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EXPANDING NLRA PROTECTION OF EMPLOYEE  
ORGANIZATIONAL BLOGS: NON-DISCRIMINATORY ACCESS  
AND THE FORUM-BASED DISLOYALTY EXCEPTION

ANDREW F. HETTINGA\*

INTRODUCTION

Since 1935, Congress has protected the rights of American workers to communicate with each other as they seek to better the conditions of their collective employment.<sup>1</sup> Over the seventy-six years of its existence, the National Labor Relations Act (“NLRA”) has protected employees who solicit coworkers to join a union, reach out to other employees in order to mobilize them about poor working conditions or unfair wages, seek public support for workplace plights, and more.<sup>2</sup> Historically, employees used traditional methods of communication to achieve these goals: leaflets and handbills distributed to employees or posted on bulletin boards,<sup>3</sup> letters to local newspapers or comments on local television reports,<sup>4</sup> or “water cooler” conversations in break or lunch rooms.<sup>5</sup> However, as employees use more powerful electronic methods of communication that exceed the scope of traditional fora to organize themselves, the National Labor Relations Board<sup>6</sup> and federal courts must consider anew what limitations may be placed on employee communication rights.

Today, employee organizational speech increasingly occurs via interactive web sites known as “web logs.”<sup>7</sup> Though the exact definition of a blog varies, a fair approximation is as follows:

\* Juris doctor candidate, May 2008. The author would like to thank his wife Kristen for her love, encouragement, and patience during the writing of this article, his parents, Paul and Joanna, and his brother, Joseph, for their unwavering support over the past two years, and Professor Martin H. Malin for his insightful comments and assistance with this article.

1. See National Labor Relations Act (NLRA), 29 U.S.C. §§ 157–158(a)(1) (2000).

2. See Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 835 (2003) (advising non-union employers on what disciplinary actions can be taken regarding organizational speech).

3. See *infra* note 64 and accompanying text.

4. See *infra* note 97 and accompanying text.

5. See *infra* note 55 and accompanying text.

6. Hereinafter “the NLRB” or “the Board.”

7. Hereinafter referred to as “blogs.” Many commentators have noted the increased use of blogs for employee organizational speech. See Katherine M. Scott, iBrief, *When Is Employee Blogging Pro-*

A blog (short for weblog) is a personal online journal that is frequently updated and intended for general public consumption. Blogs are defined by their format: a series of entries posted to a single page in reverse-chronological order. Blogs generally represent the personality of the author or reflect the purpose of the [w]eb site that hosts the blog. Topics sometimes include brief philosophical musings, commentary on [i]nternet and other social issues, and links to other sites the author favors, especially those that support a point being made on a post.<sup>8</sup>

The differences between blogs and more traditional forms of employee organizational speech are crucial. America's labor unions have recognized that blogs are a powerful means of discussing workplace issues and organization; as one commentator recently noted, the Service Employees International Union "has blogging technology available free of charge to each of its local unions."<sup>9</sup> Generally, the blog's key advantages to employees seeking to engage in organizational speech are as follows:

*Wider scope:* Blogs potentially have a much wider audience than traditional communication forms; they can reach employees at other physical locations, the clients and customers of their employers, stockholders, local and national media, and by extension the national public—and can therefore greatly swing leverage to the employees' side in workplace disputes.<sup>10</sup>

*Ability to facilitate dialogue:* Blogs are not static—they allow interested parties to post their own responses at will, and often facilitate ongoing dialogue on a particular topic. In this way, they resemble traditional "water cooler" conversations. But blogs greatly expand the scale of these conversations, so that many voices can be included simultaneously: the format allows employees separated geographically or by work schedules to participate, as well as employees in the same industry working for different employers.<sup>11</sup>

*tected by Section 7 of the NLRA?*, 2006 DUKE L. & TECH. REV. 17, ¶¶ 1–2, <http://www.law.duke.edu/journals/dltr/articles/2006dltr0017.html>; King, *supra* note 2, at 828–29; *see also* LEE RAINIE, DIRECTOR, PEW INTERNET & AM. LIFE PROJECT, THE STATE OF BLOGGING (2005), available at [www.pewinternet.org/pdfs/PIP\\_blogging\\_data.pdf](http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf) (citing survey stating that blog readership rose 58% in 2004, that approximately 12% of Internet users have used blogs to post comments, and that approximately eight million American adults maintain blogs).

8. Whatis.com, [http://whatis.techtarget.com/definition/0,289893,sid9\\_gci214616,00.html](http://whatis.techtarget.com/definition/0,289893,sid9_gci214616,00.html) (last visited Feb. 18, 2007).

9. Carson Strege-Flora, *Wait! Don't Fire That Blogger! What Limits Does Labor Law Impose on Employer Regulation of Employee Blogs?*, 2 SHIDLER J. L. COMM. & TECH. 11, ¶ 3 (2005), <http://www.lctjournal.washington.edu/Vol2/a011Strege.html>.

10. *See* Scott, *supra* note 7, ¶ 1 ("Blogging has tremendous potential to shift the balance of power from employers to employees, as employees gain the ability to communicate their concerns to other employees, customers, neighbors, stockholders, and other parties interested in the employer.")

11. *Id.* ("While employers can already send messages to employees through their own communication channels, employees now have a new means of discussing issues with each other, regardless of the obstacles presented by differently-timed shifts, physically separated workplaces, and the operational demands of work.")

*Protection of anonymity:* Traditional labor law protects an employee's right to receive organizational literature anonymously, and safeguards employees from retributive action by their employers for doing so.<sup>12</sup> The blog format provides an attractive means of accomplishing this goal, as visitors to most blogs can post comments anonymously.<sup>13</sup>

*Increased credibility:* As commentator Katherine Scott notes, blogs allow links to information and materials supporting employee complaints or workplace disputes to be easily provided—thereby allowing “[a]nyone reading the blog [to] see the factual support for or interest in any idea that is posted.”<sup>14</sup> This can greatly increase the credibility of employee organizational speech, especially to observers outside the workplace dispute.

However, the same factors that make the blog such an effective tool for employee organizing often cause employers great concern: increased notoriety (especially the tendency of employee blogs to turn up in search engine queries regarding the related employer's company name) increases the chances for damaging defamation, disparagement of company products, or breaches of confidentiality,<sup>15</sup> and the anonymous nature of the blog can thwart the identification of insubordinate workers. A very limited number of cases testing what actions employers may take against employees who blog about their workplaces have come before the NLRB to date, but evidence suggests more cases relating to employee blogging are on the way.<sup>16</sup> Because of the hybrid, unique nature of this new forum and its potential to greatly assist employees seeking to organize themselves to fight for workplace rights, the NLRB and courts should carefully consider what protections federal labor law provides for employee blogs. Other commentators have recognized that blogging should probably be protected by the

12. See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 884 (9th Cir. 2002) (noting that employer surveillance “tends to create fear among employees of future reprisal” and chills the exercise of NLRA-protected communication rights); *Snap-On Tools, Inc.*, 342 N.L.R.B. 5, 5 n.5 (2004) (“The well-established rule is that absent proper justification, photographing or videotaping employees as they engage in protected concerted activity violates [the NLRA].”).

13. See Scott, *supra* note 7, ¶ 2 (“[T]he anonymity of the [i]nternet allows employees to explore information about a labor dispute and test the waters without having to reveal their identities.”).

14. *Id.*

15. See *infra* notes 116–18 and accompanying text.

16. Google and Delta, for example, received national attention recently for firing employees that maintained blogs discussing their personal experiences in the workplace. See Krysten Crawford, *Have a Blog, Lose Your Job?*, CNNMONEY.COM, Feb. 15, 2005, <http://money.cnn.com/2005/02/14/news/economy/blogging/> (last visited Mar. 10, 2007) (discussing Mark Jen, a former Google employee fired for maintaining a website discussing work life, and Ellen Simonetti, a former Delta flight attendant also fired for maintaining a blog discussing workplace experiences); see also Stephanie Armour, *Warning: Your Clever Little Blog Can Get You Fired*, USATODAY.COM, June 14, 2005, [http://www.usatoday.com/tech/news/2005-06-14-worker-blogs-usat\\_x.htm](http://www.usatoday.com/tech/news/2005-06-14-worker-blogs-usat_x.htm) (last visited Mar. 10, 2007); Strege-Flora, *supra* note 9, ¶ 4.

NLRA<sup>17</sup>; this note seeks first to echo these commentators' opinions that employee blogs should be extended the same federal protections offered to employee organizational speech occurring in more traditional fora. This note's primary purpose, however, is to suggest an analytical framework for determining the extent to which employee organizational speech should be protected under the NLRA, particularly with regard to such speech occurring outside the workplace. In this proposed framework, the amount of protection depends first on how the employee is accessing and/or posting to the blog, and second on the type of forum in which the blog appears—a public forum, an employee-sponsored forum, or an employer-sponsored forum.

In Part I, this note will discuss the NLRA's general background and what employee speech is traditionally protected under the Act, including discussion of the critical NLRA terms "concerted" and "for mutual aid and protection." Part II identifies the first of two distinct categories of protected employee organizational speech that has emerged in labor law jurisprudence—organizational speech occurring *inside* the workplace—specifically discussing what limits employers may lawfully place on this category of organizational speech both historically and in the evolving electronic workplace. Part II concludes by asserting that traditional labor law doctrine regarding organizational speech inside the workplace should be applied to the employee blogger's workplace access to the forum. Part III discusses the second category of protected employee organizational speech—speech occurring *outside* the workplace—and identifies three sub-categories of outside the workplace fora: the public forum, the employee-sponsored forum, and the employer-sponsored forum. Part III also discusses the judicially created "disloyalty exception" doctrine, and describes how it has traditionally been used to remove organizational speech from NLRA protections in the subcategories above. Part IV suggests a new analytical framework for applying the disloyalty exception to blogs that hinges on which subcategory of organizational speech those blogs fall into.

## I. BACKGROUND

Section 7 of the NLRA gives "[e]mployees . . . the right . . . to engage in other concerted activities for the purpose of . . . mutual aid and protec-

17. See Scott, *supra* note 7, ¶4 (noting that NLRA protections "likely extend to employee blogs under certain circumstances"); Matthew E. Swaya & Stacey R. Eisenstein, *Emerging Technology in the Workplace*, 21 LAB. LAW. 1, 3-4 (2005) (noting that while the NLRB has yet to rule on the specific issue, nonunion and union employers "should exercise caution prior to disciplining an employee based on a blog posting that criticizes the terms and conditions of her employment").

tion.”<sup>18</sup> In addition to employee rights to engage in union organizational activities, section 7 has been interpreted to protect non-union employees’ concerted efforts to better the conditions of their employment.<sup>19</sup> Disciplining employees for engaging in organizational speech is considered an unfair labor practice, as adjudicated initially by the NLRB and then by federal courts; to be insulated from adverse action by employers, however, organizational speech must first be “concerted” and “for mutual aid and protection.”<sup>20</sup>

### A. Defining “Concerted” Under the NLRA

The NLRB and courts have arrived at a rather broad definition of “concerted” speech, which includes the following: organizational speech directed at only one other employee<sup>21</sup>; speech that failed to actually produce any concerted group activity but appears to have had such activity as a primary goal<sup>22</sup>; speech from employees who are merely spokespersons on matters of common concern<sup>23</sup>; speech amounting to merely an implicit attempt to induce concerted action on the part of other employees<sup>24</sup>; speech that is a “logical outgrowth” of previous group activity<sup>25</sup>; and even completely independent expressive activity, not preceded by any group discus-

18. National Labor Relations Act (NLRA), 29 U.S.C. § 157 (2000).

19. *See, e.g.*, NLRB v. Phoenix Mut. Life Ins. Co., 167 F.2d 983, 988 (7th Cir. 1948) (“A proper construction [of the NLRA’s section 7] is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved . . .”).

20. *See King, supra* note 2, at 832.

21. *Mushroom Transp. Co., Inc. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) (noting the axiomatic labor law premise that conversations between two employees are protected provided that it appears, at the very least, that the conversation “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 the employees”); *see Reef Indus., Inc.*, 300 N.L.R.B. 956, 959 (1990) (holding that the activities of only two employees in protesting employer comments were “concerted”).

22. *See Mushroom Transp. Co.*, 330 F.2d at 685 (holding that preliminary discussions between workers that concern a proper subject of organized action need not be disqualified for section 7 protection because they do not actually result in organized action or even in “positive steps toward presenting demands”). The court went on to recognize that section 7’s goals would be thwarted if communications between employees were not protected because of lack of fruition. *Id.*

23. *See id.* at 684; *King, supra* note 2, at 834.

24. *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 247 (1997) (noting that the object of inducing group action need not even be express in order for the speech to be protected under section 7). In *Timekeeping Systems*, the NLRB held that despite a specific call for organizational action in an employee’s organizational email, the speech was “concerted” because it forwarded an opinion regarding an employment policy with the intent of generally arousing support for that position. *Id.* at 248.

25. *Every Woman’s Place, Inc.*, 282 N.L.R.B. 413, 413 (1986) (holding that an employee’s independent action was concerted because she and coworkers had already met and discussed related workplace issues and brought concerns to the employer).

sion and not characterized as a protest, as long as the activity implies a common goal to alter workplace conditions.<sup>26</sup>

Though neither the NLRB nor the courts have considered whether blogs might be concerted speech, employee websites with the overt goals of encouraging concerted employee action, encouraging dialogue regarding employment issues, or that generally speak for other similarly situated employees have been protected by section 7,<sup>27</sup> as have other analogous electronic media forms.<sup>28</sup> As these examples suggest—and as other commentators have noted<sup>29</sup>—it seems highly likely that an employee blog could be “concerted” for the NLRA’s purposes. Though a blog, by its nature, cannot be directed at one specific person, once an employee creates a blog concerning a workplace topic the correspondence might be determined an “implicit” attempt to organize, even before another employee posts to the blog, and therefore protected.<sup>30</sup>

### B. Defining “Mutual Aid and Protection” Under the NLRA

Defining what employee organizational speech acts “for mutual aid and protection” has proved a more difficult task for the NLRB and the courts.<sup>31</sup> Beginning with the landmark case of *Eastex, Inc. v. NLRB*, the U.S. Supreme Court clearly extended section 7’s reach outside the realm of union activity and collective bargaining to include general employee action to improve working conditions or terms, provided that the speech was connected to a tangible workplace issue. After *Eastex*, the Board and courts took a relatively wide view of when employee speech relates closely enough to a workplace issue so as to be “for mutual aid and protection” under section 7<sup>32</sup>: speech relating to wages, hours, physical environment,

26. *NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 263–65 (9th Cir. 1995) (involving four individuals who individually refused to work overtime without previously discussing their actions with each other or characterizing their refusal as protest; nonetheless, their activities were “concerted” because they implied a common goal).

27. *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 882 n.10 (9th Cir. 2002). The court used a section 7-style analysis to consider the question of whether Hawaiian had interfered with Konop’s protected right to organize, recognizing that “[w]hile employers covered under the RLA are not subject to the provisions of the NLRA, courts look to the NLRA and the cases interpreting it for guidance.” *Id.* Proceeding under this analytical framework, the court began by flatly stating that “[t]here is no dispute that Konop’s website publication would ordinarily constitute protected union organizing activity.” *Id.* at 882.

28. *See Timekeeping Systems*, 323 N.L.R.B. at 246–47 (determining that a company-wide email discussing work vacation policy was concerted speech under section 7).

29. *See Swaya & Eisenstein*, *supra* note 17, at 4; Scott, *supra* note 7, ¶ 18.

30. *See supra* note 22.

31. *See Scott*, *supra* note 7, ¶ 8.

32. *See* 1 THE DEVELOPING LABOR LAW 83 (John E. Higgins, Jr. ed., 5th ed. 2006) (discussing examples in concluding the definition of “for mutual aid and protection” is broad).

dress codes, and working assignments or responsibilities is generally protected.<sup>33</sup> Some additional subjects of employee organizational speech related closely enough to working conditions to warrant NLRA protection are alerting management to a malicious rumor,<sup>34</sup> posting a sign and alerting news media that a mysterious illness was afflicting workers,<sup>35</sup> refusing to contribute to the denial of another employee's section 7 rights,<sup>36</sup> discussing work schedules,<sup>37</sup> distributing materials urging coworkers to vote in favor of laws affecting employment,<sup>38</sup> criticizing and urging opposition to the employer's implementation of new employment policies,<sup>39</sup> and complaining to the employer's clients about working conditions.<sup>40</sup> The NLRB and courts have even gone so far as to uphold, under very narrow circumstances, organizational speech calling for the removal of a direct supervisor or company executive.<sup>41</sup> For the purposes of this note, it suffices to note

33. See, e.g., *Vemco, Inc. v. NLRB*, 79 F.3d 526, 530 (6th Cir. 1996) (noting that protected speech must relate to a labor dispute, and because the definition of labor dispute is broad, employee interests must "bear a reasonably significant impact upon working conditions or some material incident of the employment relationship"); see also Scott, *supra* note 7, ¶ 8.

34. See, e.g., *Gatliff Coal Co.*, 301 N.L.R.B. 793, 798 (1991) (involving two employees who consulted management regarding a rumor they feared could impact employment; the actions in consulting management were protected).

35. See, e.g., *Martin Marietta Corp.*, 293 N.L.R.B. 719, 724 (1989) (involving employees who agreed to embark on a public campaign to disclose recent outbreaks of a mysterious illness, carried through by posting notice inviting other employees to talk about the illness on television; the actions were held to be protected activity).

36. See, e.g., *Phoenix Newspapers, Inc.*, 294 N.L.R.B. 47, 82, 85 (1989) (holding that a supervisor's refusal to write poor performance evaluations for an employee was protected where the employer sought to fire that employee for protected organizational activity).

37. See, e.g., *K Mart Corp.*, 297 N.L.R.B. 80, 83 (1989) (noting that "[i]mproved working conditions," including working schedules, are a frequent objective of protected organizational activity, and that discussions about the condition at issue are therefore necessary to further that objective; holding that employee "discussion about such a subject [work schedules] can be protected activity and that an employer's unqualified rule barring such discussions has the tendency to inhibit such activity").

38. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978) (holding as protected speech employee distribution of literature criticizing state legislation regarding "right to work" and presidential veto of minimum wage laws). *But see* *NLRB v. Motorola, Inc.*, 991 F.2d 278, 285 (5th Cir. 1993) (stating that "*Eastex* noted that at some point, employees' interest in distributing literature that deals with matters affecting them as employees . . . may be so removed from the central concerns of [the NLRA]" as to remove protections; denying employees the right to distribute literature protesting drug testing laws (internal quotations omitted)). Other commentators have examined this interesting question and its application to employee blogs at greater length. See generally Scott, *supra* note 7, ¶¶ 16–17.

39. See *infra* note 69 and accompanying text.

40. *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291 (6th Cir. 1998) (protecting employees who complained directly to customers regarding working conditions, noting that "[e]mployees have the right to engage in concerted communications with third parties regarding legitimate employee concerns, such as terms and conditions of employment and grievances").

41. *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 86–89 (2nd Cir. 1990). The Second Circuit upheld the NLRB's finding that three employees were protected when they wrote a letter complaining about the activities of their company's president. *Id.* at 86. The court stated that while "action seeking to influence the identity of management hierarchy is normally unprotected activity" because it is not a legitimate employee interest, "[i]n a narrow category of cases, however, concerted activity to protest the



that employee organizational speech relating to political issues affecting the workplace *could* be protected under certain circumstances.<sup>42</sup> What is important to note about all the subjects that have been protected by the NLRB and courts, however, is that employees discussing these subjects will only be protected if their speech relates to an actual, ongoing workplace dispute.<sup>43</sup>

Though the Board has not yet considered whether a blog's contents might be "for mutual aid and protection," it is fair to assume, as numerous other commentators have,<sup>44</sup> that the content of some employee blogs can meet these relatively broad requirements. The wide array of subject matter held to be protected under the NLRA could easily be, and in fact currently is, the central topic of an employee's blog.<sup>45</sup> The blog forum's expansive nature—posts can be fairly long and can cover a wide array of subjects—raises questions about how *much* blog content must relate to actual workplace disputes for the entire blog to be protected; the "relatedness" of speech content to workplace disputes is discussed at length below when considering how courts apply the "disloyalty exception" doctrine.<sup>46</sup> It suffices here to simply note that there are likely situations where blogs will at least meet the threshold determination of being "for mutual aid and protection."<sup>47</sup>

Even where employee organizational speech meets the threshold requirements of "concerted" and "mutual aid," labor law still balances the employee's section 7 rights against the competing property interests of employers—both to prevent actual and virtual "trespassing" by non-employees to the workplace,<sup>48</sup> and to preserve the proper function of the employer's business. For the purposes of this note, it will be helpful to

discharge of a supervisor or to effect the discharge or replacement of a supervisor may be protected . . ." *Id.* at 89 (citations omitted).

42. See *Eastex, Inc.*, 437 U.S. at 569–70, 575 (holding that the distribution of a letter urging support for a political campaign was protected under the NLRA, because the political issue was related to specific workplace issues). But see *Motorola, Inc.*, 991 F.2d at 280, 285 (rejecting protection of employee distribution of outside political literature).

43. See *supra* note 42 and accompanying text.

44. See *supra* note 29.

45. There are numerous examples to be found online of anonymous employee blogs that relate (albeit in some cases sporadically) to workplace issues cited above as possibly falling under NLRA protection. See, e.g., Anonymous Work Blogs Blogging, <http://anonworkblogs.blogspot.com/> (last visited May 22, 2007); Retail Record, <http://retailrecord.blogspot.com/> (last visited May 22, 2007).

46. See *infra* pp. 22–25.

47. Katherine Scott also discusses an interesting problem that might further complicate whether an employee's blog will be protected: when a poster to a blog thread generally discussing protected workplace topics goes beyond the scope, should the entire blog be protected? Scott, *supra* note 7, ¶ 17.

48. Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 40 (2000).

classify employer interests in “regulating” employee section 7 speech into two distinct categories and discuss in turn the limitations placed on employee organizational speech rights in both categories. Proceeding under the assumption that certain employee blogs meet the NLRA’s threshold requirements for section 7 protection, Part II below will discuss traditional labor law rules for what controls employers can place on otherwise protected employee organizational speech *within the workplace*, how those rules have been adapted by the use of email for organizational speech, and argue that this traditional framework should be extended to blogging. Part III will discuss limitations on NLRA protection *outside the workplace*.

## II. ORGANIZATIONAL SPEECH WITHIN THE WORKPLACE

When addressing what controls employers may place on organizational speech within the workplace, the NLRB and the courts have often considered two questions: First, when must employers allow *outside individuals* to distribute information to employees for organizational purposes? Second, what controls or policies can employers lawfully put in place to curtail inter-employee organizational speech in the workplace? The first question regarding access for non-employees for organizational purposes (usually union organizers) is largely not relevant to this note’s purposes because of the functional manner in which blogs work—employees typically seek blogs out of their own volition.<sup>49</sup> I pause only to note that the Supreme Court has clearly held that an employer may not be compelled to allow non-employees access to its physical property for the purposes of distribution or solicitation unless there is no reasonable alternate means for reaching those employees.<sup>50</sup> As an example of such “unreachable” employees, courts have posited the extreme examples of isolated mining or logging camps.<sup>51</sup>

49. The access issue would be relevant where a non-employee organizational blogger emails employees a link to their blog. For a more complete discussion of this potentially effective organizational tactic, see *id.* at 39–40.

50. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). In discussing what restrictions employers can place on distribution, the Court said,

[A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer’s notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.

*Id.*

51. The *Babcock* Court recognized that in situations where employees are isolated from civilization, and solicitation outside the workplace is thereby prohibitively difficult, access for solicitation might be required. *Id.* at 111. The Court also recognized this possibility in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799 (1945), noting that the situation before it was *not* “like a mining or lumber

Considering the second question—what controls can employers place on inter-employee organizational speech in the workplace—in the context of electronic communication has important implications for when and how employees may access and post to blogs while physically in their workplaces. Labor law has come to recognize the rights of employees to engage in the two core organizational speech activities—to “solicit” and “distribute”—using traditional modes of communication (leaflets, handbills, or in person solicitations) in the workplace.<sup>52</sup> In traditional labor cases, “distribution” typically means handing out leaflets or flyers around the workplace—a “one-way” dissemination of literature<sup>53</sup>—while “solicitation” typically involves inter-employee conversations or dialogue.<sup>54</sup>

In 1945, the Supreme Court established that employees can solicit other employees to organize while on employer property *and in work areas*, provided it is during non-work times and the employer cannot show some special circumstance—for example, loss of production or efficiency—that might prevent it.<sup>55</sup>

The Board and courts quickly distinguished between solicitation and distribution for the purposes of setting employer rules, however.<sup>56</sup> The rights of employees to distribute written organizational speech are also protected, but only on non-working time *and in non-working areas*.<sup>57</sup> The Board explained this distinction by reasoning that though organizational conversations in the workplace must be allowed to take place in work areas to be effective, the same is not true for the distribution of literature:

It does not follow . . . that an identical adjustment is appropriate where distribution of literature is involved. The distinguishing characteristic of literature as contrasted with oral solicitation—and a distinction too often overlooked—is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading

camp where the employees pass their rest as well as their work time on the employer’s premises, so that union organization must proceed upon the employer’s premises or be seriously handicapped.”

52. See King, *supra* note 2, at 859–61.

53. *Id.* at 860–61.

54. *Id.* at 860.

55. See *Republic Aviation Corp.*, 324 U.S. at 803 n.10 (recognizing and adopting the Board’s ruling below: “It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.”).

56. King, *supra* note 2, at 860–61 (citing *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 616 (1962) (“[W]e believe . . . that a real distinction exists in law and in fact between oral solicitation on the one hand and distribution of literature on the other. Further, we believe that logic and precedent call for recognition of this distinction and its legal effects.”)).

57. See *Stoddard-Quirk*, 138 N.L.R.B. at 617.

at his convenience. Hence, the purpose is satisfied so long as it is received.<sup>58</sup>

Therefore, since employee organizational objectives are achieved just as easily by handing out literature in non-working areas like the parking lot or lunchroom, there was no need to infringe on the employer's property rights by allowing distribution of literature in work areas where it might disturb production.<sup>59</sup>

Since *Republic Aviation* was decided in 1945, it has been considered "black letter" labor law that companies cannot put blanket policies in place preventing solicitation (for example, inter-employee organizational conversations) during the entire time an employee is at work (because that ban presumptively includes employee break and lunch times).<sup>60</sup> Likewise, however, it is also "black letter" labor law that employees cannot "distribute" (for example, hand out leaflets regarding employment issues) in any work areas or during any work time.<sup>61</sup> The distinction between distribution and solicitation, then, has traditionally been an important one in labor law: the right to distribute is more limited than solicitation, because effective distribution requires only that the target receives the message, while effective solicitation requires face-to-face interaction.

The traditional battleground for testing the limits of employees' rights to distribute organizational literature in the workplace has been the company bulletin board; unions and employees have often fought for the "distribution right" to post organizational messages to such boards located in common workplace areas.<sup>62</sup> The general rule is that employers may not discriminate against allowing employee access to bulletin boards—once they allow employee access for non-work purposes, they cannot discriminate against organizational speech.<sup>63</sup>

As email message systems in the workplace emerged and workers used the new technology for organizational messages, the NLRB and courts

58. *Id.* at 620.

59. *See id.*

60. *See, e.g., Timken Co.*, 331 N.L.R.B. 744, 752 (2000) ("[E]mployees have the right . . . to distribute union literature and to solicit for the union on non-work time and in non-work areas.").

61. *See supra* note 56.

62. *See generally Malin & Perritt, supra* note 48, at 44–45.

63. *See, e.g., Timken Co.*, 331 N.L.R.B. at 754 ("Employees have no statutory right to use an employer's bulletin board but, if permission is granted, it must not be accorded selectively and disparately to prevent union literature postings whereas other nonbusiness postings are permitted."). *But see Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 321–22 (7th Cir. 1995) (noting that when an employer grants employee access to bulletin boards for personal notices such as "for sale" signs, it strains the Board's "no discrimination" rule to say that the employer must then allow organizational speech in that forum: "Distinguishing between for-sale notices and announcements of all meetings, of all organizations, does not discriminate against the employees' right of self-organization.").

relied on traditional principles regarding inside-the-workplace organizational communication to decide what protections applied.<sup>64</sup> However, the Board has not decided whether employee organizational speech sent via email is distribution or solicitation.<sup>65</sup> As numerous commentators have noted, email may be a “hybrid” between the two: as a one-way communication from sender to recipient, it resembles the distribution of literature; when emails encourage and generate immediate dialogue, they more closely resemble solicitations.<sup>66</sup>

The Board has considered whether an employee e-mail disputing a company policy was protected speech and, applying reasoning analogous to that used in distribution cases, apparently concluded that since the employer allowed personal use of the email system, it could not discriminate against organizational speech.<sup>67</sup> In the relevant case, the employer proposed a new vacation day policy and invited employees to voice their opinions.<sup>68</sup> In response, software engineer Lawrence Leinweber sent an email to all company employees concluding that the new policy in fact was less favorable to them than the old.<sup>69</sup> The email contained “flippant and rather grating” language and was generally disparaging in tone<sup>70</sup>; Lienweber was eventually dismissed for “failure to treat others with courtesy and respect.”<sup>71</sup> However, the NLRB affirmed the administrative law judge’s order to reinstate Leinweber.<sup>72</sup> The Board likened Leinweber’s message more to distribution cases where employees left pamphlets on co-worker’s desks to be discovered the next morning during working hours—since it “could

64. See Adtranz, 331 N.L.R.B. 291, 293 (2000). When faced with the use of e-mail for organizational purposes and an employer’s attempt to limit that communication, the Board reasoned,

It is well established that there is no statutory right of an employee or a union to use an employer’s bulletin board. . . . However, that right may not be exercised discriminatorily so as to restrict postings of union materials.

Similarly, there is no statutory right of an employee or a union to use an employer’s telephone for personal or nonbusiness purposes. However, once an employer grants the privilege of occasional personal use of the telephone during worktime, it may not lawfully exclude union activities as a subject of discussion.

Analogously, Respondent could bar its computers and E-mail system to any personal use by employees. In this case, Respondent did permit E-mails of a personal nature, notwithstanding its rule. Therefore, Respondent could not exclude the union as a topic of discussion.

*Id.* (citations omitted).

65. King, *supra* note 2, at 866–67.

66. Elena N. Broder, Note, *(Net)workers’ Rights: The NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639, 1661–62 (1996); see Malin & Perritt, *supra* note 48, at 52–53.

67. See Timekeeping Sys., Inc., 323 N.L.R.B. 244, 248–49 (1997).

68. *Id.* at 245–46.

69. *Id.* at 246.

70. See *id.*

71. *Id.* at 247.

72. *Id.* at 250.

not have taken Respondent's employees more than a few minutes to digest," it could not have amounted to substantial disruption.<sup>73</sup> Furthermore, the Board noted that the company permitted employees to spend some working time in non-work pursuits, including posting "simple" emails to each other.<sup>74</sup> Therefore, the Board seemed to hold that, as in other more traditional cases of employer control over bulletin boards, once the employer allows personal messages or communication to be posted it cannot discriminate against organizational speech.<sup>75</sup>

*Washington Adventist Hospital, Inc.*, however, provides an example of the limitations placed on employee use of the employer's communications system.<sup>76</sup> In that case, employee Driver sent a system-wide email via his work computer system to every employee with a computer terminal at Washington Adventist Hospital protesting recent layoffs at the facility.<sup>77</sup> The message temporarily shut down any terminal receiving it, causing serious delays in patient care and general consternation of the hospital's workforce.<sup>78</sup> The administrative law judge concluded the message was not for mutual aid and protection and therefore "[Driver's] sudden, unauthorized taking over the computer-communication system, regardless of how 'concerted,' benign, or worthy the motive might have been . . . was not protected" because it interfered with the work of hospital employees operating terminals in the computer system.<sup>79</sup> Importantly, the employer had a policy preventing personal use of the message system and apparently enforced it<sup>80</sup>; moreover, Driver sent his missive via a "break message," which shut down all terminals receiving it—not merely as a "normal" message, which he could have done much less invasively.<sup>81</sup> While *Washington Hospital* seems to establish an employer defense if organizational speech transmissions overly burden the employer's electronic infrastructure, it is also important to note that the *Timekeeping Systems* court refused to apply *Washington Hospital's* holding to deny protection for Leinweber's message because he did not "take over" the entire email system.<sup>82</sup>

73. *Id.* at 249.

74. *Id.*

75. *See id.*

76. *See* 291 N.L.R.B. 95, 103 (1988).

77. *Id.* at 98.

78. *Id.*

79. *Id.* at 103.

80. *See id.* at 99–100 (describing how the employer discovered employees using terminal-to-terminal messages for dating purposes and "warned them not to do it again").

81. *See id.* at 98 (discussing the difference between mere terminal-to-terminal messages and the break message Driver sent).

82. *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249 (1997).

*Timekeeping Systems*' "no organizational discrimination" doctrine for employee email use has mostly been followed by the Board and courts in the wake of the ruling.<sup>83</sup> In this line of cases, the Board has analogized email use policies to traditional reasoning regarding employee access to company bulletin boards, telephones, or other property for non-business reasons.<sup>84</sup> Though the Board seemingly admits that under certain circumstances such blanket policies might be legitimate under the NLRA,<sup>85</sup> the NLRB's General Counsel has also issued memorandums opining that business-only policies covering email and internet use among employees are facially in violation of the NLRA because they might prohibit employees from engaging in protected solicitation-type activities.<sup>86</sup>

The NLRB's doctrines limiting employer control over the means of organizational communication in the workplace are relevant to the blogging context when considering what controls employers may place on an employee's use of a workplace internet connection to access organizational blogs. Because of the close analogies between email systems and blogs, employer controls over employee blog access while in the workplace should be limited in the same way those controls have been limited in the context of employer "business only" email policies in the workplace.<sup>87</sup> It seems logical to apply the *Timekeeping Systems* "no discrimination" rule to employee blogs, which would mean that a company's internet policy could not be applied in a discriminatory manner to prevent an employee from accessing an organizational blog with her company-provided internet connection.<sup>88</sup>

In traditional labor law, employee solicitation has been allowed in working areas during non-working time. If emails can be considered a hybrid that has at least some of the characteristics of both distribution and solicitation, a blog is surely also such a hybrid; in fact, the blog probably

83. See, e.g., *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 897 (1993) (holding that an employer policy that prohibited employee access to e-mail for union purposes while allowing employee e-mail use for other non-work purposes violated the NLRA); King, *supra* note 2, at 862.

84. See *supra* note 64.

85. See King, *supra* note 2, at 862.

86. See, e.g., *Pratt & Whitney*, Case 12-CA-18446, NLRB General Counsel's Advice Memorandum (Feb. 23, 1998), available at [http://www.nlr.gov/research/memos/advice\\_memos/index.aspx](http://www.nlr.gov/research/memos/advice_memos/index.aspx) ("We conclude that the [e]mployer's prohibition of all non-business use of electronic mail . . . including employees' messages otherwise protected by Section 7, is overbroad and facially unlawful.").

87. For obvious reasons, if employees are using an entirely personal means (for example, emailing or accessing from home) for organizational blogging, there is no level of employer involvement in controlling the blogging transmissions themselves.

88. See Scott, *supra* note 7, ¶ 32 ("[E]xisting doctrines that control employer restrictions on employee communications are thus easily adaptable to the analysis of blogging policies."); Broder, *supra* note 66, at 1662-64 (arguing that rules governing distribution in the workplace would apply to organizational email, especially when workers "telecommute").

has more characteristics of solicitation than an email message. Applying *Timekeeping Systems*' rule, an employee emailing from his desk (work area) on his lunch break (non-work time) should be allowed to send messages containing protected organizational speech, despite even a blanket "business only" policy. The analogy between email and internet usage policies at America's workplaces is obvious; the two policies are often lumped together in employee handbooks,<sup>89</sup> and are likely to implicate the same employer concerns over time wasting and inappropriate use. In the end, it is logical to apply the exceptions and doctrines surrounding the "business only" policies to internet usage. The most likely employer argument against such an extension—that it would force employers to tolerate many non-protected uses of this medium (i.e., using internet access to download inappropriately large files or otherwise hurt computer storage capacity, or view inappropriate materials)<sup>90</sup>—is easily defeated by realizing that such uses will not be considered concerted or for mutual aid and protection and therefore are not protected organizational activity.

Furthermore, in examining the Board's jurisprudence in situations with more traditional distribution methods and applying that framework to what one commentator has called the "electronic workplace," it appears that under certain unique circumstances employers should be *compelled* to allow employees to use internet or email connections for organizational speech regardless of any "business-only" policies they may have—especially in unique cases where employees are physically isolated from one another across the country, are professionally "tech savvy," and communicate with one another regarding workplace issues primarily via email or other electronic communications.<sup>91</sup>

Traditional labor law rules regarding organizational speech inside the workplace and what controls employers may place on it have implications for how an employee should be able to *access* organizational blogs at work. However, the blog format is in most cases accessible to the public. Because of this public element, blogs are likely not only a hybrid of solicitation and distribution—like email—but also a hybrid of inside and outside the workplace speech. Therefore, Part III must examine organizational speech oc-

89. See, e.g., *Texas Utilities Co.*, Case 16-CA-20121-2, NLRB General Counsel's Advice Memorandum (Jan. 28, 2000), available at [http://www.nlr.gov/research/memos/advice\\_memos/index.aspx](http://www.nlr.gov/research/memos/advice_memos/index.aspx) (considering employer policy which stated that "[i]nternet . . . and [e]-mail are provided by the Company for business-related use. Any personal use by [u]sers must be kept to a minimum, must comply with all [c]ompany policies").

90. See King, *supra* note 2, at 848–49.

91. See Scott, *supra* note 7, ¶ 35 ("Obviously, when employees are spread across many locations, or when they spend little or no time at employer facilities, the Internet may be the only practicable way for them to communicate.").



curring outside the workplace and what controls employers may place on it. In examining decisions considering this type of speech, Part III first identifies three distinct categories of fora in which this speech generally occurs and the important differences in approach the Board and courts have traditionally applied to these categories. Next, Part III discusses a broad-reaching exemption to section 7—the judicially created disloyalty exception doctrine that removes organizational speech outside the workplace from NLRA protection—and how this exception has been applied.

### III. ORGANIZATIONAL SPEECH OUTSIDE THE WORKPLACE

When discussing the level of protection afforded to employee organizational speech occurring outside the workplace and meeting the threshold requirements of “concerted” and “for mutual aid and protection,” it is useful to recognize three distinct categories of fora in which this speech has traditionally occurred—and into which employee blogs might also easily be placed. The first category, the “public forum,” involves employee organizational speech occurring in public media or generally directed at people outside the company workforce or management; the most important feature of the public forum is that its contents are accessible by the employer’s clients and customers.<sup>92</sup> The second category, the “employee-sponsored forum,” involves employee organizational speech occurring in media created, hosted, or otherwise controlled by the employee.<sup>93</sup> The third category, the “employer-sponsored forum,” has been generally alluded to above<sup>94</sup>—it is a forum for employee speech hosted by the employer, but that has been generally opened to employees (at least partially) for their personal use.<sup>95</sup>

These categories become critically important when analyzing the mechanism by which the Board and courts remove otherwise protected employee speech from NLRA protection: the “disloyalty exception,” which exempts organizational speech that is excessively disloyal to the employer. As will be discussed below, the disloyalty exception has been, at best, unevenly applied by the courts to all three categories of organizational fora identified above.<sup>96</sup>

92. See *infra* notes 97–100 and accompanying text.

93. See *infra* notes 101–02 and accompanying text.

94. See *supra* notes 62–65 and accompanying text.

95. See *supra* note 84 and accompanying text.

96. See Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. REV. 291, 295 (1993) (“The disloyalty exception has never been clearly defined, uniformly understood, or consistently applied. . . . [The NLRB] and courts have struggled laboriously but unsuccessfully to make sense of it. . . . [It has been] notoriously hard to predict when certain collective activity might later be adjudged as ‘disloyal.’”).

### A. *The Public Forum*

Traditionally, “public-forum” organizational speech has occurred in letters to a newspaper’s editorial section or comments for reported news stories<sup>97</sup>; employee-produced handbills, letters, or leaflets mailed or otherwise distributed to people outside the company itself (usually to employer clients or local businesses)<sup>98</sup>; and even the websites of local newspapers.<sup>99</sup> The key distinguishing factors of the “public forum” are that it is accessible by members of the general public (or at least selected people outside the ranks of employees and employers) and that its publication is in no way sponsored, paid for, or controlled by the employer *or* the employee. Many employee blogs might currently be placed into this category, as they are hosted via private internet providers.<sup>100</sup>

### B. *The Employee-Sponsored Forum*

The second category closely resembles the traditional union newsletter—it is a publication entirely financed and published by union members on their time, with their (or the union’s) resources, and directed entirely at a non-employer audience.<sup>101</sup> An employee blog falling within this category was most recently discussed in *Konop v. Hawaiian Airlines, Inc.*, where an employee created and maintained a website hosted at his own expense and accessible for viewing and posting only by fellow employees via a password.<sup>102</sup>

97. See *Endicott Interconnect Tech., Inc. v. NLRB*, 453 F.3d 532, 537–38 (D.C. Cir. 2006) (holding that while employees’ published comments to a newspaper reporter regarding the effects of company layoffs were otherwise “concerted” and “for mutual aid and protection” for section 7 purposes, they fell under the disloyalty exception and were therefore not protected); *Community Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976) (holding hospital’s adverse employment actions taken in response to an employee’s comments on a local television news program discussing bad working conditions at the employer’s hospital violated the NLRA, because the employee’s speech was concerted and for mutual aid and protection).

98. See *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 472 (1953) (involving employees who distributed flyers critical of their employer to clients). This case is commonly referred to as the *Jefferson Standard* case, which will be discussed in greater detail below.

99. See *Endicott*, 453 F.3d at 534 (involving an employee who posted comments regarding employer on local newspaper’s website, on which the paper had designated a public forum for discussions regarding layoffs at the employee’s workplace).

100. See *infra* note 45.

101. See *Phoenix Transit Sys.*, 337 N.L.R.B. 510, 512–13 (2002) (involving employee organizational speech published in a union newsletter distributed to 500 other employees; the court noted that “the sort of communication which takes place when articles are published in union newsletters has long been found to be protected, concerted activity”).

102. See 302 F.3d 868, 872 (9th Cir. 2002). In *Konop*, the plaintiff was a pilot for Hawaiian, and created and maintained a website where he posted material critical of the airline and the incumbent union. *Id.* He controlled access to his website by requiring visitors to the site to create user names and

### C. *The Employer-Sponsored Forum*

The traditional employer-sponsored forum for employee organizational speech was discussed in Part II above: the company bulletin board.<sup>103</sup> Email might also be classified as an employer-sponsored forum for organizational speech, as discussed above.<sup>104</sup> Many large companies have also created their own blogs, included on their websites, which they open to employees for their use in discussing workplace issues; however, research has shown that these blogs are sometimes open to the public.<sup>105</sup> For this note's purposes, this forum's defining characteristics are that it is controlled, owned, and maintained by the employer as a platform for discussion of workplace issues; the employee has access to the forum for personal purposes; and clients or the general public may or may not have access. This new forum presents an interesting hybrid between inside and outside the workplace speech: if no outside parties have access to the forum, such blogs might easily be analogized to the oft-argued-over company bulletin board—as internal company-wide email messages have been.<sup>106</sup>

### D. *The “Disloyalty Exception”*

An important exception to the general rule that employers may not discipline employees for engaging in protected organizational speech under section 7 is generally referred to as the “disloyalty exception.”<sup>107</sup> This exception doctrine allows employers to punish otherwise protected employee organizational speech because it is openly disloyal; the NLRB created this exception in response to the Supreme Court's landmark 1953 *Jefferson Standard* ruling.<sup>108</sup> In *Jefferson Standard*, the employer owned local radio and television stations in Charlotte, North Carolina.<sup>109</sup> After negotiations between the employer and its technicians broke down, the technicians did not strike but picketed during non-working times—they still received full

passwords, and by only allowing a selected list of people (mostly Hawaiian Airlines employees) to log on. *Id.*

103. See *supra* note 62-65 and accompanying text.

104. See *supra* note 64 and accompanying text.

105. See Swaya & Eisenstein, *supra* note 17, at 3 n.7 (noting that Microsoft and General Motors have created such blogs).

106. See *supra* note 84 and accompanying text.

107. See, e.g., *Endicott Interconnect Tech., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006).

108. See, e.g., *id.* (“Following *Jefferson Standard*, the Board has formulated its own two-part test under which an employee's communication to a third party is deemed protected under section 7 if, first, it is related to an ongoing labor dispute and, second, it is ‘not so disloyal, reckless or maliciously untrue as to lose the Act's protection.’”).

109. *NLRB v. Local Union No. 1229, Int'l Bhd. of Electrical Workers (Jefferson Standard)*, 346 U.S. 464, 466 (1953).

pay.<sup>110</sup> At some point, though, the technicians printed 5,000 handbills and distributed them to local businesses and mailed them to local businessmen. The handbills read,

Have you seen one of [Jefferson Broadcasting's] programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by [Jefferson Broadcasting]. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups.<sup>111</sup>

The technicians who authored these handbills were discharged.<sup>112</sup> The board declared the firings an unfair labor practice, but the Supreme Court reversed and held that, despite the fact that they might have been engaging in otherwise concerted speech, the handbills were "so disloyal" as to lose NLRA protection.<sup>113</sup> In finding the employees' disloyalty rose to such a level as to remove protection, the following factors were important to the Court: that the communication disparaged company product, directed that disparagement towards clients (advertisers here), and made no reference either to any legitimate labor dispute, wages, hours, or working conditions, and therefore had no discernable relation to the labor controversy at issue.<sup>114</sup>

In the wake of *Jefferson Standard*, the NLRB and federal courts of appeal developed the so-called "disloyalty exception" doctrine. It is important to note that though the Board and courts have sometimes conflated the two inquiries, whether speech is "concerted" and "for mutual aid and protection" and whether the disloyalty exception doctrine applies to remove NLRA protections are in fact two separate and distinct analyses.<sup>115</sup> Though courts have been inconsistent in their application of the doctrine, commentators have generally identified three types of "disloyal speech": confidentiality breaches,<sup>116</sup> recklessly or maliciously false statements,<sup>117</sup> and

110. *Id.* at 467.

111. *Id.* at 468.

112. *Id.*

113. *Id.* at 472.

114. *Id.* at 471-77.

115. See Branscomb, *supra* note 96, at 311-12. Branscomb notes that in practice, the Board and courts have not rigorously observed distinctions between section 7 threshold analyses and disloyalty exception applications:

They have often collapsed what should be distinct inquiries into one. The Board and Courts occasionally skip [considering whether speech is concerted and for mutual aid and protection] and proceed directly to analyze whether the employee lost protection under an exception, such as disloyalty. This approach may result in a failure to determine if the activity is concerted or has a section 7 purpose.

*Id.* (footnote omitted).

116. This note will not discuss organizational speech amounting to a breach of confidentiality.

remarks disparaging the employer or its products.<sup>118</sup> The first two categories are relatively easy to categorize as disloyal regardless of the forum in which the organizational speech appears. However, what kind of organizational speech falls in the final category—"disparaging speech"—remains nebulous: based on the body of case law decided in the years since *Jefferson Standard*, it is difficult to ascertain what, exactly, amounts to the type of disloyalty that will subject employees' otherwise protected organizational speech to discipline.<sup>119</sup>

### 1. Applying the Disloyalty Exception to Public-Forum Organizational Speech

The D.C. Circuit recently applied the disloyalty exception to remove from NLRA protection employee organizational speech made in the public forum.<sup>120</sup> In *Endicott Interconnect Technologies, Inc. v. NLRB*, employee Rick White provided comments to a local newspaper for a story regarding announced layoffs at his company.<sup>121</sup> He stated in part that the layoffs left "gaping holes in this business," and that they had left voids in the critical knowledge base for the highly technical manufacturing business in which EIT was engaged.<sup>122</sup> In response to the article, IBM (which purchased products from the EIT plant, accounting for sixty percent of sales) contacted EIT and expressed concern that the company had "gutted" critical positions and regarding the ongoing quality of EIT products.<sup>123</sup> While advocating for union organization at the plant, White also posted a message on a website the newspaper maintained as a public forum that asserted the employer's "business is being tanked by a group of people that have no good ability to manage it" and that management staff "will put it into the

117. See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 882 (9th Cir. 2002) (noting employer's tenable argument that Konop lost protection for this organizational speech "because his articles contained malicious, defamatory and insulting material known to be false"); Scott, *supra* note 7, ¶ 9. This note will not discuss this type of organizational speech.

118. Katherine Scott and other commentators have generally identified these distinct categories of "disloyal" speech. See, e.g., Scott, *supra* note 7, ¶ 9.

119. See Branscomb, *supra* note 96, at 309. Branscomb notes,

The first problem encountered by those seeking to make sense of the disloyalty exception is not a substantive one concerning the merits of disloyalty, but rather the absence of an analytical framework within which to evaluate section 7 cases generally. *The lack of a framework is especially conspicuous and troublesome in cases concerning disloyalty and disparagement, and its absence has led to confusing decisions with questionable results.*

*Id.* (emphasis added).

120. See *Endicott Interconnect Tech., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006).

121. *Id.* at 534.

122. *Id.*

123. *Id.*

dirt.”<sup>124</sup> The court concluded that his initial statements to the newspaper removed White’s comments from section 7 protections on disloyalty grounds; because of their “critical nature and injurious effect” the comments amounted to a “sharp, public, disparaging attack upon the quality of the company’s product” at a “critical time” as identified in *Jefferson Standard*.<sup>125</sup>

However, other courts have allowed employee organizational speech in the public forum that is critical or disparaging of employer products to remain protected by section 7, as exemplified in the *Community Hospital of Roanoke Valley, Inc. v. NLRB* decision.<sup>126</sup> In *Community Hospital*, a nurse provided an on-air interview for a local television program where she discussed problematic working conditions at her employer’s hospital, saying “there are times . . . when there are not [nurses] to cover the whole medical-surgical unit of 40 patients.”<sup>127</sup> The hospital argued that the employee’s statements fell under the disloyalty exception because she had “disparaged and discredited the quality of nursing care available at the hospital, to the point of insinuating that it was unsafe.”<sup>128</sup> However, the court held that because the employee’s statements were “directly related to protected concerted activities then in progress” at the hospital—an ongoing labor dispute over working hours—they were protected.<sup>129</sup>

The organizational speech in *Sierra Publishing Co. v. NLRB* may also be classified as within the public-forum category because it was directed at and accessible by the employer’s customers.<sup>130</sup> In that case, a letter from union organizers was sent directly to the newspaper employer’s advertisers protesting employment practices, but also generally disparaging management decisions and the future quality of the newspaper.<sup>131</sup> The court never-

124. *Id.* at 535.

125. *Id.* at 537.

126. *See* 538 F.2d 607, 610 (4th Cir. 1976).

127. *Id.* at 609.

128. *Id.* at 610.

129. *Id.* Other courts have since followed this approach. *See, e.g.,* *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 641 (1st Cir. 1982). In *Mount Desert*, an employee nurse with concerns about hospital working conditions and “inept managerial policies” sent a letter to a local newspaper detailing these complaints and alleging lowered staffing levels caused “quality patient care [to] go down the drain.” *Id.* at 636 & n.1. The court of appeals held that the hospital’s subsequent decision not to rehire the employee was an unfair labor practice:

Grange’s comments, like those [in the *Community Hospital* case], were made for the purpose of improving working conditions and thus the level of patient care. The ALJ found that criticism of the Hospital’s administration was intertwined inextricably with complaints of working conditions. Even if the staffing situation were worse in *Roanoke*, Grange published his letter in a spirit of loyal opposition—not out of malice or anger.

*Id.* at 641.

130. *See* *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 214 (9th Cir. 1989).

131. *Id.*

theless concluded that the speech retained its protection, because the letter was related to the labor dispute at issue,<sup>132</sup> and the letter's "tone was both constructive and hopeful" and did not impugn the paper's journalistic integrity.<sup>133</sup> Importantly, the court concluded that employee organizational speech directed at third parties—even clients or customers—can easily be taken with a grain of salt (and the possible bad impacts for the employer thereby lessened) if the third party clearly knows of the context in which the disparaging or critical comments appear.<sup>134</sup>

## 2. Applying the Disloyalty Exception to the Employee-Sponsored Forum

In the recent *Konop* case, the Ninth Circuit applied the disloyalty exception doctrine to an employee-sponsored forum: a website designated exclusively for employees and that was password protected.<sup>135</sup> Many of the employee's criticisms related to his opposition to labor concessions that Hawaiian sought from the union; his website encouraged Hawaiian employees to seek alternative union representation.<sup>136</sup> *Konop*'s website proclaimed that Hawaiian vice presidents did "dirty work . . . like the Nazis during World War II" and that a particular vice president was "one incompetent at the top," had "little skill and little ability with people," and was suspected of fraud.<sup>137</sup> James Davis, a vice president at Hawaiian, used the usernames and passwords of two employees (with their permission) to log onto the website and view its contents.<sup>138</sup> *Konop* alleged, among other things, that he was placed on medical suspension in retaliation for his comments on the website in violation of the Railway Labor Act.<sup>139</sup>

The court used a section 7-style analysis to consider the question of whether Hawaiian had interfered with *Konop*'s protected right to organize, recognizing that "[w]hile employers covered under the RLA are not subject to the provisions of the NLRA, courts look to the NLRA and the cases

132. *Id.* at 217.

133. *Id.*; see also *Allied Aviation Serv. Co. of New Jersey, Inc.*, 248 N.L.R.B. 229, 231 (1980), *enforced*, 636 F.2d 1210 (3rd Cir. 1980) (holding an aircraft mechanic's letter to the employer's customers, commercial airlines, informing them of lax safety practice was protected; in rejecting the disloyalty exception, the Board noted that "great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues").

134. *Sierra Publ'g Co.*, 889 F.2d at 217 ("Moreover, extending § 7 protection in this direction does not pose an unreasonable threat to employers; third parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context.").

135. See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 882 (9th Cir. 2002).

136. *Id.* at 872.

137. *Id.* at 882–83 (alteration in original).

138. *Id.* at 873.

139. *Id.*

interpreting it for guidance.”<sup>140</sup> Proceeding under this analytical framework, the court began by flatly stating that “[t]here is no dispute that Konop’s website publication would ordinarily constitute protected union organizing activity.”<sup>141</sup> However, Hawaiian argued that Konop’s organizational speech lost its statutory protection under the disloyalty exception because his articles contained “malicious, defamatory and insulting material known to be false,”<sup>142</sup> an argument the court assumed to proceed along disloyalty exception lines.<sup>143</sup> The court disagreed, finding that Konop’s statements were simply “rhetorical hyperbole” and opinions protected by federal labor laws.<sup>144</sup> Importantly, the court reversed the lower court’s grant of summary judgment against Konop on his charges that Davis interfered with his organizing activities under the RLA by viewing the website under false pretenses.<sup>145</sup> The court noted that “[a]bsent a legitimate justification, employers are generally prohibited from engaging in surveillance of union organizing activities.”<sup>146</sup> The Ninth Circuit had previously found unfair labor practices where an employer had “eavesdropp[ed] on private conversations between employees and [a] Union representative” that occurred in an employee break room; the *Konop* court expressly stated that it saw “no principled distinction between the employer’s eavesdropping . . . and Hawaiian’s access of Konop’s secure website.”<sup>147</sup> The court remanded for a determination of whether Hawaiian’s “eavesdropping” in this case was justified by its concerns over identifying and correcting any false statements.<sup>148</sup>

### 3. Applying the Disloyalty Exception to the Employer-Sponsored Forum

When considering the application of disloyalty exception doctrine to an employer-sponsored forum, it is especially important to first recognize that if the public has no access to the forum the disloyalty exception likely has no application at all.<sup>149</sup> In the *Washington Hospital* case, the employee organizational speech at issue was essentially a company-wide email message not at all accessible by the public.<sup>150</sup> The administrative law judge

140. *Id.* at 882 n.10.

141. *Id.* at 882.

142. *Id.*

143. *Id.* at 883 n.11.

144. *Id.* at 883.

145. *Id.* at 884.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See* *Washington Adventist Hosp.*, 291 N.L.R.B. 95, 101 (1988).

150. *See id.*



decided this case without reaching any possible application of the disloyalty exception doctrine, but stated in dicta that the doctrine probably did not apply because no outside people had seen the message:

I think it sufficient to note that the message, not addressed to or seen by nonhospital personnel, did not openly insult the administration or disparage the hospital or its services. . . . [A]s noted, the message was not addressed to third persons or seen by third persons, much less the general public and did not hold up the hospital, its personnel, or its services to ridicule or disparagement. In short, were it necessary to decide the issue, I would conclude that the message itself was not so insulting or disparaging to the hospital or to the administration or to the hospital's officers as to come within the *Jefferson Standard* rule and render conduct which was otherwise concerted and protected outside the pale of statutory protection.<sup>151</sup>

The *Timekeeping Systems* case, discussed above, also shows a court's refusal to apply the disloyalty exception doctrine to organizational speech in an employer-sponsored forum where the outside world had no access to that speech—again, in the form of a company-wide email.<sup>152</sup> In declining to apply the doctrine, the court noted that it is the public disparagement of company products that the *Jefferson Standard* Court found so critical in declaring organizational speech disloyal, and quickly concluded that since “[n]o such public disloyalty occurred here” the disloyalty exception did not apply.<sup>153</sup>

In the wake of decisions applying the disloyalty exception, finding a workable standard for when employee organizational speech of the so-called “disparaging product” variety rises to the level of disloyalty seems difficult at best.<sup>154</sup> Since employee blogs may be categorized as “outside the workplace” speech, they will be subject to the disloyalty exception. It is also clear that meaningful distinctions may be drawn between different types of employee speech in general and blogs specifically. Part IV suggests a framework for applying the disloyalty exception to blogs based on

151. *Id.*

152. *See* *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249 (1997). After finding organizational speech protected, the court considered the application of the disloyalty exception doctrine but declined to apply it.

153. *Id.*

154. *See* *Branscomb*, *supra* note 96, at 309. *Compare* *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 882–83 (9th Cir. 2002) (applying the disloyalty exception doctrine but nevertheless protecting the employee's speech comparing employer personnel to “the Nazis during World War II” and calling a company president “one incompetent at the top” with “little skill and little ability with people”), *with* *Endicott Interconnect Tech., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (applying the disloyalty exception doctrine and declining to protect organizational speech that included statements that “there were gaping holes in [the employer's] business” and that there were “voids in the critical knowledge base for the highly technical business”).

these distinctions. This framework will help the Board and courts give this important new communication forum the protection it properly deserves.

#### IV. A NEW FRAMEWORK FOR APPLYING THE DISLOYALTY EXCEPTION TO ORGANIZATIONAL SPEECH OUTSIDE THE WORKPLACE

Before suggesting a new framework for applying the disloyalty exception doctrine to employee blogs, we must first identify the following factors the Board and courts have traditionally relied on to apply the exception and remove speech from NLRA protection: how closely connected employee comments are to actual labor disputes<sup>155</sup>; the timing of the organizational comments (i.e., the more “critical” a time for the employer with regards to their relationship with the marketplace, the more likely the speech will be deemed disloyal)<sup>156</sup>; the general tone (overly harsh, critical, attacking, etc.)<sup>157</sup>; the employee’s general motive<sup>158</sup>; and the intended audience (the employer’s clients or customers, the general public, or other employees).<sup>159</sup> While many of these factors are subjectively applied by the Board and courts, it appears that determining when organizational speech’s “general tone” rises to the level of disloyalty may be most susceptible to this problematic flaw.<sup>160</sup>

155. See *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 476 (1953); *Emarco, Inc.*, 284 N.L.R.B. 832, 833 (1987) (finding that employees’ remarks to general contractor that employer subcontractor never paid its bills, was “no damn good,” and could not finish the job was not disparaging because they were “related to” the labor dispute and were not so disloyal, reckless, or maliciously untrue as to lose protection).

156. See *Endicott*, 453 F.3d at 537.

157. See *id.*

158. See *Richboro Cmty. Mental Health Council, Inc.*, 242 N.L.R.B. 1267, 1268 (1979) (holding that an employee’s letter protesting employer’s discharge of another employee and accusing employer of mismanagement was protected in part because the letter’s tone was not malicious and the employee’s motive was not impure). The Board stated,

[The employee’s] appeal is clearly distinguishable from the type of public disparagement of an employer’s product which the Board has found unprotected. In those cases, the disparagement was calculated to alienate the public’s patronage as a tactic to increase the employees’ leverage in the labor dispute. [The employee’s] comments cannot be construed as a deliberate attempt to injure Respondent by impugning its operation. Rather, the clear purpose of his letter was to remedy Respondent’s discharge of [another employee]. There is nothing in the letter to suggest that [the employee’s] intent was to sabotage or undermine Respondent’s reputation.

*Id.* (footnotes omitted).

159. See *id.* at 1267–68 (noting that the employee’s [redacted] was directed at state funding agencies whose decisions were critically important to the employer).

160. The *Timekeeping Systems* Board provided a useful recap of the difficult practice of evaluating “general tone” to discover sufficiently egregious disloyalty to an employer. See 323 N.L.R.B. 244, 249 (1997) (refusing to apply the disloyalty exception). Noting that the question of what, exactly, will place organizational speech that would otherwise be protected into “disloyalty exception” territory is not easily answered, the Board stated that “[s]ome concerted conduct can be expressed in so intolerable a manner as to lose the protection of Section 7,” and that, generally, employee speech will not be pro-

Given the employee blog's unique advantages for organizational speech discussed above—a wider scope, better ability to facilitate dialogue, closer protection of employee anonymity, and increased credibility<sup>161</sup>—and given that they therefore present clear tactical and practical advantages to employees seeking to organize over their traditional communication counterparts, the disloyalty exception doctrine should be judiciously applied to blogs.

As discussed above, it seems obvious that as a threshold matter employee organizational blogs can be, under certain circumstances, found to fall within section 7's requirements of "concerted" and "for mutual aid and protection."<sup>162</sup> Given the arguably inconsistent manner in which the NLRB and courts have applied disloyalty exception doctrine to organizational speech outside the workplace,<sup>163</sup> it might therefore be advantageous for a different analytical approach to be used for the exception's application to the important new format of employee organizational blogs—one which limits the use of subjective factors like the speech's general "tone" to declare disloyalty. Neither the NLRB nor the courts approach the application of the disloyalty exception doctrine by explicitly considering *first* what forum the employee organizational speech appears in—an inquiry that inherently includes many of the considerations listed above, such as the intended audience and the employee's general motive, and potentially truncates analysis by rendering other factors partially moot (e.g., if no customers can access the forum, then the timing of employee comments, direct relation to labor disputes, or even general tone will be much less important).<sup>164</sup>

As discussed above in Part III, this analytical framework should always begin—as one commentator suggests—with the threshold determination that organizational blogs are "concerted" and "for mutual aid and protection."<sup>165</sup> Should employee blogs meet the threshold requirements,

tected when it occurs in a manner "so violent or of such serious character as to render the employee unfit for further service." *Id.* at 248. The Board noted that mere "unpleasantries" uttered in the course of organizational speech are generally not enough to remove section 7 protections—including characterizations of management as "a-hole[s]," U.S. Postal Service, 241 N.L.R.B. 389, 390 (1979), or as "hypo-critical," "despotic," and "tyrannical," Harris Corp., 269 N.L.R.B. 733, 736 (1984), or even references to a company's CEO as a "cheap son of a bitch" in inter-employee conversations, Alaska Cummins Services, Inc., 281 N.L.R.B. 1194, 1194 (1986).

161. See *supra* notes 10–14 and accompanying text.

162. See *supra* notes 29 and accompanying text.

163. See *supra* note 154 and accompanying text.

164. See *supra* note 153.

165. See Branscomb, *supra* note 96, at 313–14. Branscomb adeptly sums up the reasons for separating this analysis:

they should then be placed within one of the three identified categories—public, employer sponsored, or employee sponsored—*before* the disloyalty exception doctrine is applied. As mentioned above, this initial categorization takes account of two critical disloyalty exception factors: the blog’s intended audience and the related issue of the employee’s motive for the blog’s speech content. The public forum presumes an intended audience of employer customers and the general public, and allows an inference that the employee intended to publicize some legitimate labor dispute to aid in the resolution of that dispute.<sup>166</sup> The employee-sponsored forum presumes an intended audience of other employees and not the general public or customers, and allows an inference that the employee intends to begin a dialogue between fellow employees to aid in the resolution of a labor dispute.<sup>167</sup> The employer-sponsored forum depends entirely on the access the public has to that forum: if there is no public access, the forum presumes an intended audience only of other employees and management, and allows an inference that the employee desired both to dialogue with other employees and to bring management attention to issues in the hopes of resolving labor disputes.<sup>168</sup>

This classification of the organizational speech’s forum limits the Board’s and courts’ reliance on subjective factors—what Branscomb calls “the more nebulous, non-statutory issues of disloyalty and disparagement”<sup>169</sup>—when applying the disloyalty exception: the speech’s general tone, direct relation to labor dispute at issue, and impact that the timing of speech has with regards to the employer’s marketplace standing (e.g., before a merger or an important product launch). In short, the threshold determination of the organizational speech’s forum should in effect dictate the degree to which the more nebulous *Jefferson Standard* “disloyalty exception” factors are applied to subject that speech to discipline.

[I]t is important to complete the concertedness (step one) and purpose (step two) inquiries before starting the disparagement/disloyalty inquiry. . . . [B]y adhering to the proper analysis, subsequent decision makers will shorten the inquiry in those cases in which employees’ conduct lacks the required concert or purpose. . . . [D]ecision makers who dispose of cases at the first two steps have the additional benefit of avoiding the more nebulous, non-statutory issues of disloyalty and disparagement. . . . Finally, on a practical level, when the Board and courts fail to follow a coherent analytical approach, their decisions create precedent that is perplexing to subsequent Board members or judges attempting to apply cases such as *Jefferson Standard*. Lack of clear distinctions among the three analytical steps causes confusion in the substantive law concerning each of the three issues.

*Id.* (footnotes omitted).

166. If the public-forum speech was merely intended to insult the employer or damage its business, the speech should not have met the threshold requirement of “for mutual aid and protection.”

167. See *supra* notes 158-59 and accompanying text.

168. See *supra* notes 155, 158, 159 and accompanying text.

169. Branscomb, *supra* note 96, at 313.

In the case of a public-forum-category blog, the presumed audience (employer customers and the general public) and employee motive (at least some intent to publicize labor disputes to aid in the resolution of those disputes) justify applying the remaining disloyalty exception factors at the traditional or mid-point level—removing speech with divisive general tone, critical of the employer’s products, or especially damaging to the employer given its timing. Organizational speech made in the public-forum blog should also more closely relate, in its entirety, to an actual, ongoing labor dispute—as was the requirement in *Jefferson Standard* itself.<sup>170</sup> Since no employee is hosting the blog, concerns regarding the “overall blog content” apparent in employee-sponsored blogs are moot. Additionally, it seems important to note that employee organizational speech directed at third parties—even clients or customers—can easily be taken with a grain of salt (and the possible bad impacts for the employer thereby lessened) if the third party clearly knows of the context in which the disparaging or critical comments appear, and in public fora, that context is presumably a neutral one designed to facilitate debate of this kind.<sup>171</sup>

In the case of employee-sponsored fora like that in the *Konop* case, the presumed audience (other employees and not the general public or employer customers) and motive (inter-employee dialogue to aid in the resolution of a labor dispute) justify lowering the application of the remaining disloyalty exception doctrine to its weakest point. Since neither the employer nor its customers can access blog content, only the most egregiously divisive or insulting speech should result in employee discipline.<sup>172</sup> Furthermore, speech in employee-sponsored fora may be more loosely connected to actual workplace disputes: it should only need to meet minimum threshold requirements of relatedness as those requirements are applied in the “for mutual aid and protection” analysis, and courts should hesitate to remove “fringe speech” discussing replacement of supervisors or political views from protection.<sup>173</sup> Though, as commentator Scott notes, “the multitude of posts and comments contained on blogs will present an analytical

170. See *supra* note 114 and accompanying text.

171. *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) (“Moreover, extending § 7 protection in this direction does not pose an unreasonable threat to employers; third parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context.”).

172. Providing an example of the disloyalty exception doctrine at its weakest application, the *Konop* court allowed very divisive speech to remain protected. See *supra* note 154. Indeed, the apparent hesitation to apply the disloyalty exception doctrine to entirely employer-sponsored fora because no outside party has access also supports weakened application in the employee-sponsored blog as well. See *supra* notes 149–151 and accompanying text.

173. See *supra* notes 41–42 and accompanying text.

challenge” when considering how closely blog content must relate to labor disputes, the Board and courts should probably be content to accept, as Scott suggests, that if the “critical mass” of posts or the overall intent of the blog is for organization, it is protected.<sup>174</sup>

Furthermore, the *Konop* holding suggests (and other commentators have noted) that even employer attempts to monitor this category of blogs might in themselves be unfair labor practices if they chill employee organizational speech.<sup>175</sup> Though the NLRB and courts have also considered whether an employee’s speech has been so disloyal as to render further employment with a company practically impossible due to acrimony between the parties, regardless of any impact on the employer’s business, traditional labor law has often forced such parties to work together again.<sup>176</sup> This factor, on its own, seems to be a weak justification for allowing employers to discipline otherwise protected employee speech.

Whether the disloyalty exception applies at all to the employer-sponsored website—an internal company website that facilitates employee comments or blogging—should depend entirely on whether the public has access to the blog, again because of presumed audience and motive issues. As stated above, if the public has no access to the employer-sponsored blog, courts should apply the doctrine at a very weak level, if at all. If the public does have access, then the presumed audience (customers or those interested in the particular company hosting the larger website) and employee motive (to dialogue with other employees and to bring management attention to issues in the hopes of resolving labor disputes) justify the application of the disloyalty exception at its *strongest* here. Unlike the neutral public forum, when the website is controlled by and bears the imprimatur of the employer, and even if disclaimers are posted a certain number of visitors (who presumably are clients or interested parties) can be expected to mistakenly conclude that the employer controls and thereby endorses the content of the employee blog, and is tacitly “endorsing” the speech.<sup>177</sup> Furthermore, employees posting comments to an employer-sponsored blog

174. See Scott, *supra* note 7, ¶ 17.

175. See *supra* notes 147–48 and accompanying text.

176. See *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 250 (1997). The Board ordered *Leinweber* reinstated after drawn-out litigation. *Id.* In addressing the employer’s contention that it would be difficult to continue employment relations with the disgruntled former employee, the Board stated that while *Leinweber* was “a rather unusual person” and “a bit of a wise guy,” ultimately the employer’s “feelings must take second place to the dictates of the statute; the employer who was called a ‘cheap son-of-a-bitch’ by an employee [in a previously discussed case] was probably not entirely pleased either.” *Id.*

177. See *Washington Adventist Hosp.*, 291 N.L.R.B. 95, 98–99 (1988). In *Washington Adventist*, the employee sent a message that appeared on every employee’s computer screen and prevented them from continuing work on their terminals. The message did not identify its sender; it is therefore possible that the other employees may have believed the message was sent by their employer.

expect their supervisors and management to review comments, and should be aware that because of concurrent public access, highly divisive speech has greater potential impact and causes greater damage. It would seem that employee organizational speech has the highest potential to damage the employer's relations with or perception by its customers here. Furthermore, this forum raises traditional concerns—mostly articulated in the discussion of employee organizational speech inside the workplace—about the employer's property interest (here, in its internet server) and its heightened ability to control access to its use.<sup>178</sup>

Should it be applied by the Board and courts, this new analytical framework could also be very useful in guiding employee and employer choices for organizational communication in the blogging format. To receive the most protection, employees would be wise to set up their blogs as Konop did, limiting public access, openly encouraging employee dialogue, overtly stating organizational goals, and editing comments to ensure that the overall "critical mass" of content is organizational in nature. Indeed, this set up would likely be most advantageous to employers, as well: it limits damaging exposure of customers to divisive employee speech. Employers likewise might choose to limit public access to their provided blog space if they want to spark more honest dialogue between management and employees; employees would be more willing to speak freely about labor disputes without fear that a broad application of the disloyalty exception doctrine would allow them to be fired, and employers would thereby get a more realistic picture of employee complaints. Employers might, on the other hand, choose to allow their customers access to this forum, in which case employee organizers would presumably know to be more cautious in their organizational messages.

### CONCLUSION

As the NLRA's impact on the lives of employees shrinks alongside dwindling union membership,<sup>179</sup> the rise of employee organizational efforts through new electronic media like blogs presents a renewed opportunity for the aged statute to serve its goals of protecting worker organizational rights. Employee organizational blogs can be, and in many cases already are, an important tool for concerted action that can easily be considered "for mutual aid and protection" under the broad definition the Board and

178. See *supra* notes 50, 62 and accompanying text.

179. Mark Weisbrot, *Globalization for Whom?*, 31 CORNELL INT'L L.J. 631, 638 (1998) ("Since 1973, union membership has fallen from twenty-four percent to about fourteen percent of the labor force.").

courts have traditionally lent those terms. The analogy between traditional labor law policies governing employer bulletin boards, workplace solicitation speech, and email use has already been drawn. Extending the “no discriminatory use” doctrine, which arose in that traditional labor law context, to internet use makes imminent sense, especially when considering the incredible impact blogging can have on effective employee organization. More importantly, though, the blog’s public nature makes it susceptible to the nebulous and inconsistent “disloyalty exception” standard, which the Board and courts have misinterpreted and unevenly applied to remove otherwise protected organizational speech from NLRA protections. To ensure employee access to this critical forum and to shape employee and employer choices regarding the use of organizational blogging in more positive ways, the Board and courts should temper the application of subjective “disloyalty factors” according to what forum the speech occurs in, applying it most strongly in the employer-controlled forum, at its midpoint in the public forum, and most weakly in the employee controlled forum.



