



9-23-2015

# Regulation Of Workplace Gossip: Can Employers Mitigate Potential Liability Without Violating The NLRA?\*

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## Recommended Citation

O'Callaghan, Paula and Hartigan, Rosemary (2015) "Regulation Of Workplace Gossip: Can Employers Mitigate Potential Liability Without Violating The NLRA?\*", *North East Journal of Legal Studies*: Vol. 34 , Article 1.  
Available at: <http://digitalcommons.fairfield.edu/nealsb/vol34/iss1/1>

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**REGULATION OF WORKPLACE GOSSIP:  
CAN EMPLOYERS MITIGATE POTENTIAL  
LIABILITY WITHOUT VIOLATING THE NLRA?\***

by

Paula O'Callaghan\*\*  
Rosemary Hartigan\*\*\*

**INTRODUCTION**

It's little surprise that employers attempt to regulate workplace gossip. Popular business literature portrays gossip as eroding employee cohesion and discipline, wasting time and creating a poisonous work environment.<sup>1</sup> Influential organizations from the Roman Catholic Church<sup>2</sup> to the U.S. Chamber of Commerce<sup>3</sup> advocate regulating gossip. In the United States, employers may be liable for gossip under common law or various statutory theories.<sup>4</sup> Regulating workplace gossip may seem prudent business strategy. However, in a recent case before the National Labor Relations Board (NLRB, or "Board"), one employer's no-gossip policy was found to violate the National Labor Relations Act (NLRA

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\*Material in this paper was presented to the 2014 North East Academy of Legal Studies in Business annual meeting under the title, "Follies and Pitfalls of Attempting to Regulate Workplace Gossip: Protected Concerted Activity Meets *Prosocial* Gossip."

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or “the Act”).<sup>5</sup> Can an employer mitigate potential liability for workplace gossip without violating the NLRA?

This paper explores how employers can regulate workplace gossip without violating the Act. We examined NLRB decisions considering both gossip-specific work rules and broader work rules involving speech related conduct.

## **EMPLOYER REGULATION OF WORKPLACE GOSSIP**

Research in the U.S. and Western Europe shows that more than 90% of the workforce engages in some form of gossip.<sup>6</sup> Meanwhile, gossip has morphed from being shared at the physical “water cooler” to the virtual one with emails, texts, instant messages, tweets, and social media status updates. Employers have reacted to workplace gossip with everything from consciousness-raising sessions<sup>7</sup> to regulation and outright employment terminations.<sup>8</sup>

Gossip regulation is found in diverse industries and workplaces. A Montana-based online printing company requires its new hires to sign a written “no gossip” provision embedded in an *agreement to values*.<sup>9</sup> At UNESCO gossip is included in the anti-harassment policy under *moral harassment*.<sup>10</sup> Wal-Mart has disciplined and fired employees for *spreading rumors*,<sup>11</sup> and *gossip mongering*.<sup>12</sup>

There is clustering of regulation in certain industries, such as healthcare, where this language is popular:

We will not engage in or listen to negativity or gossip. We recognize that listening without acting to stop it is the same as participating.<sup>13</sup>

Firms big and small regulate gossip. Empower, a boutique public relations firm in Chicago has a mandatory, “no

gossip” policy,<sup>14</sup> as does Bridgewater Associates, one of the world’s largest hedge funds.<sup>15</sup>

Some employers discipline or discharge workers for gossip under the at-will employment doctrine<sup>16</sup> or ad-hoc work rules. Our research demonstrates that employers regulate gossip through a variety of general work rules from anti-harassment rules to wage nondisclosure rules.<sup>17</sup>

## **LAW AND THE REGULATION OF GOSSIP**

An extensive, yet highly porous, web of laws enmeshes workplace speech. The applicable laws often depend upon whether the employer is governmental or private sector. The First Amendment<sup>18</sup> and the NLRA provide the backbone of speech protection; state laws may afford additional rights. Legal status also may derive from how the speech is communicated; for example, in instances of speech via email or social media, the Stored Communications Act<sup>19</sup> might apply. Common law concepts such as defamation also apply to workplace speech. Workplace gossip may fall into any of these legal regulatory schemes, even if the speech takes place outside the workplace.

This paper focuses on liability under the National Labor Relations Act. Therefore the analysis is limited to private employers in the United States that are subject to the jurisdiction of the National Labor Relations Board.<sup>20</sup> The NLRA applies to the vast majority of private sector employees – both union and non-union – even though they may not be conscious of their rights under the Act, and their employers may not realize that the labor law applies to their type of organization; indeed, a common misunderstanding is that the NLRA applies only to unionized workplaces.<sup>21</sup>

*Is Gossip protected concerted activity?*

Does the NLRA guarantee the right to gossip about work? Section 7 of the NLRA grants “employees” the right to engage in “concerted activities” for “mutual aid or protection.”<sup>22</sup> *Employee* is broadly defined to include both unionized and nonunionized workers in the private sector; however it does not include “supervisors.”<sup>23</sup> It is “...an unfair labor practice for an employer to interfere with, restrain, or coerce employees...” with regard to exercise of their Section 7 rights.<sup>24</sup> The terms *concerted activities* and *mutual aid and protection* are not defined specifically within the Act.

The NLRB has interpreted protected concerted activity as generally requiring two or more employees acting together toward an improvement in working conditions; however, a single employee may act alone on behalf of others.<sup>25</sup> A substantial question is whether the benefit or improvements sought would inure to the individual solely or to the group as a whole.<sup>26</sup> Individual griping is not protected under the Act.<sup>27</sup>

In previous work<sup>28</sup> we noted that while some workplace gossip could be considered mere “idle talk” or “chatter,” and some may be harmful and malicious, gossip may “constitute preliminary activity toward mutual aid and protection that would constitute protected, concerted activity” under Section 8(a)(1) of the NLRA. We determined that gossip most likely would be considered protected concerted activity when it can be construed as relating to “terms and conditions of employment,”<sup>29</sup> or “matters affecting ... employment,”<sup>30</sup> is more than “griping,”<sup>31</sup> and involves discussion with other employees.<sup>32</sup> Not all gossip is protected.<sup>33</sup> We have noted that gossip can be so “opprobrious” that it loses protection of the Act.<sup>34</sup>

*Overly broad no gossip policy violates the NLRA*

In the first case to consider a stand-alone no gossip policy under the NLRA, an administrative law judge ruled that the policy violated Section 8(a)(1) of the Act.

In 2012 an Atlanta-area for-profit school, Laurus Technical Institute (“Laurus”),<sup>35</sup> instituted a “No Gossip Policy” and subsequently terminated admissions representative Joslyn Henderson, based in part on violations of the new gossip policy.<sup>36</sup> The Acting General Counsel<sup>37</sup> issued a complaint against Laurus for unfair labor practices for maintaining an overly broad “No Gossip Policy” and for suspending and terminating Henderson for violating the “No Gossip Policy” while engaged in protected concerted activities.<sup>38</sup>

The Laurus policy defined *gossip* as:

1. Talking about a person’s personal life when they [sic] are not present
2. Talking about a person’s professional life without his/her supervisor present
3. Negative, or untrue, or disparaging comments or criticisms of another person or persons
4. Creating, sharing, or repeating information that can injure a person’s credibility or reputation
5. Creating, sharing, or repeating a rumor about another person
6. Creating, sharing or repeating a rumor that is overheard or hearsay...<sup>39</sup>

The policy also discussed gossip in terms of draining productivity and morale.<sup>40</sup> Henderson’s termination apparently followed a period of upheaval in the organization.<sup>41</sup> Henderson

verbally objected to new enrollment goals and how admissions “leads” were handled – behavior the administrative law judge characterized as protected.<sup>42</sup>

Judge Dawson noted that the policy would prohibit communications – positive or negative – outside the presence of the subject and his or her supervisor.<sup>43</sup> The judge opined that such a policy – on its face – would “chill” an employee’s lawful activity under the Act and would be viewed to do so by a reasonable employee. She found the no gossip policy violates section 8(a)(1) of the Act<sup>44</sup> and added:

Indeed, [Laurus] does not even defend the no gossip rule in its brief. The language in the no gossip policy is overly broad, ambiguous, and severely restricts employees from discussing or complaining about any terms and conditions of employment.<sup>45</sup>

Laurus appealed Judge Dawson’s decision to the full board, but did not attempt to defend its no-gossip policy on appeal, vigorously defending the case on other grounds.<sup>46</sup> The Board accepted Judge Dawson’s finding that the no-gossip policy was over broad and violated the NLRA,<sup>47</sup> ordering the employer to rescind its policy and to offer the plaintiff reinstatement.<sup>48</sup>

### *Regulating gossip after Laurus*

As we expected, the Board adopted the ALJ’s decision in *Laurus* with respect to the no-gossip policy violating Section 8(a)(1) of the NLRA.<sup>49</sup> Thus, we strongly caution employers about banning gossip as broadly and generally as Laurus did.

There is, however, a category of gossip that falls outside the protection of the NLRA. It is well established that gossip that is specifically *malicious* is not protected,<sup>50</sup> and this principle recently was extended to gossip that is *harmful*.<sup>51</sup> The precise language of the rule is important; the Board makes a distinction between banning “malicious gossip,” which is allowed, and banning “malicious statements,” which is not.<sup>52</sup> The Board has found a work rule prohibiting engaging and listening to “negativity or gossip” violated Section 8(a)(1) of the Act,<sup>53</sup> so we caution about linking an otherwise lawful ban on malicious or harmful gossip with other work rules.

*What workplace speech can be regulated under the NLRA?*

Employers are understandably concerned about the organization’s liability for hostile work environment or harassment-type claims stemming from gossip.<sup>54</sup> Legal concerns and a real or perceived decrease in productivity<sup>55</sup> may motivate employers to enact anti-gossip policies. The NLRA may be the furthest thing from the employer’s mind, if the employer even is aware of the labor law.<sup>56</sup> The legal concerns surrounding harassment certainly are legitimate. While approving a work rule prohibiting *abusive or threatening language* under the Act the court in *Adtranz* noted, “[u]nder both federal and state law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment.”<sup>57</sup>

If no gossip policies are risky, are there other regulatory approaches less likely to violate the NLRA?<sup>58</sup> We examined more than 45 speech related work rules on which the Board has ruled. The Appendix presents our findings which illustrate that nearly 72% of these speech related work rules were found to violate the NLRA.



The Board applies a multi-part test to assess whether a speech related work rule violates the Act. The initial step asks, “...whether the rule explicitly restricts activities protected by Section 7.”<sup>59</sup> If explicit restriction is not evident, a workplace rule still may violate Section 8(a)(1) if any *one* of these are true.

- (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.<sup>60</sup>

Examining the work rules found to pass the test, there is an extreme end of the spectrum consisting of harassing and abusive behavior. The Board has approved work rules banning:

- Abusive and threatening language<sup>61</sup>
- Profane language<sup>62</sup>
- Harassment<sup>63</sup>
- Verbal, mental and physical abuse<sup>64</sup>
- Injurious, offensive, threatening, intimidating or coercive conduct<sup>65</sup>
- Slanderous statements<sup>66</sup>
- Oral or written statements, gestures, or expressions that convey a direct or indirect threat of physical or emotional harm<sup>67</sup>

At the other end of the spectrum, the Board has very recently approved banning displays of “negative attitude” to staff or guests of the firm in one instance.<sup>68</sup> We caution that this new precedent on “negative attitude” may not be entirely reliable.<sup>69</sup>

## **GOSSIP AND SOCIAL MEDIA IN THE WORKPLACE**

In a recent survey nearly 90% of businesses reported using social media for business purposes and 80% of those reported having social media policies for their employees.<sup>70</sup> It is increasingly likely that an employer's work rules regarding speech and its social media policy will intersect.<sup>71</sup> If an employer includes provisions in its social media policy regarding discussions between or among employees it should consider whether those provisions might violate the Act.<sup>72</sup> An NLRB Regional Director noted, "[t]he conduct at the water cooler is now sometimes the conduct in the social media, but the same law applies."<sup>73</sup> This echoes a statement by Board Chairman Pearce recently where he explained the role of the NLRB as, "... applying traditional rules to a new technology."<sup>74</sup> As the law develops we note the fluid nature of the virtual water cooler where workers can interact and share work-related information easily with others outside the workplace - a feature not found around the water cooler in traditional workspaces.<sup>75</sup>

Recently in *Kroger Co.*,<sup>76</sup> an administrative law judge struck down a social media policy with a rule that prohibited discussion of matters such as plant closings – which are protected by Section 7 of the Act.<sup>77</sup> The ALJ also struck down Kroger's rule regarding confidentiality of "personnel matters" because it was not defined or limited.<sup>78</sup>

## **PRACTICAL IMPLICATIONS FOR MANAGERS**

At the outset we noted that gossip often is viewed as eroding discipline, wasting time and creating a toxic work environment.<sup>79</sup> We noted that workplace gossip also has the

potential for employer legal liability; the focus of this paper has been a strategy for the mitigation of that legal liability. As Constance Bagley has stressed, managers should use the law in ways that create value for the firm.<sup>80</sup> Attempts to regulate workplace gossip – particularly if the regulation is overly broad – are more likely to result in hindering value rather than creating value for an organization. We have demonstrated that there are ways to implement work rules that mitigate an employer’s potential liability without violating the NLRA. Beyond rules that encompass harassment and other serious behaviors, we add a note of caution. When an employer attempts to use work rules to enforce a *civility code* in the workplace, it may find itself incurring significant attorney’s fees defending its rules before the Board.<sup>81</sup>

Taking another view, gossip can be a positive, proactive, management tool. Gossip has been shown to have potential for exposing workplace wrongdoing, and as such it can play an important role in reinforcing ethics and legal compliance. For example, we note the potentially useful role of gossip in exposing workplace wrongdoing. One of the largest corporate scandals of the twentieth century, which led to the downfall of the ENRON Corporation, was initially brought to light through office gossip.<sup>82</sup> Corporate compliance programs often prevent misconduct or mitigate sanctions in the event misconduct is uncovered.<sup>83</sup> We note that in a workplace where gossip is banned, reporting may be delayed or ignored and it might take longer for wrongful conduct and unethical practices to “surface” for corrective action.

## CONCLUSION

Gossip is so central to the human psyche that it is virtually impossible to eliminate.<sup>84</sup> Moreover, based on the affirmation of the *Laurus*, decision, it is likely that a broad anti-gossip provision would chill employees’ rights to

protected concerted activity. Employers who wish to regulate harmful workplace speech without running afoul of the NLRA should craft their work rules to include precise definitions of the speech prohibited, such as “malicious or harmful gossip,” “abusive and threatening language,” “profane language,” “harassment,” “verbal, mental and physical abuse,” “bullying or other injurious, offensive, threatening, intimidating or coercive conduct.”

We recommend that employers recognize that not all gossip is created equal. Some of it has positive value. As noted by eminent management scholar, Henry Mintzberg,

...today’s gossip may be tomorrow’s fact. The manager who is not accessible for the telephone call informing him that his biggest customer was seen golfing with his main competitor may read about a dramatic drop in sales in the next quarterly report. But then it’s too late.<sup>85</sup>

Rather than attempting to ban all workplace gossip, managers should use gossip as a diagnostic tool for issues that management can solve at the root level.<sup>86</sup> Grosser et al. suggest that ideally, employers should “reduce all of the destructive and unnecessary forms of gossip while allowing the positive and functional forms of gossip to remain.”<sup>87</sup> We agree and believe this approach also will find legal support under the NLRA.

<b>Appendix: Survey of speech related work rules examined by the NLRB, 1979-2014</b>			
<i>Speech related work rules</i> ≠rule prohibiting.	<i>Violates NLRA Section 8(a)(1) ?</i>	<i>Authority</i>	
Abusive language: abusive/threatening language≠		NO	88
Abusive language: profane language, harassment verbal/mental/physical abuse≠		NO	89
Complaining: about conditions of employment≠	YES		90
Confidentiality: information such as personal/financial≠	YES		91 92
Confidentiality: disclosing confidential information	YES		93
Confidentiality: wages, discipline, performance ratings	YES		94
Confidentiality: divulging company-private information≠		NO	95
Confidentiality: not discuss internal investigations	YES		96
Confidentiality: not discuss work-related accidents	YES		97
Courtesy: be courteous, polite & friendly, respectful	YES		98
Derogatory attacks≠	YES		99
Disclaimer requirement: employees required to use a specified disclaimer identifying themselves as an associate	YES		100
Disciplinary action: discussion of≠	YES		101
Discourteous or inappropriate attitude or behavior	YES		102
Disrespectful conduct≠	YES		103
Disruptive conduct≠	YES		104
Disparaging comments≠	YES		105
False statements≠	YES		106
False, vicious or malicious statements≠	YES		107 108 109
Oral, written statements, gestures/expressions, direct/indirect threat of physical or emotional harm		NO	110
Gossip: indulging in harmful gossip≠		NO	111
Gossip: malicious≠		NO	112 113 114
Gossip: broad no gossip policy	YES		115
Gossip: gossiping about others inc supervisors/managers		NO	116
Gossip: will not engage in or listen to negativity or gossip	YES		117
Gossip & complaining/general prohibition	YES		118
Grievances: limits on discussion of grievances≠		NO 119	120

Harassment: of employees, supervisors≠		NO	121
Injurious, offensive, threatening, intimidating, coercing≠		NO	122
Negativity: displays of negative attitude disruptive≠		NO	123
Negativity: negative comments fellow team members≠	YES		124
Negativity: negative conversations employees/managers≠	YES		125
Non-Disparagement	YES		126
Posting/circulating/distributing writing w/o permission	YES		127
Rumor: commenting on rumors, speculation, or personnel matters, rumors or speculation related to business plans ≠	YES		128
Slander: slanderous or detrimental statements≠		NO	129
Social media policy: broad confidentiality policy + do not post anything false, misleading, obscene, defamatory, profane, discriminatory, libelous, threatening, harassing, abusive, hateful or embarrassing to person or entity.	YES		130
Social media policy: inappropriate behavior online≠	YES		131
Social media policy: sharing of personal information about employees such as performance and compensation≠	YES		132
Social media policy: may not blog, enter chat rooms, post messages on public websites, disclose company info	YES		133
Social media policy: use of social networking sites that could discredit company or damage its image≠	YES		134
Social media policy: statements damaging or that defame≠	YES		135
Unauthorized information in reference requests≠		NO	136
Terms and conditions of employment: discuss w/clients≠	YES		137
Unfair criticism: Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism≠	YES		138
Wages: wage and salary non-disclosure rule	YES		139 140 141 142

<sup>1</sup> Rosemary Hartigan and Paula O'Callaghan, *Loose Lips Bring Pink Slips: Fired for Gossip at the Office*, 40 *ACAD. LEGAL STUD. IN BUS. NAT'L PROC.* \_\_, 24 (2009). Available at <http://alsb.roundtablelive.org/Default.aspx?pageId=619644>.

<sup>2</sup> Francis X Rocca, *Be 'conscientious objectors' to gossip Francis urges curial officials*. *CATHOLIC HERALD*. December 23, 2013, <http://www.catholicherald.co.uk/news/2013/12/23/be-conscientious-objectors-to-gossip-francis-urges-curial-officials/>

<sup>3</sup> The US Chamber of Commerce Foundation asks, "Is Gossip Poisoning Your Workplace?" and prescribes a three-step treatment plan, of which the

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first step is creating a “no-gossip” policy <http://institute.uschamber.com/is-gossip-poisoning-your-workplace/>

<sup>4</sup> See, *Reese v. Barton Healthcare Systems*, 693 F. Supp. 2d 1170 (E.D. Cal. 2010) (Employer may be responsible under *respondeat superior* for defamatory statement made by one employee about another if made within the scope of employment); See also, *Adtranz v. NLRB*, 253 F.3d 19, 27 (Ct. Appeals DC Cir, June 26, 2001). (“Abusive language can constitute verbal harassment triggering liability under state or federal law”)

<sup>5</sup> See, *Laurus Technical Institute*, NLRB No. 10-CA-093934 (Div. of Judges, December 11, 2013), *aff’d*, *Laurus Technical Institute*, 360 NLRB, No. 133 (2014), *Laurus Technical Institute v. NLRB*, No. 14-1139 and 14-1162 (D.C. Cir, In Mediation), briefs and docket information available at <http://nlrb.gov/case/10-CA-093934>

<sup>6</sup> Travis J. Grosser, Virginie Lopez-Kidwell, Giuseppe (Joe) Labianca, and Lee Ellwardt, *Hearing it Through the Grapevine: Positive and Negative Workplace Gossip*, ORGANIZATIONAL DYNAMICS, 41 (2012), 52-61 at 53.

<sup>7</sup> SAM CHAPMAN, THE NO-GOSSIP ZONE: A NO-NONSENSE GUIDE TO A HEALTHY, HIGH-PERFORMING WORK ENVIRONMENT (2009), 26.

<sup>8</sup> See, for example, *Letner v. Wal-Mart*, 172 F.3d 873, 1999 U.S. App. LEXIS 843 (6th Cir. Tenn. 1999).

<sup>9</sup> Shayla McKnight, *Workplace gossip? Keep it to yourself.*, N.Y.TIMES, November 15, 2009, at BU9, available at <http://www.nytimes.com/2009/11/15/jobs/15pre.html>.

<sup>10</sup> UNESCO, Standards of Conduct, Anti-harassment Policy, [http://www.un.org/womenwatch/osagi/UN\\_system\\_policies/\(UNESCO\)Anti-harassment\\_Policy.pdf](http://www.un.org/womenwatch/osagi/UN_system_policies/(UNESCO)Anti-harassment_Policy.pdf)

<sup>11</sup> Rumors can be about people or events; gossip is about people who are not present (see, for example, Grosser, et.al. *supra* note 6).

<sup>12</sup> See, *Jackson v. Ritter*, 1992 U.S. Dist. LEXIS 12114 (1992), *aff’d*, 990 F.2d 1268 (11th Cir. Ala. 1993) (Wal-Mart employee disciplined for malicious gossip); *State ex rel. Wal-Mart v. Riley*, 159 Ohio App. 3d 598 (Ohio Ct. App., 2005) (Wal-Mart employee fired for spreading rumors).

<sup>13</sup> See, for example, *Community Memorial Hospital, Hicksville, OH* <http://www.cmhosp.com/printpage/index.cfm?pageID=10> (Behavior Standards; Attitude); *Madison County Healthcare System, Winterset, Iowa* <http://www.madisonhealth.com/Main/CompassofIntegrity.aspx> (Attitude); and *Illini Community Hospital, Pittsfield, IL* <http://www.illinihospital.org/?id=392&sid=3> (Behavioral Standards).

<sup>14</sup> CHAPMAN, *supra* note 7, at 11.

<sup>15</sup> John Cassidy, *Mastering the Machine, How Ray Dalio built the world's richest and strangest hedge fund*. THE NEW YORKER, July 25, 2011, [http://www.newyorker.com/reporting/2011/07/25/110725fa\\_fact\\_cassidy?currentPage=all](http://www.newyorker.com/reporting/2011/07/25/110725fa_fact_cassidy?currentPage=all); See also, John Crace, *The office that banned gossip*. THE GUARDIAN, July 5, 2010,

<http://www.theguardian.com/theguardian/2010/jul/05/office-banned-gossip>

<sup>16</sup> See, *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, (8<sup>th</sup> Cir., 2013), (employer fired two employees for spreading a “malicious rumor” – later determined to be protected concerted activity).

<sup>17</sup> See, Appendix, survey of speech related work rules examined by the NLRB, 1979-2014.

<sup>18</sup> See, Jerome O’Callaghan, Rosemary Hartigan, and Paula O’Callaghan, (Spring 2011). *Gossip, the Office and the First Amendment*. 25 NORTH EAST J. OF LEG STUD, 1-20

<sup>19</sup> 18 U.S.C. 121 §§ 2701–2712.

<sup>20</sup> See, jurisdictional standards, <http://www.nlr.gov/rights-we-protect/jurisdictional-standards>

<sup>21</sup> John R. Runyan and Mami Kato, *What Every Employment Lawyer Needs to Know About the National Labor Relations Act*, MICHIGAN BAR J. (September, 2013), p. 34,

<https://www.michbar.org/journal/pdf/pdf4article2260.pdf>

<sup>22</sup> 29 U.S.C. §§ 157.

<sup>23</sup> 29 U.S.C. §§ 152.

<sup>24</sup> 29 U.S.C. §§ 158(a)(1). Remedies could involve reinstatement and back pay. 29 U.S.C. § 157 (10)(160)(c).

<sup>25</sup> See, *Meyers Industries (I)*, 268 NLRB 493, 497 (1984); and *Meyers Industries (II)*, 281 NLRB 882, 887 (1986).

<sup>26</sup> *NLRB v Talsol Corp*, 155 F3d 785, 796 (6<sup>th</sup> Cir. 1998).

<sup>27</sup> *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3<sup>rd</sup> Cir. 1964).

<sup>28</sup> Paula O’Callaghan and Rosemary Hartigan, *Do Bans on Workplace Gossip Violate the NLRA? Employers Respond to Employee Speech in the Social Media Age*, 43 *Acad. Legal Stud. In Bus. Nat’l Proc.* \_\_ (2012). Available at [http://alsb.mobi/wp-content/uploads/2012/04/NP-2012-](http://alsb.mobi/wp-content/uploads/2012/04/NP-2012-OCallaghan_Hartigan.pdf)

[OCallaghan\\_Hartigan.pdf](http://alsb.mobi/wp-content/uploads/2012/04/NP-2012-OCallaghan_Hartigan.pdf)

<sup>29</sup> *Id.* at 7. See, *Knauz BMW*. This decision was vacated for procedural reasons by *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

<sup>30</sup> *Id.* See, *Hispanics United of Buffalo*. This decision was vacated for procedural reasons by *Noel Canning*, *supra* note 29.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.* at 8. See, discussion of *Knauz BMW* case.

<sup>33</sup> O’Callaghan and Hartigan, *supra* Note 28 at 3, “malicious gossip.”



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<sup>34</sup> O’Callaghan and Hartigan, *supra* Note 28 at 9, citing *Atlantic Steel* test.

<sup>35</sup> Laurus Technical Institute, *supra* note 5 at 10.

<sup>36</sup> *Id.*

<sup>37</sup> The Acting General Counsel will be referred to as the “General Counsel.”

<sup>38</sup> Laurus, *supra* note 5 at 10-11.

<sup>39</sup> *Id.* at 4

<sup>40</sup> “Gossip is not tolerated at Laurus Technical Institute. Employees that participate in or instigate gossip about the company, an employee, or customer will receive disciplinary action. Gossip is an activity that can drain, corrupt, distract, and down-shift the company’s productivity, moral [sic], and overall satisfaction. It has the potential to destroy an individual and is counterproductive to an organization. Most people involved in gossip may not intend to do harm, but gossip can have a negative impact as it has the potential to destroy a person’s or organization’s reputation and credibility...” *Ibid.*

<sup>41</sup> *Id.* at 5. See, “Mass Firings.”

<sup>42</sup> *Id.* at 7. See, “New admissions director and workplace changes.”

<sup>43</sup> *Id.* at 12.

<sup>44</sup> *Id.*

<sup>45</sup> Laurus, *supra*, note 5 at 12.

<sup>46</sup> Laurus argued that it had sufficient other grounds to terminate Henderson’s employment, that the NLRB lacked a quorum to act on this case, and challenged the impartiality of the administrative law judge in the case. See, Brief in Support of Exceptions filed 1/8/2014, available at <http://www.nlr.gov/case/10-CA-093934>

<sup>47</sup> Laurus Technical Institute, 360 NLRB, No. 133 (2014) at 1 (see, footnote 1 within Board decision and order).

<sup>48</sup> Judge Dawson inadvertently neglected to order that the plaintiff be reinstated *Id.* (see, footnote 2 within Board decision and order).

<sup>49</sup> Note that Laurus did not seriously defend the no gossip policy before the Board. See, Brief in Support of Exceptions, available at <http://www.nlr.gov/case/10-CA-093934> Laurus appealed to the Court of Appeals for the D.C. Circuit, its brief made no mention of the no gossip policy. See, Brief to Court of Appeals, available at <http://www.nlr.gov/case/10-CA-093934> On December 30, 2014 Laurus posted a “Notice to Employees” by order of the NLRB, stating the company would “not maintain or enforce any overly broad no-gossip policy or rule...not discipline [employees]...for violating the overly broad no-gossip policy...We will...rescind our no-gossip policy...” Compliance Case - Certification of Posting, available at <http://nlrb.gov/case/10-CA-093934> This case currently is held in abeyance by the Court of Appeals pending

completion of a mediated settlement between Laurus and the NLRB. See, *Laurus Technical Institute v. NLRB*, No. 14-1139 and 14-1162 (D.C. Cir., In Mediation). Circuit Court Order available at <http://nlrb.gov/case/10-CA-093934>

<sup>50</sup> *Southern Maryland Hosp. Ctr.*, 293 NLRB No. 136 (1989), *enfd.* in rel. part, 916 F.2d 932 (4th Cir. 1990); *Sam's Club*, 342 NLRB No. 57 (2004); and *Ellison Media Company*, 344 NLRB No. 136 (2005).

<sup>51</sup> See, *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011).

<sup>52</sup> See, *Lafayette Park Hotel* 326 NLRB No. 69, at 825 (1998) and *American Cast Iron Pipe Co.*, 234 NLRB No. 178, at 1126 (1978), *enfd.* 600 F.2d 132 (8th Cir. 1979).

<sup>53</sup> *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014) at 1, *appeal docketed*, No.14-1082 and 14-1119, *Hills and Dales General Hospital v. NLRB* (D.C. Cir., November 7, 2014). General Counsel did not allege that the prohibition on gossip was unlawful.

<sup>54</sup> *O'Callaghan and Hartigan*, *supra*, note 28 at 2.

<sup>55</sup> Howard M. Wexler and Joshua D. Seidman, *More Talk for the Water Cooler – NLRB Judge Finds Employer's "No Gossip Policy" Unlawful*, SEYFARTH SHAW LLP LABOR RELATIONS BLOG, available at <http://www.employerlaborrelations.com/2013/12/26/more-talk-for-the-water-cooler-nlrb-judge-finds-employers-no-gossip-policy-unlawful/>.

<sup>56</sup> *Id.*

<sup>57</sup> *Adtranz v. NLRB*, *supra* note 4 at 27. See also, Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?* 85 GEO. L.J. 627 (1997).

<sup>58</sup> Kecia Bal, *Goodbye, No-Gossip Policies*, (May 13, 2014), HUMAN RESOURCE EXECUTIVE ONLINE, <http://www.hreonline.com/HRE/view/story.jhtml?id=534357081>

<sup>59</sup> *Flex Frac Logistics v. NLRB*, 2014 U.S. App. LEXIS 5429 (5<sup>th</sup> Cir., 2012), *aff'd*, 746 F. 3d 205 (5<sup>th</sup> Cir., 2014), quoting *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75, at 646 (2004).

<sup>60</sup> *FlexFrac* quoting *Heritage Village-Livonia* at 647.

<sup>61</sup> *Adtranz v. NLRB*, *supra* note 4.

<sup>62</sup> *Adtranz v. NLRB*, *supra* note 4, and *Lutheran Heritage Village-Livonia*, *supra*, note 59 at 647 (It was noted that in a workplace where the use of profane language is commonplace such a restriction may be unlawful).

<sup>63</sup> *Lutheran Heritage Village-Livonia*, *supra*, note 59 at 647.

<sup>64</sup> *Id.*

<sup>65</sup> *Palms Hotel and Casino*, 344 NLRB 1363 (2005).

<sup>66</sup> *Tradesmen International*, 338 NLRB No. 49 at 463 (2002).

<sup>67</sup> *First Transit Inc.*, 360 NLRB No. 72 (2014).

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<sup>68</sup> Copper River of Boiling Springs, LLC, 360 NLRB No. 60 at 1 (2014) (employee was discharged for a verbal outburst using a profanity).

<sup>69</sup> See, David Weldon, *Luck of the (Panel) Draw? NLRB Narrowly Upholds Employer's Negative Attitude Rule* (March 5, 2014), [http://www.franczek.com/frontcenter-NLRB\\_Copper\\_River\\_Boiling\\_Springs.html#page=1](http://www.franczek.com/frontcenter-NLRB_Copper_River_Boiling_Springs.html#page=1).

<sup>70</sup> SOCIAL MEDIA IN THE WORKPLACE AROUND THE WORLD 3.0, PROSKAUER ROSE, LLP (2013/2014), at 1-2, available at <http://www.proskauer.com/files/uploads/social-media-in-the-workplace-2014.pdf>

<sup>71</sup> See generally, Robert Sprague and Abigail E. Fournier, *Online Social Media and the End of the Employment at-Will Doctrine*, 52 WASHBURN L. J. 557-579 (2013), and Steven Greenhouse, *Even If It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. TIMES, January 21, 2013, <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all>.

<sup>72</sup> See, Christine Neylon O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 CHARLESTON L. REV. 411-428 (2014).

<sup>73</sup> Rosemary Pye, *The 21<sup>st</sup> Century Water Cooler: Applying the NLRA to Social Networking and Beyond*, <https://www.northeastern.edu/law/pdfs/alumni/labor-law-2012.pdf>.

<sup>74</sup> Steven Greenhouse, *supra*, note 71.

<sup>75</sup> Ariane Ollier-Mallaterre, Nancy Rothbard and Justin Berg, *When Worlds Collide In Cyberspace: How Boundary Work In Online Social Networks Impacts Professional Relationships*, 38 ACAD. OF MGMT. REV. 4, 645 (2013).

<sup>76</sup> The Kroger Co. of Michigan, Case No. 07-CA-098566, (Division of Judges, April 22, 2014) at 14.

<sup>77</sup> *Id.* at 15.

<sup>78</sup> *Id.*

<sup>79</sup> Rosemary Hartigan and Paula O'Callaghan, *supra*, note 1 at 24.

<sup>80</sup> See, CONSTANCE E. BAGLEY, WINNING LEGALLY: HOW TO USE THE LAW TO CREATE VALUE, MARSHAL RESOURCES, AND MANAGE RISK 37 (2005).

<sup>81</sup> Also reinstatement and/or back pay. See, 29 U.S.C. § 157 (10)(160)(c).

<sup>82</sup> Adam H. Gates, *Enforcing Civility in the Workplace is a Potentially Risky Proposition, According to the NLRB*, May 15, 2014, available at <http://www.bakerdonelson.com/enforcing-civility-in-the-workplace-is-a-potentially-risky-proposition-according-to-the-nlr-05-15-2014/>

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- <sup>83</sup> Jonathan Sack, *When is an Internal Investigation Not Privileged?* FORBES, April 16, 2014, available at <http://www.forbes.com/sites/insider/2014/04/16/when-is-an-internal-investigation-not-privileged/>.
- <sup>84</sup> *Supra*. note 6 at 53.
- <sup>85</sup> As cited in Grosser et al. *supra* note 6 at at 53-54.
- <sup>86</sup> *Id.* at 59.
- <sup>87</sup> *Id.* at 56.
- <sup>88</sup> *Adtranz v. NLRB*, *supra* note 4.
- <sup>89</sup> *Lutheran Heritage Village-Livonia*, *supra* note 59 at 647.
- <sup>90</sup> *Guardsmark, LLC*, 344 NLRB No. 97 at 809 (2005).
- <sup>91</sup> *MCPc*, 360 NLRB No. 39 (2014), *appeal docketed*, No. 14-1379 and 14-1731, *MCPc, Inc. v. NLRB*, (3rd Cir., April 14, 2014).
- <sup>92</sup> *First Transit Inc.*, *supra* note 67.
- <sup>93</sup> *Flex Frac Logistics*, *supra* note 59.
- <sup>94</sup> *DirectTV*, 359 NLRB No. 54 (2013). Vacated for procedural reasons by Noel Canning, *supra* note 29. Board is currently considering the case. See, <http://nrlb.gov/case/21-CA-039546>
- <sup>95</sup> *Lafayette Park Hotel*, *supra* note 52.
- <sup>96</sup> *Banner Health Systems*, 358 NLRB No. 93 at 1 (2012). Decision vacated for procedural reasons by Noel Canning, *supra* note 29. The Board is currently considering the case. See, <http://nrlb.gov/case/28-CA-023438>
- <sup>97</sup> *First Transit Inc.*, *supra* note 67.
- <sup>98</sup> *Knauz BMW*, 358 NLRB No. 164 at 1 (2012).
- <sup>99</sup> *Southern Maryland Hospital*, *supra* note 50.
- <sup>100</sup> *The Kroger Co. of Michigan*, *supra* note 76.
- <sup>101</sup> *SNE Enterprises, Inc.*, 347 NLRB 472, 492–493 (2006), *enfd.* 257 Fed. Appx. 642 (4th Cir. (2007).
- <sup>102</sup> *First Transit Inc.*, *supra* note 67.
- <sup>103</sup> *University Medical Center*, 335 NLRB No. 87 (2001), enforcement denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003).
- <sup>104</sup> *Brighton Retail*, 354 NLRB No. 62 (2005).
- <sup>105</sup> *American Medical Response*, Case 34–CA–12576, Advice Memorandum dated October 5, 2010.
- <sup>106</sup> *First Transit Inc.*, *supra* note 67.
- <sup>107</sup> *Lafayette Park Hotel*, *supra* note 52.
- <sup>108</sup> *Cincinnati Suburban Press*, 289 NLRB No. 127 (1988).
- <sup>109</sup> *American Cast Iron Pipe Co.*, *supra* note 55.
- <sup>110</sup> *First Transit Inc.*, *supra* note 67.
- <sup>111</sup> *Hyundai America Shipping Agency*, *supra* note 51.
- <sup>112</sup> *Southern Maryland Hospital*, *supra* note 50.

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- <sup>113</sup> Sam's Club, *supra* note 50.
- <sup>114</sup> Ellison Media Company, *supra* note 50.
- <sup>115</sup> Laurus Technical Institute, *supra* note 5.
- <sup>116</sup> Casino San Pablo, 361 NLRB No. 148 (2014).
- <sup>117</sup> Hills and Dales General Hospital, *supra* note 53. With "negativity."
- <sup>118</sup> Aroostook County Regional Ophthalmology Center v. NLRB, 81 F.3d 209 (D.C. Cir. 1996), *aff'd* in part and denied in part 317 NLRB No. 32 (1995).
- <sup>119</sup> But must consider the organizational context. *Id.*
- <sup>120</sup> In a larger hospital setting, same rule might violate Act, *Id.*
- <sup>121</sup> Lutheran Heritage Village-Livonia, *supra* note 59.
- <sup>122</sup> Palms Hotel and Casino, *supra*, note 65.
- <sup>123</sup> Copper River of Boiling Springs, *supra*, note 68.
- <sup>124</sup> Hills and Dales General Hospital, *supra* note 53.
- <sup>125</sup> Claremont Resort & Spa, 344 NLRB No. 105 (2005).
- <sup>126</sup> Quicken Loans, 359 NLRB No. 141 (2013), affirmed by 361 NLRB No. 94 (2014), *appeal docketed*, No. 14-1231, Quicken Loans, Inc. v. NLRB, (D.C. Cir., January 7, 2015).
- <sup>127</sup> First Transit Inc., *supra* note 67.
- <sup>128</sup> The Kroger Co. of Michigan, *supra* note 76.
- <sup>129</sup> Tradesmen International, *supra* note 66.
- <sup>130</sup> Valero Services, See, <http://www.nlr.gov/news-outreach/news-story/valero-services-agrees-rescind-its-nationwide-social-media-policy> and <http://www.cookbrown.com/doc.asp?id=693>
- <sup>131</sup> The Kroger Co, *supra* note 76.
- <sup>132</sup> General Motors, NLRB No. 07-CA-53570 (Div. of Judges, Detroit, MI, May 30, 2012).
- <sup>133</sup> DirectTV, *supra*, note 94.
- <sup>134</sup> Butler Medical Transport, NLRB No. 05-CA-97810 (Div. of Judges, Baltimore, MD, Sept. 4, 2013).
- <sup>135</sup> Costco Wholesale Corporation 358 NLRB No. 106, (2010). Vacated for procedural reasons by Noel Canning, *supra* note 29. The Board is currently considering the case. See, <http://nlrb.gov/case/34-CA-012421>
- <sup>136</sup> First Transit Inc., *supra* note 67.
- <sup>137</sup> Kinder-Care Learning Centers, 299 NLRB No. 164 (1990).
- <sup>138</sup> William Beaumont Hospital, No. 07-CA-093885 (Div. of Judges, Detroit, MI, January 30, 2014).
- <sup>139</sup> Design Technology Group, LLC d/b/a Bettie Page, 359 NLRB No. 96 (2013), *aff'd*, 361 NLRB No. 79 (2014), *appeal docketed*, No. 14-1232, Design Technology Group v. NLRB, (D.C. Cir., November 5, 2014)
- <sup>140</sup> NLRB v. Brookshire Grocery Company, 919 F.2d 359 (5<sup>th</sup> Cir., 1990).

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<sup>141</sup> DirectTV, *supra*, note 94.

<sup>142</sup> First Transit Inc., *supra* note 67.