to engage in other concerted activities for mutual aid or protection.¹⁹⁵ Cases discussing confidentiality rules reveal that employees are generally free to discuss wages and working conditions with other employees.¹⁹⁶ Because the likely effect of Viacom’s policy will be to “chill” employee discussion of working conditions, wages, and employee organizing on blogs, the policy may constitute an unfair labor practice.

Of course, just as not all dissemination of “confidential” information is protected under the NLRA,¹⁹⁷ not all employee blogging is protected. Although employers may not create overbroad policies that prohibit protected employee blogging, company policies with reasonable restrictions concerning employee blogging are valid under the NLRA.¹⁹⁸ Valid company blogging policies include prohibitions on the posting or discussion of confidential company information, trade secrets, and

193. See *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259–60 (10th Cir. 2005).

194. *Bahney*, *supra* note 16.

195. Cf. Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121, 127–28 (2003).

196. See, e.g., *Aroostook County Reg’l Ophthalmology Ctr.*, 81 F.3d 209, 212 (D.C. Cir. 1996) (nonetheless upholding the validity of the confidentiality agreement because it did not preclude employees from discussing terms and conditions of employment).

197. See *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1089 (D.C. Cir. 2003) (holding that release or disclosure of “confidential” information concerning patients or other employees is not protected).

198. Cf. *id.* at 1089.

confidential information regarding other employees' terms and conditions of employment (without permission).¹⁹⁹ One example of an employee blogging policy that appears to be valid is Yahoo!'s policy.²⁰⁰ It provides that "[a]ny confidential, proprietary, or trade secret information is obviously off-limits for your blog per the Proprietary Information Agreement you have signed with Yahoo!".²⁰¹ So long as the "Proprietary Information Agreement" is limited to trade secret information and other reasonable confidentiality protection, the policy does not violate the NLRA. However, if it prevents or deters employees from discussing working conditions or wages, then Yahoo!'s policy constitutes an unfair labor practice under the NLRA.

V. CONCLUSION

Employee blogging falls under the purview of the NLRA. Employee blogging will meet the NLRA requirements for "concerted activity" for "mutual aid or protection" if: (1) the blog is either a "collective" blog or "spokesperson" blog; and (2) the blog is intended to spur protected group action. Adverse employment actions against employees who engage in protected employee blogging violate the NLRA. Further, company blogging policies that discourage employees from discussing work-related matters on blogs are in direct conflict with the policy behind the NLRA to protect "the right of workers to act together to better their working conditions"²⁰² and as such constitute unfair labor practices under the NLRA.²⁰³

199. *Cf. id.*; NLRB v. Certified Grocers of Ill., Inc., 806 F.2d 744, 746 (7th Cir. 1986) (noting the parties' agreement that "a rule which merely forbids employees with access to confidential information to disclose it without the company's authorization is valid").

200. Yahoo! Personal Blog Guidelines: 1.0, <http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf> (last visited Nov. 3, 2006) (policy posted on personal blog of Yahoo! employee Jeremy Zawodny).

201. *Id.*

202. NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962).

203. *See* NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (2000).