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## “CONCERT” OR SOLO GIG? WHERE THE NLRB WENT WRONG WHEN IT LINKED IN TO SOCIAL NETWORKS

Late last year, labor law took an important step into the 21st century. In *Hispanics United of Buffalo, Inc.*,<sup>1</sup> the National Labor Relations Board (NLRB or “Board”) held that an employer violated section 8 of the National Labor Relations Act (NLRA or “Act”) by terminating five employees who posted a series of comments about the employer on the popular social networking website Facebook.<sup>2</sup> Outside of work hours, the employees posted to Facebook a number of comments about a dispute related to their job. The original post said, “Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB I about had it! My fellow coworkers how do u feel?”<sup>3</sup> In less than two hours, a number of her colleagues posted a variety of responses, including: “What the f. . . Try doing my job I have 5 programs”; “What the Hell, we don’t have a life as is, What else can we do???”; and “Tell her to come do mt [my] fucking job n c if I don’t do enough, this is just dum.”<sup>4</sup>

The employee who was the subject of the posts saw them on Facebook and complained to a supervisor at work.<sup>5</sup> The supervisor met individually with five of the employees who posted messages, told them that the posts “constituted bullying and harassment and violated [the employer’s] policy on harassment,” and discharged them immediately.<sup>6</sup> An Administrative Law Judge held in September 2011 that the employer wrongfully

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1. 359 N.L.R.B. No. 37 (2012).

2. *Id.* at 1. Facebook is a social networking website that allows users to publish information on the Internet in a way that will make it viewable to all Internet-users or only to “friends” that the poster designates. The NLRB General Counsel released a memorandum on the social media cases in which he defined social media as “various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications.” Memorandum OM 12-31 Rep. of the Acting Gen. Counsel Concerning Social Media Cases to All Reg’l Directors, Officers-in-Charge, and Resident Officers 2 (Jan. 24, 2012), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567> [hereinafter General Counsel’s Second Memo]. *See also* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008) (defining “social networks” as “web-based services that allow individuals to: (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system”).

3. *Hispanics United*, 359 N.L.R.B. No. 37, at 7.

4. *Id.*

5. *Id.* at 8.

6. *Id.*

terminated the employees in violation of sections 7 and 8 of the NLRA,<sup>7</sup> and the Board upheld the decision.<sup>8</sup>

Social networks have been a prevalent part of the Internet for years,<sup>9</sup> but in 2012 the Board first took the position that employees can be protected under sections 7 and 8 of the NLRA from retaliation for their online activity.<sup>10</sup> Section 7 mandates that “[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>11</sup> Section 8 makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].”<sup>12</sup>

These cases arise out of similar fact patterns. An employee logs onto a social networking website, such as Facebook or Twitter, and publishes a brief comment about something that he finds unsatisfactory at work.<sup>13</sup> Some posts are disparaging and derogatory;<sup>14</sup> others are less offensive. Because social networking websites are designed to allow users to interact and share information with one another, other web users (including co-workers and customers) read the material.<sup>15</sup> On Twitter, a user might “retweet” the comment to share it with more users and add her own opinion.<sup>16</sup> To do the same on Facebook, a user might perform any number of actions which would disperse the material to more people on the site:

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7. *Id.* at 9.

8. *Id.* at 1.

9. See, e.g., Eszter Hargittai & Yu-li Patrick Hsieh, *From Dabblers to Omnivores: A Typology of Social Network Site Usage*, in *A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES* 146, 146 (Zizi Papacharissi ed., 2011) (“Social network sites (SNSs) have become some of the most popular online destinations in recent years . . .”).

10. See Memorandum OM 11-74 Rep. of the Acting Gen. Counsel Concerning Social Media Cases to All Reg’l Directors, Officers-in-Charge, and Resident Officers (Aug. 18, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743> [hereinafter General Counsel’s First Memo] (summarizing case developments arising from the use of social media).

11. 29 U.S.C. § 157 (2012).

12. *Id.* § 158.

13. See *infra* text accompanying notes 70, 99–100, and 114.

14. See, e.g., *supra* text accompanying note 4; see also Sam Hananel, *Woman Fired Over Facebook Rant; Suit Follows*, MSNBC.COM (Nov. 10, 2010, 9:43:18 AM), <http://www.msnbc.msn.com/id/40097443/ns/business-careers/t/woman-fired-over-facebook-rant-suit-follows/> (employee posted message on personal Facebook page that said “Love how the company allows a 17 to be a supervisor,” where “17” is a term used to denote a psychiatric patient).

15. See *infra* note 187. For further reading on how social networks work and the scope of viewers who can see a user’s post on a social network, see generally John M. Miller, *Is MySpace Really My Space? Examining the Discoverability of the Contents of Social Media Accounts*, 30 TRIAL ADVOC. Q. 28, 28–29 (2011).

16. See FAQs About Retweets (RT), TWITTER, <http://support.twitter.com/articles/77606> (last visited Jan. 19, 2013) (“Twitter’s retweet feature helps you and others quickly share that Tweet with all of your followers.”).

clicking a button beneath the post that says “Like;”<sup>17</sup> sharing the item with her own network of Facebook friends;<sup>18</sup> or adding a comment beneath the original post.<sup>19</sup> Co-workers or customers of the same employer might reply to the complaint to offer their support or disagreement.<sup>20</sup> They might formulate a plan to improve the situation when they return to work,<sup>21</sup> or they might not.<sup>22</sup> In any case, almost as soon as the post goes online, the employer finds out about it and subsequently discharges the employee for insubordination.<sup>23</sup>

The employee files a complaint with the Board under section 8(a) of the Act.<sup>24</sup> When the case makes its way to court, the principal legal issue is whether the employee who was terminated for posting the material online was engaging in a protected concerted activity for the purpose of mutual aid or protection. The issue is of particular importance because of the potential volume of claims that could arise based on terminations that result from employee expression on the Internet.<sup>25</sup>

Administrative Law Judges (ALJs) first answered these questions in a series of cases in 2011, and the NLRB followed by upholding two of those

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17. Liking on Facebook, FACEBOOK, <https://www.facebook.com/help/like> (last visited Jan. 19, 2013) (“Clicking Like under something you or a friend posts on Facebook is an easy way to let someone know that you enjoy it . . . .”); *see also infra* note 119 and accompanying text.

18. *See* How to Post and Share, FACEBOOK, <https://www.facebook.com/help/sharing> (last visited Jan. 19, 2013).

19. *See, e.g., infra* text accompanying note 115. When a Facebook user adds a comment to another user’s post, the material becomes visible to larger network of users. *See* Thomas E. Weber, *Cracking the Facebook Code*, THE DAILY BEAST (Oct. 18 2010, 2:57 AM), <http://www.thedailybeast.com/articles/2010/10/18/the-facebook-news-feed-how-it-works-the-10-biggest-secrets.html>.

20. Boyd & Ellison, *supra* note 2, at 210 (“Most sites support the maintenance of pre-existing social networks, but others help strangers connect based on shared interests, political views, or activities.”).

21. *See infra* text accompanying note 70.

22. *See infra* text accompanying notes 97–100.

23. *See infra* text accompanying notes 72, 104, 120, 123.

24. 28 U.S.C. § 158 (2012).

25. Numerous news articles describe employees who are fired when their supervisors discover their posts on Facebook. For example, in one recent incident, the Pittsburgh Pirates fired their team mascot because he expressed his disagreement with a management decision made by the team’s president. Dan Majors, *Out at the plate: Pirates dump outspoken pierogi*, PITTSBURGH POST-GAZETTE (Mar. 29, 2012, 2:15 AM), <http://www.post-gazette.com/stories/sports/pirates/out-at-the-plate-pirates-dump-outspoken-pierogi-251881/>. In another interesting story, Internet users identified a Burger King employee who posted a picture of himself standing in containers of lettuce that was to be served to customers. Vince Grzegorek, *4Chan Catches Mayfield Heights Burger King Employee Who Snapped Pictures of Himself Standing on Food* (July 19, 2012, 2:32 PM), <http://www.clevescene.com/scene-and-heard/archives/2012/07/17/4chan-catches-mayfield-heights-burger-king-employee-who-snapped-pictures-of-himself-standing-on-food>. These particular facts may not have made for strong wrongful termination complaints under section 7, but they illustrate the common occurrence of terminations because of online conduct.

decisions in 2012.<sup>26</sup> Despite the NLRB General Counsel's assertions to the contrary, the initial lawsuits in this area have not targeted situations that are "fairly straightforward"<sup>27</sup> under section 7. Rather, the nature of social networking websites and the comments that employees commonly publish on them raise compelling questions about the scope of protection afforded under the law, indicating that the NLRB in fact is "wading into uncharted legal territory"<sup>28</sup> and should take an early opportunity to set the right course. The Internet is a new medium for employees acting in concert, but the core principles for determining what constitutes "concerted activity" remain the same.<sup>29</sup> Although the meaning of "concerted activity" is broad enough to encompass some individual activity,<sup>30</sup> there are limitations on how far the term will go to protect an employee who acts by making a Facebook post or Tweet.<sup>31</sup>

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26. See *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (2012); *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 (2012); Cameron G. Shilling, *Social Media and the NLRB (Part 1): The NLRB Intervenes in Social Media*, PRIVACY AND DATA SECURITY BLOG (Oct. 3, 2011), <http://blog.mclane.com/?p=618> (noting the NLRB's foray into social media). Soon after the ALJs issued their first opinions, commentators realized that input from the NLRB, and perhaps someday the courts of appeals, would be forthcoming. See, e.g., Brian Wassom, *5 Predictions for Social Media Law in 2012*, MASHABLE (Jan. 5, 2012), <http://mashable.com/2012/01/05/social-media-legal-predictions/>. The D.C. Circuit recently called into question the validity of these decisions—and many others—when it ruled that the Board did not have a quorum in *Canning v. NLRB*, 2013 WL 276024, No. 12-1115 (D.C. Cir. Jan. 25, 2013). For a discussion of how the *Canning* decision may affect the social media cases, see Brian Wingfield, *Workers Gripping on Facebook at Risk of Job Loss After Ruling*, WASH. POST, Jan. 29, 2013, <http://washpost.bloomberg.com/Story?docId=1376-MHCODP6TTDSH01-2T2IJ37086113K K1B9N2GFFJAL>.

27. Steven Greenhouse, *Company Accused of Firing Over Facebook Post*, N.Y. TIMES, Nov. 8, 2010, [http://www.nytimes.com/2010/11/09/business/09facebook.html?\\_r=0](http://www.nytimes.com/2010/11/09/business/09facebook.html?_r=0).

28. Catherine Ho, *Business Abuzz About Workplace Rules on Social Media*, WASH. POST, Oct. 2, 2011, [http://www.washingtonpost.com/business/capitalbusiness/labor-board-ruling-has-businesses-buzzing-about-workplace-rules-on-social-media/2011/09/26/gIQABVYmFL\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/labor-board-ruling-has-businesses-buzzing-about-workplace-rules-on-social-media/2011/09/26/gIQABVYmFL_story.html); see also Michael Lebowich, Rondald Meisburg, Mark Theodore and Corinne Osborn, *NLRB "De-Friends" Employers In Its First Complaint Based On Employee's Social Network Comments*, METROPOLITAN CORPORATE COUNSEL (Dec. 1 2010), <http://www.metrocorpocounsel.com/articles/13284/nlr-de-friends-employers-its-first-complaint-based-employees-social-network-comments> (arguing that comments on social networks are different than "conversations around the water cooler" because only the former "are broadcast to hundreds or thousands of persons with a few keystrokes and the click of a mouse").

29. "The specific medium in which the discussion takes place is irrelevant to its protected nature." *Triple Play Sports Bar & Grille*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012) (citing *Timekeeping Systems, Inc.*, 323 N.L.R.B. 244, 247 (1997)); see also *Hispanics United*, 359 N.L.R.B. No. 37, at 1 ("Although the employees' mode of communicating their workplace concerns might be novel, we agree with the judge that the appropriate analytical framework for resolving their discharge allegations has long been settled under *Meyers Industries* and its progeny.").

30. See *infra* notes 138–40 and accompanying text.

31. Cf., e.g., *Tyler Bus. Servs., Inc. v. NLRB*, 680 F.2d 338 (4th Cir. 1982) (finding no concerted activity where employee told client about a rumor that the company's president and vice president were having an affair because there was no evidence that the employee wanted to induce group action or to act on behalf of other employees); *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949) (finding that employee who was discharged for circulating a position which called for the

This Note argues that some of the recent social media decisions by ALJs and the Board may extend section 7's protection of concerted activity beyond what precedent allows.<sup>32</sup> Furthermore, it proposes that even where the activity is concerted and for mutual aid or protection, the NLRB should not apply section 7 protection to employee social network posts that tarnish the employer's public image by disseminating details about workplace problems on the Internet. The Supreme Court has suggested that "even when concerted activity comes within the scope of the 'mutual aid or protection' clause, the *forms* such activity permissibly may take may well depend on the object of the activity."<sup>33</sup> In the social networking cases, the Board and courts would best effectuate the purpose of the NLRA, while allowing employers to control their public image, by protecting only employees' online statements that are communicated privately or that do not disparage the employer.

Part I provides a general history of the NLRA and an overview of recent social networking cases that have been decided by ALJs. Part II examines the definition of concerted activity and the challenges for parties who contend that their individual social network activity was concerted. Part III discusses the "mutual aid or protection" requirement. Part IV suggests that in deciding whether to grant employees section 7 protection, the NLRB should adopt a balancing test that would consider the form of the protest against the object of the activity before extending protection.<sup>34</sup>

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removal of a certain foreman was acting out of personal resentment that constituted an individual gripe, not a concerted activity protected by section 7 of the NLRA).

32. The NLRB has "broad authority to construe the NLRA in light of its expertise," but "judicial deference is not accorded a decision of the NLRB when the Board acts pursuant to an erroneous view of the law." *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985); *see also* *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[I]f [agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law."); *NLRB v. KSM Indus.*, 682 F.3d 537, 544 (7th Cir. 2012) ("We . . . defer to the Board's interpretations of the law 'unless they are irrational or inconsistent with the Act.'"); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 870 (9th Cir. 2011) ("Under *Chevron* . . . , we defer to the Board's interpretation of the NLRA if its interpretation is rational and consistent with the Act.").

33. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 n.18 (1978) (emphasis added). Of course, it is unlikely that an entire mode of communication could (or should) be excluded altogether. *See* MARION G. CRAIN, PAULINE T. KIM, & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* ch. 8, § D.3, Note 1.a (2d ed. Supp. 2012) ("As the Board explained in *Timekeeping Systems*, the NLRA's protection of concerted activity applies to e-mail as well as to more traditional forms of oral and written communication.").

34. Related issues not covered in this Note are the NLRB's recent challenges against the legality of employee handbook social media provisions that may violate the protection of concerted activity in section 7. Generally, the NLRB not only strikes down policies that explicitly restrict protected activities, but also provisions that "(1) employees would reasonably construe to prohibit Section 7 activity; (2) [were] promulgated in response to union activity; or (3) [were] applied to restrict the

## I. HISTORY OF THE NLRA, CONCERTED ACTIVITY, AND THE SOCIAL NETWORKING LAWSUITS

Section 7 of the NLRA is the legal foundation for the NLRB's claims against employers in the social network cases.<sup>35</sup> Under the law, "[e]mployees shall have the right to self-organization, to form, join or to assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>36</sup> Although the statute enumerates a few very specific rights, the catch-all protection of "concerted activities for . . . mutual aid or protection" is much broader.<sup>37</sup> Section 8 makes it unlawful for employers to retaliate against employees who engage in concerted activity under section 7.<sup>38</sup> To meet the requirements for protection, the employee's activity: (1) must be concerted; (2) must be undertaken for the purpose of mutual aid or protection; and (3) cannot be unlawful, excessively disloyal, or any other circumstance that would go beyond the purpose of the statute and justify removing protection.<sup>39</sup> Additionally, for the employer to be liable, the

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exercise of Section 7 rights." *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (internal quotation marks omitted). The General Counsel has only recently challenged social media policies unlawfully restricting activity protected by section 7. See Cameron G. Shilling, *Social Media and the NLRB (Part 2): Employment Policies—The Chilling of Concerted Activity*, PRIVACY AND DATA SECURITY BLOG (Oct. 5, 2011), <http://blog.mclane.com/?p=645> (summarizing NLRB's approach to employers' social media rules).

35. 29 U.S.C. § 157 (2012).

36. *Id.* (emphasis added).

37. See generally Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1678–1700 (1989) (showing how the statutory language, congressional intent, and rulings by the Board and the courts all support a broad reading of "concerted activities").

38. 29 U.S.C. § 158 (2012). Section 8 gives the statute its enforcement power, making it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees who engage in the concerted activities described in section 7. Often, an employer who interferes with the right to engage in concerted activity does it by discharging the employee. See, e.g., *Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237 (6th Cir. 1980) (employer committed unfair labor practice by discharging employees who engaged in protected activity).

39. This final element is not in the text of the statute, but is well established through case law. Courts will remove protection for a number of circumstances that may be applicable to posts made online, but they do not present particularly new challenges in that context and are generally outside the scope of this Note. See, e.g., *Jolliff v. NLRB*, 513 F.3d 600, 610 (6th Cir. 2008) (defamatory statements made with actual malice are not protected by section 7); *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006) (employee's disloyalty warranted discharge); *Star Meat Co. v. NLRB*, 640 F.2d 13, 14 (6th Cir. 1980) (noting that some violent acts by employees "remove such employees from the protection of the Act"); *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950, 956 (7th Cir. 1976) (finding disclosure of employers' confidential information to be cause for discharge). *But see Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 837 (5th Cir. 1991) (holding that letter and t-shirt that employees sent to a personnel manager were not offensive enough to lose protection). The Supreme

employer must have “[known] the concerted nature of the employee’s activity,” and that activity must have been the motivation for the employee’s discharge.<sup>40</sup> Unlike most other provisions of the NLRA, this section applies to nearly all non-union workplaces.<sup>41</sup>

The general history of section 7 of the NLRA, like many other labor laws, is tied to the legacy of the New Deal. Also known as the Wagner Act, the law was passed at a time when “employers were virtually unrestrained by law from dealing with unions as they saw fit.”<sup>42</sup> Prior to the passage of the NLRA, when employees tried to make a better workforce through union activity, employers engaged in “bribery of employees, company spy systems, blacklisting of union sympathizers, removal of an existing business to another location for the sole purpose of frustrating union activity, and promises by employers of wage increases or other special concessions to employees should the latter refrain from joining a union.”<sup>43</sup> “The Wagner Act was motivated by Senator Robert Wagner’s desire to enable workers and employers to bargain from levels of comparative strength and to achieve industrial peace through collective bargaining.”<sup>44</sup>

Accordingly, the Supreme Court has applied section 7 to protect employees who distributed union-sponsored newsletters to co-workers,<sup>45</sup> and employees who left work without permission to protest cold temperatures in the workplace.<sup>46</sup> However, the Court has also recognized

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Court recognized these limitations in *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962) (listing types of employee activities that are not protected by the Act). Taking a narrower position than this Note, one commentator has argued that “when an employee posts expletives about his employer on a social-networking website, it is not protected behavior under § 7 of the NLRA.” Kimberly Bielan, Note, *All A-“Twitter”*: *The Buzz Surrounding Ranting on Social-Networking Sites and Its Ramification on the Employment Relationship*, 46 *NEW ENG. L. REV.* 155, 158 (2011).

40. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at 2 (2012).

41. The NLRA applies broadly to all employers whose businesses affect interstate commerce, with the exception of a few specific occupations: agricultural laborers, domestic workers, employees of a parent or spouse, independent contractors, and “individual[s] employed by an employer subject to the Railway Labor Act.” 29 U.S.C. § 152 (2012). Additionally, the Act does not protect managers or “any individual employed as a supervisor.” *See id.* (exempting supervisors); *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974) (finding that “Congress intended to exclude from the protections of the Act all employees properly classified as ‘managerial’”).

42. ARTHUR A. SLOANE & FRED WITNEY, *LABOR RELATIONS* 105 (3d ed. 1977). Before the passage of the NLRA, “[t]he employers’ traditional weapons for fighting labor organizations—such as formal and informal espionage, blacklists, and the very potent practice of discharging ‘agitators’—were normally left undisturbed by the judges.” *Id.*

43. *Id.* at 108.

44. Donald C. Carroll, *At-Will Employment: The Arc of Justice Bends Towards the Doctrine’s Rejection*, 46 *U.S.F. L. REV.* 655, 663 (2012).

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

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

certain limitations to the clause.<sup>47</sup> Ultimately, in its more than seventy-five years of existence, section 7 has been used to protect employees and increase their bargaining power when they intend to create a better work environment.

#### A. Section 7 before Social Media

Before examining the application of section 7 to the new social media cases, it is informative to review two cases under section 7: a classic case arising under the law, and a modern one that applied section 7 to another modern technology: e-mails.

*NLRB v. Washington Aluminum* is an early and oft-cited case involving non-union employees who exercise their rights under section 7.<sup>48</sup> On an “extraordinarily cold day in Baltimore,” employees arrived to work at their employer’s machine shop to find unbearably cold (and therefore unworkable) conditions.<sup>49</sup> The employees discussed the issue among themselves, and decided to leave with the hope that it would persuade their employer to fix the heating issue.<sup>50</sup>

After the employees were discharged for the walkout, they brought a claim under section 7.<sup>51</sup> The employer argued that employees should not receive protection because they did not give the employer any opportunity to avoid the walkout by granting their demands.<sup>52</sup> The Supreme Court disagreed, concluding that employees do not lose protection “merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.”<sup>53</sup> Without any dissent, the Court recognized that the employees should receive protection under the NLRA.<sup>54</sup>

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47. See, e.g., *NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464 (1953) (holding that an employer did not engage in an unfair labor practice by discharging employees who made a public disparaging attack on the employer and did not reference any ongoing labor controversy).

48. 370 U.S. 9 (1962).

49. *Id.* at 11. The temperature in the shop was 11 degrees, and the furnace responsible for heating the building had broken. *Id.*

50. *Id.* at 11–12. One employee described their goal very well in terms of the purpose behind section 7: “And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way.” *Id.* at 12.

51. *Id.* at 13–14.

52. *Id.* at 13.

53. *Id.* at 14.

54. *Id.* at 18.

A more recent case illustrates how the NLRA applies to modern day technology. In *Timekeeping Systems*,<sup>55</sup> the Board addressed section 7 as it relates to employee communication over email. The case involved an employee who sent an email to his co-workers and supervisor to explain why a proposed vacation time policy would be unfavorable to the workplace.<sup>56</sup> Offended that the complaint went to the entire office, the supervisor asked the employee send an apology memo to the recipients of the message.<sup>57</sup> When the employee declined, he was discharged.<sup>58</sup>

The NLRB concluded that the employee was engaged in concerted activity for mutual aid or protection.<sup>59</sup> The employee's activity was protected because it was an "effort to incite the other employees to help him preserve a vacation policy which he believed best served his interests, and perhaps the interest of other employees . . . ."<sup>60</sup> Finally, even though the employee's email contained some arrogant language, it was not egregious enough to lose protection.<sup>61</sup> Despite his online activity over the company email system, the court ordered reinstatement.<sup>62</sup>

After *Timekeeping Systems*, section 7 and new communications technologies did not meet in case law. In the meantime, commentators discussed employee blogging as the next area of NLRA application.<sup>63</sup> Over a decade after *Timekeeping Systems*, the social media cases emerged.

### B. The Social Network Cases

A summary of three section 7 social networking cases illustrates the interaction between employers and employees on social networks and the new problem before the courts. In August 2011, NLRB General Counsel Lafe E. Solomon released a report to "present[] recent case developments

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55. 323 N.L.R.B. 244 (1997).

56. *Id.* at 246.

57. *Id.*

58. *Id.* at 247.

59. *Id.* at 248.

60. *Id.*

61. *Id.* at 249.

62. *Id.* at 250. This most colorful portion of the opinion prophesized problems that might occur in the future from employee Internet activity: "[the employee] is, I concede, a rather unusual person, perhaps one of a new breed of cyberspace pineers who are attracting public attention, and at the same time—how else can I say it—a bit of a wise guy." *Id.*

63. See, e.g., Marc Cote, *Getting Dooced: Employee Blogs and Employer Blogging Policies Under the National Labor Relations Act*, 82 WASH. L. REV. 121 (2007); Katherine M. Scott, *When Is Employee Blogging Protected By Section 7 of the NLRA?*, 2006 DUKE L. & TECH. REV. 17; Robert Sprague, *Fired for Blogging: Are there Legal Protections for Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355 (2007).

arising in the context of today's social media."<sup>64</sup> Without identifying any cases specifically by name, the report described a variety of complaints that the General Counsel has filed. This Note will focus on three illustrative ones: *Hispanics United of Buffalo, Inc.*,<sup>65</sup> *Karl Knauz Motors*,<sup>66</sup> and *Triple Play Sports Bar & Grille*.<sup>67</sup>

### 1. *Hispanics United of Buffalo, Inc.*

The first case to address employees terminated for social media activity was *Hispanics United of Buffalo, Inc.*, decided by an ALJ on September 2, 2011, and affirmed with a separate opinion by the NLRB on December 14, 2012.<sup>68</sup> The problems that led to the litigation began when one employee published a comment during non-work hours on Facebook about a co-worker who had been critical of her work and may have been preparing to take her complaints to a supervisor.<sup>69</sup> The post briefly explained the problem and then asked, "My fellow coworkers how do u feel?"<sup>70</sup> Four co-workers responded with a number of comments, such as: "What the f . . . Try doing my job I have 5 programs"; "Tell her to come do . . . [my] fucking job n c if I don't do enough, this is just dum"; and "(insert sarcasm here now)."<sup>71</sup> The employee who was the subject of the posts brought them to the attention of a supervisor, who fired five of the employees who had participated in the online conversation.<sup>72</sup> The General Counsel initiated a complaint on behalf of all of the discharged employees.<sup>73</sup>

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64. General Counsel's First Memo, *supra* note 10, at 2. Although the purpose of the report was to educate employers and "encourage compliance" with section 7, *id.*, it "clearly stakes a claim for the NLRB" with regard to its position about concerted activity through social media. Shilling, *supra* note 34.

65. 359 N.L.R.B. No. 37 (2012).

66. 358 N.L.R.B. 164 (2012).

67. 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).

68. *Hispanics United*, 359 N.L.R.B. No. 37.

69. *Id.* at 7. In each of the cases covered by this Note, the post was made outside of work hours using a non-work computer. Under the rule from *Atlantic Steel*, an employee may lose section 7 protection based on "the place of the discussion." *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979). Consequently, social media posts could lose protection if the employee makes them "on the clock," a scenario not covered by this Note. *See Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979) (describing the "place of the discussion" as relevant to protection).

70. *Hispanics United*, 359 N.L.R.B. No. 37, at 2, 7.

71. *Id.* at 7–8. When the NLRB upheld the ALJ's decision, its opinion did not repeat all of the comments that the employees posted. *Id.* at 2.

72. *Id.* at 2. It was not disputed that the reason for the termination was the Facebook posts. In cases where the employer contends that the motive for discharge was something other than protected activity, courts assess the credibility of the reason under the burden-shifting framework set forth in *NLRB v. Wright Line, Inc.*, 662 F.2d 899, 904–07 (1st Cir. 1981).

73. *Hispanics United*, 359 N.L.R.B. No. 37, at 6.

The ALJ held that the employer committed an unfair labor practice by terminating the five employees who wrote the posts.<sup>74</sup> The ALJ cited *Meyers I* and *Meyers II*, which held that concerted activities are those “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”<sup>75</sup> In *Meyers II*, the Board expanded the definition of “concerted activities” to include “circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”<sup>76</sup> The ALJ suggested that “[i]t is irrelevant to this case that the discriminatees were not trying to change their working conditions and that they did not communicate their concerns to [the employer],”<sup>77</sup> but the holding was on narrower grounds. Reemphasizing that “[i]ndividual action is concerted so long as it is engaged in with the object of initiating or inducing group action,”<sup>78</sup> the ALJ held that the employees were engaging in concerted activity by “taking a first step towards taking group action to defend themselves against accusations that they could reasonably believe [a co-worker] was going to make to management.”<sup>79</sup> The ALJ also determined that the employees’ Facebook posts were not “so opprobrious as to lose protection under the Act.”<sup>80</sup> Finally, the ALJ held that the discharged employees had not been harassing another employee through their Facebook posts, so the employer could not justify their termination on that basis.<sup>81</sup>

The NLRB affirmed the ALJ’s rulings, findings, and conclusions, but added its own opinion.<sup>82</sup> Also relying on the rules from the *Meyers* cases, the Board found that the activity was concerted because the original author of the post was “solicit[ing] her coworkers’ views about [another

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74. *Id.* at 9.

75. *Id.* at 8 (quoting *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 497 (1984)) (internal quotation marks omitted).

76. *Id.* at 2 (quoting *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986)).

77. *Id.* at 9.

78. *Id.* (citing *Mushroom Transp. Co.*, 330 F.2d 683, 685 (3d Cir. 1964); *Whittaker Corp.*, 289 N.L.R.B. 933 (1988)). In *Mushroom Transportation*, the court held that an employee did not engage in activity protected by section 7 when he talked to other employees about how to deal with problems at work because there was “no evidence that any question of group action ever entered into the conversations.” 330 F.2d at 685.

79. *Hispanics United*, 359 N.L.R.B. No. 37, at 9.

80. *Id.* In making this determination, the ALJ looked to the four factors: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” *Id.* at 9–10. These factors are from *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979).

81. *Hispanics United*, 359 N.L.R.B. No. 37, at 10.

82. *Id.* at 1.

employee's] criticism."<sup>83</sup> As for the other four employees, "[b]y responding . . . with comments of protest, [they] made common cause with her, and, together, their actions were concerted."<sup>84</sup> Furthermore, the Board reaffirmed the ALJ's finding that the actions were concerted because they were a "first step towards taking group action to defend themselves against the accusations they thought could reasonably believe [a co-worker] was going to make to management."<sup>85</sup>

The Board majority opinion and its lone dissenter disagreed as to whether the five employees satisfied the "mutual aid or protection" element.<sup>86</sup> The dissent reasoned that the employees were merely "venting"<sup>87</sup> to each other to express their "mutual disagreement with [their co-worker's] criticism of their job performance."<sup>88</sup> That the conversation involved opinions about job performance did not make it "for mutual aid or protection," particularly because the employees did not "suggest or implicitly contemplate doing anything in response to this criticism."<sup>89</sup> The dissent went on to note that there was no evidence that the employees were talking to each other "with the intent of promoting a group defense," and reasoned that the case would be different if the original post had informed the colleagues of an intent to discuss the issue with management.<sup>90</sup>

In response, the majority noted that the "object or goal of initiating, inducing, or preparing for group action does not have to be stated explicitly when employees communicate," for the discussion to receive protection.<sup>91</sup> In this case, the majority held that the employees satisfied the "mutual aid" element because the objective of preparing for group action was manifest through the discussion, even if it was not expressly stated.<sup>92</sup>

## 2. *Karl Knauz Motors*

Less than one month after the ALJ in *Hispanics United* issued a ruling, another ALJ issued a decision on social networks and section 7, which was also reviewed and affirmed by the Board. In *Karl Knauz Motors*, the ALJ and Board found that some of an employee's activities were concerted,

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83. *Id.* at 2.

84. *Id.*

85. *Id.* (internal quotation marks omitted).

86. *Id.* at 2.

87. *Id.* at 5 (Hayes, dissenting).

88. *Id.* at 4 (Hayes, dissenting).

89. *Id.* at 5.

90. *Id.*

91. *Id.* at 3 (internal quotation marks omitted).

92. *Id.*

while others were not concerted.<sup>93</sup> Ultimately, the posts that led to the employee's termination were the ones that did not qualify for protection under section 7, so the employer prevailed on that point.<sup>94</sup> This was the Board's first review of an ALJ decision on social media and section 7, and the variety of findings makes it particularly instructive as to what online activity is concerted.

The dispute began when the employer, a BMW car dealership, announced a sales event that would offer hot dogs, cookies, and chips to customer-attendees.<sup>95</sup> After a meeting with the general sales manager to discuss the event, several car salespersons discussed their disappointment about the quality of food being offered, and their concern that without a better menu, the event might not help them earn much money in commissions.<sup>96</sup>

At the event, the employee took photos of his fellow co-workers holding hot dogs, water, and Doritos, and said that they would be posted on his Facebook page.<sup>97</sup> Less than a week later, the same employee took pictures of a Land Rover for sale after it accidentally ended up in a pond adjacent the premises during a test drive.<sup>98</sup>

The employee uploaded the pictures from the BMW event and the Land Rover accident to Facebook.<sup>99</sup> He wrote comments below some of the pictures, including: "I was happy to see Knauz went 'All Out' for the most important launch of a new BMW in years"; "No, that's not champagne or wine, it's 8 oz. water"; and, underneath the picture of the Land Rover, "This is your car. This is your car on drugs."<sup>100</sup>

Two days later, several supervisors at the dealership met with the employee to discuss his online activity.<sup>101</sup> When the supervisors asked him what he was thinking when he posted the pictures and comments, the employee responded by saying, "It's none of your business," and "[I] wasn't thinking anything."<sup>102</sup> The dealership supervisors explained that the pictures had "thoroughly embarrassed . . . everybody that works at

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93. 358 N.L.R.B. No. 164 (2012).

94. *Id.* at 1 n.1.

95. *Id.* at 7.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 7–8.

101. *Id.* at 8.

102. *Id.* (internal quotation marks omitted).

BMW.”<sup>103</sup> After considering the matter further, the dealership discharged the employee six days later.<sup>104</sup>

The ALJ found that posting the pictures of salespersons eating hot dogs at the BMW sales event was a protected concerted activity because at a company meeting other employees had discussed the inadequate menu, and because the event “could have had an effect upon his compensation.”<sup>105</sup> The pictures of the Land Rover in the pond, however, were not protected.<sup>106</sup> Because the ALJ believed that the unprotected Land Rover pictures were the reason for the termination, the employee ultimately was not protected under the NLRA.<sup>107</sup>

In considering whether the activity should lose protection for any reason, the ALJ noted the “mocking and sarcastic” tone of the comments to the pictures. However, the language did not rise to a level that warranted removing protection.<sup>108</sup>

When the case went on appeal to the NLRB, the Board adopted in full the ALJ’s finding that the employee was terminated “solely because of his unprotected Facebook postings about an auto accident at a Land Rover dealership.”<sup>109</sup> As a result, it added no insight as to what constitutes concerted activity beyond the ALJ’s determination.

### 3. *Triple Play Sports Bar & Grille*

*Triple Play Sports Bar & Grille*<sup>110</sup> is another one of the early decisions applying section 7 to employees’ online activity, and as of publication the Board has not issued its own opinion on the case. The ALJ in *Triple Play* held that section 7 protected two restaurant employees who were terminated for their conversations on Facebook.<sup>111</sup>

The problems between the parties began when employees filled out their tax returns and learned that they each unexpectedly owed several hundred dollars in state taxes.<sup>112</sup> The restaurant’s managers responded by arranging a meeting with their account and payroll company to discuss the issue, but before that meeting took place, the employees took their

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103. *Id.*

104. *Id.* (internal quotation marks omitted).

105. *Id.* at 10.

106. *Id.* at 10–11.

107. *Id.* at 11.

108. *Id.* at 10.

109. *Id.* at 1 n.1.

110. 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012).

111. *Id.*

112. *Id.*

problems to Facebook.<sup>113</sup> One employee wrote a message, viewable to the public, on a former co-workers Facebook wall, stating: “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I owe money . . . Wtf!!!!”<sup>114</sup> Four people who viewed the post were other employees or patrons of Triple Play, and they contributed to the discussion by adding seventeen comments beneath the employee’s message.<sup>115</sup> Some of the comments were offensive or used foul language,<sup>116</sup> but others were civil and suggested next steps.<sup>117</sup> The discussion also mentioned the upcoming meeting, with the employee who started the discussion writing, “Well discuss good because I won’t be there to hear it. And let me know what his excuse is.”<sup>118</sup> One employee clicked the “Like” button attached to the original post, which automatically placed a message underneath it that indicated that he “like[s] this.”<sup>119</sup>

The employer discovered the discussion soon after it went online, and the employee who made the first post was fired one day later.<sup>120</sup> When the employee who clicked the “Like” button returned to work, the employer met with him to ask if he had a problem with the company.<sup>121</sup> The employee “replied that he had no such problems.”<sup>122</sup> The restaurant manager explained that he thought the online posts and comments constituted “defamation,” and then discharged the employee who clicked the “Like” button.<sup>123</sup>

The ALJ held that terminating the employees was an unfair labor practice under the NLRA.<sup>124</sup> He concluded that the post was concerted activity because several employees had spoken to the restaurant about the tax issue previously, and because the parties had scheduled a meeting with the payroll administrator to discuss it further.<sup>125</sup> The comments “specifically discussed issues they intended to raise at this upcoming

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (“You owe them money . . . that’s fucked up”; “Ralph fucked up the paperwork . . . as per usual”; “[Ralph] probably pocketed it all from our paychecks”; and “I owe too. Such an asshole.”)

117. *Id.* (“It’s all Ralph’s fault. He didn’t do the paperwork right. I’m calling the labor board to look into it because he still owes me about 2000 in paychecks.”)

118. *Id.*

119. *Id.* For a description of the “Like” button, see *supra* note 17.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

meeting and avenues for possible complaints to government entities,” so therefore they were “part of an ongoing sequence of events involving their withholdings and taxes owed to the State of Connecticut, and [were] therefore concerted activity.”<sup>126</sup> Furthermore, because clicking the “Like” button was the other employee’s means of assenting to the comments made, that act “constituted participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity.”<sup>127</sup>

Next, the ALJ addressed whether the comments were sufficiently egregious to lose protection, or whether they should lose protection because two customers observed and participated in the exchange.<sup>128</sup> The ALJ concluded that the activity did not lose protection under those circumstances.<sup>129</sup> The decision did not hold the two employees responsible for some of the more profane phrases in the Facebook discussion, which were made only by former employees and customers.<sup>130</sup>

In each of these cases, the ALJs or the board had to decide whether the discharged employees were engaged in protected concerted activity, and in each case there was at least some concerted activity. The Acting General Counsel has acknowledged that “not all online activity is concerted.”<sup>131</sup> However, the early decisions may have overlooked, failed to consider, or diminished the importance of key evidence suggesting that the online activity, in fact, did not fall under the purview of section 7.

## II. CONCERTED ACTIVITY ON SOCIAL NETWORKS

Whether section 7 protects an employee’s posts on an online social network first depends on whether that activity is concerted. As noted above, the NLRA does not offer a definition of concerted activity.<sup>132</sup> However, decades of case law have resulted in a few well-established principles that have made the term broader than its literal denotation, making the phrase more of “a term of art rather than a factual description.”<sup>133</sup>

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. “Lafe Solomon, Business Lawyer, Share Views On Social Media Under NLRA and Other Laws,” *Dailey Lab. Rep. (BNA)* No. 31, at A-15 (Feb. 14, 2013).

132. *See* 29 U.S.C. § 152 (2012) (definitions section of NLRA).

133. *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1160 (5th Cir. 1980).

A. *The Legislative History and Historical Context of Section 7 Offers Few Hints about the Meaning of “Concerted Activity”*

The legislative history of section 7 gives courts little guidance as to what constitutes concerted activity for mutual aid or protection.<sup>134</sup> When it enacted the statute against the backdrop of the labor movement of the 1930’s, “Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.”<sup>135</sup> Like other old statutes that courts struggle to apply to the Internet,<sup>136</sup> the NLRA was conceived “long before anyone could even imagine the possibility of the viral power” that comes with communicating on the Internet.<sup>137</sup> As a result, the statute’s language and history give few hints as to the scope of its protection when new situations, such as those in the social networking cases, make their way to the courts. However, nothing in the purpose or history of the NLRA suggests that employee activity on social networks should be categorically unprotected under section 7. Case law arising from offline concerted conduct is the best guide to understanding when online activity qualifies as concerted

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134. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 834 (1984). (“[T]here is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in enacting the ‘concerted activities’ language . . .”). In *NLRB v. City Disposal*, the Court also noted that the concerted activity language actually was taken from the Clayton Act, which exempted some union activity from anti-trust laws, and the Norris-La Guardia Act of 1932. *Id.* at 834–35.

135. *Id.* at 835. The Congressional findings codified in 29 U.S.C. § 151 observed that “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions.” See Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 331–46 (1981) (discussing the history and policy of section 7).

136. See generally Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521 (2003) (criticizing judicial tendency to use a cyberspace-as-place metaphor to apply traditional property laws to the Internet); Megan M. La Belle, *The Future of Internet-Related Personal Jurisdiction After Goodyear Dunlap Tires v. Brown and J. McIntyre v. Nicastro*, 15 NO. 7 J. INTERNET L. 3 (2012) (discussing an emerging issue of personal jurisdiction and the Internet). Some commentators might be inclined to call for an amendment to the NLRA to solve the problem of employee Internet chatter. See, e.g., Bielan, *supra* note 39, at 182–83. However, sometimes Internet-era laws create further ambiguities and questions. See, e.g., Orin S. Kerr, *Cybercrime’s Scope: Interpreting “Access” and “Authorization” in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003) (addressing varying interpretations of statutes that prohibit “unauthorized access” to computers).

137. Jim Evans, *Column: Social Networking Rants—An Employee Right?*, COSHOCTON TRIB., Nov. 21, 2010, at A7.

*B. Under the Rule from Meyers, a Single Statement by an Individual Can Be Concerted Activity*

Although a person cannot “act in concert with himself,” section 7 protects individual acts in two principle circumstances.<sup>138</sup> First, it protects an individual employee who acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”<sup>139</sup> Second, it protects individual action by an employee who seeks to initiate, induce, or prepare for group action.<sup>140</sup> Under this second scenario, courts have protected as “concerted activity” comments by an individual employee that expresses his or her dissatisfaction with something in the workplace. As one court explained in the context of grievances under a collective bargaining agreement:

Organized and protected complaints will often develop from the dissatisfaction of an individual employee; the employee’s initial protestations do not forfeit protection under the Act merely because they precede union involvement or concerted activity. If the employee actually proceeds on behalf of other employees, or at least with the intent to induce group action, in the presentation of work-

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138. *McLean Trucking Co. v. NLRB*, 689 F.2d 605, 608 (6th Cir. 1982) (protecting under section 7 truck drivers who refused to drive a truck that they believed to be unsafe).

139. *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 497 (1984). This type of protected activity is not the main focus of this Note, because most online posts will not take the form of one employee taking action to change the workplace on behalf of others. *Hispanics United* could possibly be characterized as one employee acting on behalf of others by asking them how they felt about an issue prior to a meeting, but that act is more naturally described as *preparation* for further concerted activity. See *infra* note 140. For cases where individual activity was protected because one employee took action on behalf of others, see, e.g., *NLRB v. Duquesne Elec. & Mfg. Co.*, 518 F.2d 701 (3d Cir. 1975) (employees who designated a spokesperson to present grievance to supervisor engaged in concerted activity); *Air Contact Transp., Inc.*, 340 N.L.R.B. 688, 695 (2003) (employee engaged in concerted activity when, at a company meeting, he wanted to ask “some questions on behalf of [himself] and [his] co-workers” regarding wages and benefits (internal quotation marks omitted)); *Neff-Perkins Co.*, 315 N.L.R.B. 1229, 1232 (1994) (questions to management about employee wages and quality of equipment were concerted because they implicated “areas of common concern to all employees”).

140. *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986); see also *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969) (“The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity.”). Professor Morris argues that this standard should be abandoned. Morris, *supra* note 37. However, it is still imposed by the NLRB and courts. See *MJ Mueller, LLC*, 352 N.L.R.B. 525 (2008) (“Such individual action is concerted as long as it is engaged in with the object of initiating or inducing . . . group action.”) (quoting *Phillips Petroleum Co. & Paper*, 339 N.L.R.B. 916, 918 (2003)).

related grievances arguably based within the collective bargaining agreement, then the activity is protected by the Act.<sup>141</sup>

This reasoning recognizes that change for a group acting in concert in the workplace often arises from one person's observation of an unfavorable condition of employment. Although a purpose of the NLRA was "to protect the rights of workers to act together to better their working conditions,"<sup>142</sup> the genesis of that movement begins with the action, words, or idea of an individual.<sup>143</sup>

Accordingly, the definition of concerted activity is "expansive enough to include individual activity which is connected to collective activity."<sup>144</sup> There are, however, a few limitations to this seemingly broad definition of concerted. "Mere griping" about a condition of employment is not protected, but when the "griping" coalesces with expression inclined to produce group or representative action, the statute protects the activity.<sup>145</sup> Additionally, the individual's actions must concern something more than personal interests that are his and his alone.<sup>146</sup>

In the social media cases, the NLRB General Counsel has argued that an individual's online speech is concerted activity by relying on the *Meyers* cases.<sup>147</sup> The dispute in *Meyers* arose when a truck driver complained to his employer about faulty brakes on his company vehicle.<sup>148</sup> Another employee who subsequently drove the truck made the same complaint to management.<sup>149</sup> The first truck driver was discharged after he received an official inspection of the vehicle, which confirmed his suspicion about the faulty brakes and prompted his discharge because,

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141. *McLean Trucking*, 689 F.2d at 608.

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

143. Professor Morris suggests a broader standard that, consistent with the statutory language of section 7, would better protect an employee's *right* to engage in concerted activity: "[Employees] must be protected in any of their group conversations that relate to conditions of employment, absent some overriding legitimate employer interest requiring a limit to such conversation." Morris, *supra* note 37, at 1693. Professor Morris argues that the "limit" should not be based on "whether the conversation in question has reached the advanced stage of looking toward group action," but rather "on such factors as time, place, and interference with productive work." *Id.*

144. *Id.* at 1717 (quoting *Meyers II*, 281 N.L.R.B. at 885).

145. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1348 (3d Cir. 1969).

146. *See Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28–29 (7th Cir. 1980) (holding that one employee's complaints about job risks and overtime were unprotected personal griping because the complaints were not directed at inducing collective actions or made on behalf of a group).

147. *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493 (1984), *rev'd sub nom Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *remanded to Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882 (1986), *aff'd sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

148. *Prill*, 755 F.2d at 943.

149. *Id.*

according to his employer, “we can’t have you calling the cops like this all the time.”<sup>150</sup>

The court of appeals held that the employee was not engaged in concerted activity. First, the court confirmed that concerted activity “encompass[es] [only] those circumstances where individual employees seek to initiate or to induce or to prepare for group action.”<sup>151</sup> Next, the court found that the employee did not meet this standard because he “acted on his own, without inducing or preparing for group action.”<sup>152</sup> Finally, the court of appeals explained that the employee could have benefited from section 7 if he had “simply gotten together with his co-workers to complain about the violation of statutory safety provisions.”<sup>153</sup>

Despite its ultimate holding in favor of the employer, *Meyers* defined concerted activity in terms broad enough to encompass many individual statements and actions that take place on and off the Internet. The rest of this section will detail some of the other limitations on concerted activity, highlighting areas where online posts may not qualify for protection. In particular, online concerted activity may not be concerted if it is an “individual gripe,” or if it is not “inciting, inducing, or preparing” for future concerted activity.

### C. An Employee’s Individual Gripes Are Not Concerted Activity

Just like discussions that take place offline, some social network conversations are individual gripes, not concerted activity.<sup>154</sup> Many

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150. *Id.* at 945.

151. *Prill*, 835 F.2d at 1484 (quoting *Meyers II*, 281 N.L.R.B. at 887 (internal quotation marks omitted)).

152. *Id.* at 1485. He acted alone when he complained to his employer, and although on another occasion he overheard another employee complain about the same problem, there was “no evidence that anything else occurred.” *Id.* (quoting *Meyers*, 268 N.L.R.B. at 498) (internal quotation marks omitted).

153. *Id.* In confirming the framework that stands today, *Meyers II* adopted its rule and reasoning from an earlier Third Circuit case, *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). In that case, an employee was terminated for talking to other employees about their rights regarding pay, vacation time, and other company policies. *Id.* at 684. The court held that the activity was not concerted because there was “no evidence that any question of group action entered into the conversations.” *Id.* at 685. Although many communications can receive protection because “almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals,” the Act does not protect activity “when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to.” *Id.*; see also *MJ Mueller, LLC*, 352 N.L.R.B. 525 (2008) (one employee concerned about pay policies was engaged in concerted activities when he contacted co-workers to initiate action).

154. The Acting General Counsel has also acknowledged that individual griping that occurs online should not receive protection. See “Lafe Solomon, Business Lawyer, Share Views On Social Media Under NLRA and Other Laws,” *Dailey Lab. Rep. (BNA)* No. 31, at A-15 (Feb. 14, 2013).

employees who take to Facebook to discuss their problems at work will likely complain about something that only affects them as individuals but does not concern any group.<sup>155</sup> “Purely personal griping does not fall within the scope of protected, concerted activity.”<sup>156</sup> In *NLRB v. Deauville Hotel*, the court held that an employee did not engage in concerted activity when he complained about a new, lower-ranking job to which he had been assigned.<sup>157</sup> The activity did not receive protection because the issue at work affected him alone, and not any other co-worker.<sup>158</sup> Rather than involving concerted activity for mutual aid or protection, cases like *Deauville Hotel* are examples of an individual’s unprotected activity for individual protection.

Given the variety of subjects that employees discuss through online social networks,<sup>159</sup> courts may encounter a special difficulty when they try to decide whether a social network post is individual griping or concerted activity. In *Hispanics United*, for example, the original Facebook post arguably was not concerted at the outset because it was motivated by the employee’s individual issue with a co-worker who had been critical of her job performance. However, because she called for group support and because the other employees noted that they had a problem with the same employee, there was more support for the argument that it was concerted activity.<sup>160</sup> In contrast, the posts at issue in *Triple Play* clearly were not “individual gripes” because they involved a tax issue that was from the start common to several employees.<sup>161</sup>

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155. Based on case law and semantics, this requirement might be better described as an element of the “mutual aid or protection” requirement. See *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 885 (1986); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 282–83 (2002) (describing the “mutual aid or protection” standard).

156. *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1530, 1535 (11th Cir. 1987) (holding that employee engaged in protected, concerted activity when she spoke on behalf of her co-workers regarding an issue at a company meeting); see also *Ryder Tank Lines, Inc.*, 135 N.L.R.B. 936 (1962) (one employee’s complaint about insufficient compensation for driving on a particular trip was purely personal, not concerted); *enforcement denied on other grounds*, 310 F.2d 233 (5th Cir. 1962).

157. 751 F.2d 1562, 1571 (11th Cir. 1985).

158. *Id.* See also *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949) (employee who circulated petition calling for discharge of foreman was not engaged in concerted activity because, although other employees signed the petition, the problems at work involved only the individual worker and the foreman, not other employees). Professor Morris criticizes the court in *Joanna Cotton Mills* for “overreact[ing] to what it perceived to be an ‘unwarranted interference with management.’” Morris, *supra* note 37, at 1695.

159. People are more willing to share information online, even if is embarrassing. See Victoria Vogt, *Why Do People Share Embarrassing Information Online?*, HOWSTUFFWORKS (July 8, 2009), <http://computer.howstuffworks.com/internet/social-networking/information/share-information-online.htm>.

160. See *supra* text accompanying notes 70–71.

161. See *supra* text accompanying note 114.

Many disgruntled employees who decide to discuss their work problems online will post about something that does not affect anyone beyond themselves. Judges must examine carefully the facts of each case to discern the fine line between concerted activity and individual griping. If it meets that hurdle, then the next issue is whether the post is seeking to induce group action.

*D. To Be Concerted Activity, the Employee Social Network Activity Must Be Performed with the Object of “Inciting, Inducing, or Preparing for Group Action”*

Although an employee’s online social network activity sometimes can be concerted, “to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.”<sup>162</sup> To fulfill this requirement, the employee must present some evidence that the online discussion may have led to further concerted action for mutual aid or protection.<sup>163</sup> However, as the Board pointed out in *Hispanics United*, “the ‘object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate.”<sup>164</sup> Rather, “a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions.”<sup>165</sup> Nevertheless, under this framework social network posts that are not the genesis of more activity should not qualify for protection.

The early cases illustrate overlooked differences between posts that are intended to precede future activity, and ones that are not. In *Hispanics United*, the ALJ held that the employees met the standard for initiating, inducing, or preparing for group action because they “were taking a first step towards group action to defend themselves against the accusations

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162. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). This requirement is not as strenuous as it may sound; protesting employees do not need to make a “specific demand” immediately before or after taking concerted action to make a change in the workplace. In *Washington Aluminum*, the Supreme Court held that employees were protected under section 7 even though they did not make a “specific demand” when they walked off the job. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

163. *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493 (1984). See also *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967) (posting cartoons at work was not done for purpose of inducing or preparing any group action, but rather for employee’s own personal gratification).

164. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at 3 (2012) (quoting *Relco Locomotives, Inc.*, 358 N.L.R.B. No. 37, at 17 (2012)).

165. *Id.* (internal quotation marks omitted).

they could reasonably believe [a co-worker] was going to make to management.”<sup>166</sup> The employee’s Facebook post asked her co-workers how they felt about an issue in preparation for an anticipated complaint to management by their co-worker.<sup>167</sup> Under the standard from *Meyers*, this was a protected concerted activity because it solicited advice to prepare for group action that the employees would take at the meeting.<sup>168</sup>

Courts may face issues in determining an employee’s intent to induce concerted activity among co-workers when the post involves an event that occurred in the past. The employee in *Karl Knauz* posted pictures of a sales event that qualified as concerted activity, but these arguably may not have intended or contemplated future group action because he was complaining about a one-time past event that could not possibly change.<sup>169</sup> The judge held that some of the posts were concerted because the Facebook pictures and comments were posted to protest an issue that “could have had an effect upon his compensation,” reasoning that a more elegant event may have made it easier for the salespeople to earn commissions.<sup>170</sup> However, no matter what action was taken, concerted or individual, the car dealership could not return to the event and tell the hot dog vendor to go home. Because the activity looked forward to no further action but merely complained about something in the past that was not readily changeable in the present, it likely should not have been characterized as concerted.

*Triple Play* illustrates how a gripe can quickly develop intent for more action to solve a problem in the present. The conversation at issue began when one employee wrote a sarcastic, public remark on a former co-worker’s Facebook wall.<sup>171</sup> This alone would not seem like protected concerted activity because the discussion was between a current employee and a former employee and was more of a gripe than a call to action. The interaction did not occur with any intention of inciting, inducing, or preparing for action: it was one employee just venting a problem to a friend. However, the nature of the conversation changed as more employees commented on the original post and added their own information about the workplace payroll tax issue.<sup>172</sup> At that point, several employees indicated that they shared the same problem and that they

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166. *Id.* at 9.

167. *See supra* note 69.

168. *See supra* note 73.

169. *See supra* text accompanying note 95.

170. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, at 10 (2012).

171. *See supra* text accompanying note 114.

172. *See supra* note 116 and text accompanying notes 115–19.

wanted to do something about it. When one employee mentioned the upcoming meeting to discuss the issue,<sup>173</sup> it almost certainly tipped the balance closer to the concerted activity that was clear at an earlier point in *Hispanics United*.

Furthermore, in each of these early decisions the Board and ALJs could have given greater weight to statements of the employees themselves; some readily admitted to their employers that they had no intention of taking concerted action after publishing their comments online.<sup>174</sup> In cases where courts extend protection, the employees ultimately manifest their intent to seek change in the workplace by presenting their grievances to a supervisor<sup>175</sup> or considering some other action toward their goal. The social networking cases gave little weight to the employees' own statements indicating that no further action was intended.<sup>176</sup> In *Triple Play*, where the employer discharged the employee who "Liked" a sarcastic Facebook post, the employee said that he had "no . . . problems" with the supervisor or the restaurant.<sup>177</sup> Similarly, in *Karl Knauz*, the employee told his supervisor that the Facebook posts were none of BMW's business and that he "wasn't thinking anything" when he put the pictures and sarcastic comments online.<sup>178</sup> Unlike many other cases where courts have extended

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173. See *supra* text accompanying note 118.

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An inquiry into the concerted nature of conduct should not focus solely upon the group nature of the complaints. Instead, it also should air what the employees decided to do about those complaints. Here, while there was evidence that drivers were irritated by working conditions, there is nothing to indicate that they had decided to act upon those annoyances.

*Manimark Corp. v. NLRB*, 7 F.3d 547, 551 (6th Cir. 1993). In *Manimark*, the Court held that no protected concerted activity occurred where, *inter alia*, the employee refused an invitation from management to follow up on his complaints with a group meeting to discuss the issues. *Id.* at 551–52.

175. See, e.g., *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962) (concerted activity occurred when employees walked off the job without permission because they wanted to the company to provide better heating at work); *NLRB v. Duquesne Elec. & Mfg. Co.*, 518 F.2d 701 (3d Cir. 1975) (concerted activity occurred when employees selected a representative to present grievances to the company vice president and owner); *Sutherland v. NLRB*, 646 F.2d 1273, 1274 (8th Cir. 1981) (employees who approached supervisor made it clear that they were not satisfied with wages).

176. Of course, the reason an employee might not tell the employer about future activity is not because none is planned, but because of feared retaliation. Either way, this is a question of fact that could be further explored in the ALJ fact-finding process, and in some cases may be relevant to the outcome.

177. *Triple Play Sports Bar & Grille*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012). On the other hand, because there were other employees with the same issue who planned to discuss the matter further with management, the manifest weight of the evidence probably suggests that their activity should receive section 7 protection. See *supra* text accompanying notes 115, 118.

178. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, at 8 (2011). Often, both employees and other people who post information online do not think about or have any particular intent when they share the information. Consider the case of one employee who was discharged because of her

section 7 protection, these statements are evidence that the employees who made the posts did not intend to take their grievances from the Internet to the workplace; this should receive greater consideration from the courts. Based on the statute's goal of protecting employee efforts to make the workplace better, it makes little sense to extend protection to those who indicate to their employers that they have no interest in inducing future concerted activity.

Finally, the early cases indicate that the Board or ALJs may want to distance their holdings from this restriction on the concerted activity definition. Although the ALJ in *Hispanics United* based his holding on the "inciting, inducing, or preparing for action" standard, he offered an argument that would erode that rule.<sup>179</sup> The ALJ suggested that "[i]t is irrelevant to this case that the discriminatees were not trying to change their working conditions and that they did not communicate their concerns to [their employer]."<sup>180</sup> In the "leading case" cited to support this proposition, the NLRB reached its rationale by disapproving of the well-settled rule from *Meyers*: "In agreeing that the employee activity in issue here was concerted within the meaning of the Act, Chairman Gould and Member Browning decline to rely on, and question the continuing vitality of *Meyers Industries*."<sup>181</sup> This result overruled the ALJ, who had relied on *Meyers* to reach the opposite conclusion in the case.<sup>182</sup>

In sum, the ALJ and Board used *Meyers* as the "appropriate analytical framework" for disposing of the case.<sup>183</sup> However, to argue that employees need not be "trying to change their working conditions" to receive protection, the opinion relied on a case that sought to depart from the *Meyers* standard. If *Meyers* still places a meaningful limitation on what constitutes concerted activity, future decisions should require some evidence that the employee speech at least could have begun an effort to change workplace conditions.

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Facebook post. "It was my own fault," she said. "I did write the message. But I had no idea that something that, to me is very small, could result in my losing my job . . . I lost my job because of a Facebook status." Eric Frazier, Facebook Post Costs Waitress her Job, CHARLOTTEOBSERVER.COM (May 17, 2010), <http://www.charlotteobserver.com/2010/05/17/1440447/facebook-post-costs-waitress-her.html>.

179. See *supra* note 71.

180. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at 9 (2012).

181. *Aroostook Cnty. Reg'l Ophthalmology Ctr.*, 317 N.L.R.B. 218, 220 n.12 (1995). In that case, the Board held that employee complaints to each other concerning schedule changes, which were not brought to the supervisor's attention, constituted protected concerted activity. *Id.* at 220.

182. *Id.* at 220. The ALJ stated that "where the employee activity at issue consists only of talk, for that activity to be protected by Section 7 'it must appear that it was engaged in with the object of initiating group action.'" *Id.* at 228.

183. *Hispanics United*, 359 N.L.R.B. No. 37, at 1.

*E. Without Giving Careful Attention to the Case Law Limitations on Concerted Activity, Any Social Network Post Might Qualify for Protection*

The broadest reading of section 7 would suggest that *any* social network post about a problem at work should constitute concerted activity. Social networks allow users instantly to direct communications at each other.<sup>184</sup> Even when a user uploads a message without directing it to anyone in particular,<sup>185</sup> it may be viewable by anyone on the Internet,<sup>186</sup> or at least to co-workers, customers, and “friends” within the user’s network. On social networking sites, when one user speaks, many others listen. The no longer secret ingredient to Facebook’s success is its ability to connect users all over the globe in an experience that emulates real world interaction.<sup>187</sup> Because anyone, including co-workers, can view a person’s post that says, “I HATE my boss,” an overly-broad reading of the statute could classify such expression as concerted activity. It is more likely that online communications are concerted when a user directs them toward a co-worker, as opposed to another friend or to no one at all.<sup>188</sup>

In any section 7 dispute, the distinction between concerted activity and non-protected activity can be subtle. The precedents are adaptable to the new medium, with careful application. The NLRA can survive the test of time, but section 7 will not apply to every social network activity that employees take.

III. “MUTUAL AID OR PROTECTION” INCLUDES ACTIVITY THAT WILL AFFECT THE “TERMS AND CONDITIONS OF EMPLOYMENT”

Even if employees act in concert, that “is not sufficient by itself to show that they engaged in that concerted activity which is protected by the Act.”<sup>189</sup> The second of the three basic requirements for protection

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184. Features for sharing include “tagging” each other in posts and commenting on each other’s activity, just like the employees in *Triple Play*. See *supra* text accompanying notes 115–19.

185. This was the type of post made by the employee in *Karl Knauz Motors*. See *supra* text accompanying notes 99–100.

186. See *supra* text accompanying notes 15–19.

187. See, e.g., *THE SOCIAL NETWORK* (Columbia Pictures 2010) (“People want to go online and check out their friends, so why not build a website that offers that? Friends, pictures, profiles, whatever you can visit, browse around, maybe it’s someone you just met at a party . . . I’m talking about taking the entire social experience of college and putting it online”).

188. After all, section 7 “extend[s] to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.” *Root-Carlin, Inc.*, 92 N.L.R.B. 1313, 1314 (1951).

189. *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991).

mandates that the object of the activity be for the purpose of “mutual aid or protection.”<sup>190</sup>

A few courts have given some insight about what it means for employees to take action for mutual aid or protection. In *Eastex, Inc. v. NLRB*, the Supreme Court suggested that “some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity . . . . [A]t some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause.”<sup>191</sup> Some courts have interpreted this language “to require the showing of a ‘nexus’ between the activity and ‘employees’ interests as employees,”<sup>192</sup> but overall, this has not imposed a significant restriction on what is protected by section 7.<sup>193</sup> The statute protects all employees who “seek to improve terms and conditions of their employment or otherwise improve their lot as employees.”<sup>194</sup> Without fear of retaliation, employees can seek to change a wide variety of workplace conditions “related to wages, hours or terms and conditions of employment.”<sup>194</sup> For example, in *Hoytuck Corp.*,<sup>195</sup> the NLRB extended section 7 protection to employees who complained about a supervisor because it was “evident that [the supervisor’s] conduct had an impact on employee working conditions.”<sup>196</sup>

As with the “concerted activity” requirement, in some of the social networking cases the Board may have erred in finding that employees

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190. “Mutual aid or protection” is not defined by the Act. *See* 29 U.S.C. § 152 (2012).

191. 437 U.S. 556, 567–68 (1978).

192. *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d 601, 606 (D.C. Cir. 2007); *see also* Raymond T. Mak, *City Disposal Systems and the Interboro Doctrine: The Evolution of the Requirement of “Concerted Activity” Under the National Labor Relations Act*, 2 HOFSTRA LAB. L.J. 265, 268 n.20 (1985) (noting that this phrase has been interpreted broadly “to include almost any activity which somehow affects the well-being of the employees as a group”).

193. *Eastex*, 437 U.S. at 565. The employees in *Eastex* wanted to distribute a newsletter that would encourage their coworkers to support various worker-friendly political causes in their state. *Id.* The Court held that this was protected activity for mutual aid and protection even though it sought political change, and not anything from the employer. *Id.*

194. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at 9 (2012); *see, e.g.*, *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811, 814 (6th Cir. 1975) (protecting concerted activity taken under circumstances where “an employer’s failure to maintain discipline rises to the point of threatening employee safety”); *see also* *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991) (“The conditions of employment which employees may seek to improve are sufficiently well identified to include wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like.”).

195. 285 N.L.R.B. 904 (1987).

196. *Id.* at 904 n.3. Another case distinguished *Joanna Cotton Mills v. NLRB* on the basis that there was “no evidence of any relation between the employees’ expressed concerns and working conditions.” *Atl.-Pac. Const. Co., Inc. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995) (conduct of immediate supervisor affects working conditions).

engaged in activity for the purpose of “mutual aid or protection.” In *Hispanics United*, the individual employee’s grievance implicated a condition of employment because it involved a commonly-shared problem that employees had in dealing with one particular co-worker.<sup>197</sup> *Triple Play* is another clear case of activity that involved a term and condition of employment, because the employee’s online complaint was related to an alleged mistake that the employer made in taxes that would affect the income of several employees.<sup>198</sup>

On the other hand, a few other precedents indicate that the activity protected in *Karl Knauz* may not fulfill the mutual aid or protection requirement. In *New River Industries, Inc. v. NLRB*, the Fourth Circuit declined to extend section 7 protection to employees who posted around the workplace a letter that satirically criticized management’s decision to provide ice cream to employees to celebrate a new agreement that the company reached with a supplier.<sup>199</sup> The court concluded that the letter, although indisputably concerted activity, was not an act for mutual aid or protection.<sup>200</sup> Rather, “[t]he expression of criticism about management or, in this case, the value of a one-time gift or expression of appreciation from management is not a condition of employment that employees have a protected right to seek to improve.”<sup>201</sup> Because the letter did not address wages, hours, or some other term or condition of employment, it was not protected.<sup>202</sup>

The employee activity in *Karl Knauz* is too similar to *New River* to be distinguished. In both cases, the satirical activity criticized a one-time management decision that occurred in the past and had no ongoing effect on the terms and conditions of employment. As a result, it is unlikely that the BMW employee engaged in protected activity when he uploaded pictures of the event to Facebook, despite the attenuated connection between the pictures and the event. Although some comments on the

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197. See *supra* note 71 and accompanying text. Although, as discussed previously, the ALJ readily pointed out that “the discriminatees were not trying to change their working conditions,” this language seems to refer more to their intent to engage in concerted activity than whether the contemplated acts would be for the purpose of “mutual aid or protection.” *Hispanics United*, 359 N.L.R.B. No. 37, at 9.

198. “It is well established that an employee is guaranteed the right to protest wages, as was allegedly done in this case, under the NLRA.” *Anco Constr. Co. v. Freeman*, 693 P.2d 1183, 1185 (Kan. 1985).

199. 945 F.2d 1290, 1294 (4th Cir. 1991). The letter read in part: “The employees of New River would like to express their great appreciation of the 52 flavors of left over ice cream from the closed Meadow Gold Plant. It has boosted moral [sic] tremendously.” *Id.* at 1292.

200. *Id.* at 1295.

201. *Id.* at 1294.

202. *Id.* at 1295.

Internet may complain about conditions of employment that could be changed, these should be distinguished carefully from posts that involve only one-time events at work that no concerted action could possibly affect.

Although the “mutual aid or protection” element is unarguably broad and less litigated than the requirement of “concerted activity,” courts should keep a careful eye out for employee complaints about one-time, past events that may not be considered a “term or condition of employment.” Whether or not the activity happens in concert, complaints about something that cannot be changed do little to advance the purpose of the act because they cannot make the workplace better. That was precisely the situation in *Karl Knauz*, where no matter how the employee acted, the employer could not go back and improve the event that the employee and his coworkers were upset about. Particularly in cases where employees send information to social networks from their phones almost as soon as the events occur,<sup>203</sup> it is more likely that the events will not constitute a term or condition of employment.

#### IV. SOME ACTIVITY, INCLUDING CERTAIN DISPARAGING ACTS, LOSE PROTECTION UNDER THE ACT

Even if employees act in concert for their own mutual aid or protection, they will lose protection under the act in certain cases. Employees may not effectively seize their employer’s business by remaining on the job but choosing what tasks they wish to do and not do,<sup>204</sup> or by slowing down their work.<sup>205</sup> Violence and threats are not tolerated,<sup>206</sup> and neither are illegal activities such as misappropriation of confidential information.<sup>207</sup> At the same time, “[t]he employee’s right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.”<sup>208</sup>

All of these categories are easily applicable to social media cases, but none arose in the ones that have emerged so far. Two contrasting cases

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203. General Counsel’s Second Memo, *supra* note 3, at 31 (describing a case where an employee was terminated for uploading a comment about work from her cell phone).

204. *NLRB v. J. I. Case Co.*, 198 F.2d 919 (5th Cir. 1952).

205. *NLRB v. Robertson Indus.*, 560 F.2d 396 (9th Cir. 1976).

206. *NLRB v. Red Top, Inc.*, 455 F.2d 721 (8th Cir. 1972).

207. *See Texas Instruments, Inc. v. NLRB*, 637 F.2d 822, 832 (1st Cir. 1981) (“The presence or absence of subreption and misappropriation is certainly a significant factor in deciding whether employee conduct is a protected exercise of a section 7 right.”).

208. *Boaz Spinning Co. v. NLRB*, 39 F.2d 512, 514 (5th Cir. 1968).

about losing protection, however, are particularly relevant. In *NLRB v. Owners Maintenance Corp.*,<sup>209</sup> two employees engaged in protected concerted action when they “sought to organize and obtain concerted employee support through the distribution of leaflets” outside of their office.<sup>210</sup> In contrast, in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard)*,<sup>211</sup> the Supreme Court held that employees who distributed 5,000 leaflets disparaging their company during a labor dispute did not engage in concerted activity because the attack did not advance or refer to the objectives of the employee dispute.<sup>212</sup>

The cases about employees giving out handbills are similar to those involving employee complaints on social networks because both involve an employee with a grievance who seeks change in the workplace by announcing the issue outside of the work environment. The question for courts is whether the online commentary falls closer to *Jefferson Standard*, where the attack on the employer made no reference to the ongoing dispute, or to *Owners Maintenance Corp.*, where the flyers directly sought support through concerted activity to change a policy in the workplace.

Once again, some of the early social networking cases seem to meet this requirement for concerted activity, while others are less clear. In *Hispanics United* and *Triple Play*, the employees specifically referenced the ongoing dispute at work in their online conversation. Even the protected pictures and comments made by the employee in *Karl Knauz* seemed to simply make fun of the employer’s event rather than advance a constructive conversation about how to make change in the workplace, making them seem to fall closer to the leaflets in *Jefferson Standard*.<sup>213</sup> Although the employee arguably referred to a problem in the workplace by taking pictures of the mediocre food selection, similar to leaflets in *Owners Maintenance*, the pictures did little to advance the discussion of the issue and much to disparage the employer. In sum, posts to social networks that do not refer to workplace disputes but merely disparage the employer should not receive protection under the NLRA.

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209. 581 F.2d 44 (2d Cir. 1978).

210. *Id.* at 49.

211. 346 U.S. 464 (1953).

212. “Their attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions.” *Id.* at 476.

213. *See supra* text accompanying notes 79–80.

V. COURTS SHOULD REQUIRE THE FORM OF THE CONCERTED ACTIVITY  
TO BE COMMENSURATE WITH THE OBJECT OF THE PROTEST AND NOT  
EXTEND PROTECTION TO EMPLOYEES' PUBLIC COMPLAINTS ON  
SOCIAL NETWORKS

Even if the activities in social network cases are concerted and for mutual aid or protection under section 7, before extending protection courts should consider the form of the activities against their ability to create meaningful change in the workplace. The early cases involving social networks show that a broad application of section 7 will lead to adverse consequences for employers, but without substantially helping employees institute change in the workplace.<sup>214</sup> The Board and ALJ decisions have extended protection to communications that have a minimal effect on employees' terms and conditions of employment. Even if the NLRB had not applied section 7 to protect the social media posts, the employees still could have engaged in concerted activity (and still used the Internet to do so) in a manner that would be equally effective at making change.

A. *Granting Section 7 Protection to Employees Who Post Publically  
Viewable Comments Online Will Not Further the Goals of the NLRA,  
but Will Needlessly Harm Employers.*

Employee disparagement on the Internet can bring plenty of unwelcome attention to employers, which is somewhat unfair to those who previously are unaware that there is a problem in the workplace.<sup>215</sup> One popular entertainment website recognized that such unwanted publicity was funny enough to “go viral” and increase traffic to their website, so it published a series of pictures of an attractive young woman writing a series of humorous complaints about her boss on a whiteboard.<sup>216</sup> The

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214. For example, in *Hispanics United* it is difficult to argue that one employee describing a workplace grievance to a former co-employee advances a cause to improve the terms or conditions of the workplace. Furthermore, the litany of comments underneath the post did virtually nothing but identify which employees were disgruntled or unenthusiastic about their job.

215. Of course, *NLRB v. Washington Aluminum* made clear that employees do not have to make a demand on their employer before taking concerted activity. 370 U.S. 9, 14 (1962). In that case, however, the employer was well aware that the employees were leaving because of the cold—a move suggested by their very own foreman. *Id.* at 11.

216. Karen Auge & Daniel Petty, *HOAX Online Erase-Board, Stick-It-to-the-Man Job Quitter Is Really a Colorado Actress*, THE DENVER POST, Aug. 8, 2010, at A-01. When one law firm surveyed 120 multinational employers, 43% of respondents reported employee misuse of social networks. *More Than 75 Percent of Businesses Use Social Media, Nearly Half Do Not Have Social Networking*

stunt worked, giving the website a moment in the spotlight as Internet users spread the material from one person to the next.<sup>217</sup> The entire effort was a manufactured hoax, but it illustrates how one disgruntled employee complaining about her job online could have damaging effects on the employer. When customers saw the posts that were the subject of *Triple Play*, the effects may have been smaller, but were much more real.<sup>218</sup>

If courts uphold the NLRB General Counsel's broad interpretation of section 7, employers will have little recourse to protect their business from disgruntled employees who take to the Internet to "publicly bash[] the company, co-workers, and supervisors electronically."<sup>219</sup> Because some social media posts are viewable to an uncountable number of people around the globe, employers' social media policies promote "conveying a positive public image" and are "based on the premise that employees have a responsibility to keep problems with co-workers and managers within the confines of the company and out of the public eye."<sup>220</sup> The current use of section 7 to protect a wide variety of employee activity on social networks makes it difficult for employers to solve problems in-house and put forth a positive public image. In fact, if the employee's disparaging online activity falls under the protection of section 7, employers may run afoul of the law merely for asking their employees about it.<sup>221</sup> Once the activity is deemed concerted, an employee can continue posting items on Facebook or Twitter indefinitely, with the employer left powerless to stop it.<sup>222</sup>

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*Policies*, PROSKAUER (July 14, 2011), <http://www.proskauer.com/news/press-releases/july-14-2011/more-than-75-percent-of-businesses-use-social-media-nearly-half-do-not-have-social-networking-policies/>.

217. Auge & Petty, *supra* note 216.

218. In *Triple Play*, several customers commented alongside the employees and former employees who engaged in the online discussion. *Triple Play Sports Bar & Grille*, No. 34-CA-12915, 2012 WL 76862 (N.L.R.B. Div. of Judges Jan. 3, 2012). The comments seemed to affect the customers' view of the employer, saying things such as: "You owe them money . . . that's fucked up," "Yeah I really don't go to that place anymore," and "[the employer's restaurant is] way to expensive." *Id.*

219. Evans, *supra* note 137.

220. *Id.*

221.

We find [the employer's] questions about what had happened and why constitute unlawful interrogations when viewed in the context in which they were made. These interrogations were part of [the employer's] investigation into the waitresses' concerted activity and therefore cannot be separated from [the employer's] unlawful questions about the leader's specific identity, which were also part of the investigation.

*Club Monte Carlo Corp.*, 280 N.L.R.B. 257, 257 (1986).

222. In *Kolkka*, the Board held that a "refusal to comply once with an unlawful order to cease engaging in Section 7 activity is not transformed into insubordination simply because the refusal is repeated each time the unlawful order is reiterated." 335 N.L.R.B. 844, 849 (2001).

Giving employees unfettered discretion to post about the workplace—even in a concerted manner—without consequences will also leave employers helpless to stop cyber-bullying and harassment between co-workers. Although much attention has been given to cyber-bullying in schools because of its devastating effects,<sup>223</sup> it exists among adults in the workforce as well.<sup>224</sup> Under the NLRB and General Counsel’s interpretation of the statute, an employer who takes action against online harassment between employees may risk violating section 7.

As a result of these considerations, social media may call for different protection than other forms of public employee concerted activity. Previously, employees were protected when they went on strike, picketed, handed out pamphlets, or engaged in many other protected activities in public. The employees or third parties could, if they chose to do so, spread word of the event well beyond the walls of the workplace.

Public social media posts, especially those not directed at co-workers are different from these other means of expression.

*B. To Protect the Employer’s Business Interests while Allowing Employees to Exercise their Section 7 Rights, the NLRB Should Consider the Form of Employee Protests*

When applying section 7 to activity on the Internet, courts should adopt a test that would protect the rights of employees to discuss problems that arise in the workplace while allowing the employer to respond to those problems and control its public image, when possible.<sup>225</sup> The NLRB has broad discretion under the NLRA to make sure the law effectuates its purpose in new scenarios. In *Eastex, Inc. v. NLRB*, the Supreme Court refused to “delineate precisely the boundaries of the ‘mutual aid or protection’ clause,” reasoning that the task should be one “for the Board to

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223. See generally Stacy Katz Carchman, *Cyberbullying: A Growing Threat Among Students*, SUN SENTINEL, Feb. 11, 2009, [http://articles.sun-sentinel.com/2009-02-11/news/0902100110\\_1\\_cyber\\_bullying-school-students-cell-phones](http://articles.sun-sentinel.com/2009-02-11/news/0902100110_1_cyber_bullying-school-students-cell-phones).

224. Michelle Singletary, *Can Complaining About Your Job on Facebook Get You Fired?*, WASH. POST, Sept. 15, 2011, at A14 (employee who was the subject of discharged co-workers’ public Facebook discussion said the conversation was “cyber-bullying” and “harassing behavior”).

225. Other commentators have suggested that employers could more carefully craft their social media policies to address the issue. See Carson Strega-Flora, *Wait! Don’t Fire That Blogger! What Limits Does Labor Law Impose on Employer Regulation of Employee Blogs?*, 2 SHIDLER J. L. COM. & TECH. 11, 14 (2005). However, policies that have a “chilling effect” on employee speech may be readily struck down as violating the NLRA. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998) (“mere maintenance” of a policy that tends to chill employees’ exercise of their right to engage in concerted activity violates the NLRA). For a discussion of possible legislative amendment to limit employee rights to conduct certain activities on the Internet, see Bielan, *supra* note 39, at 157.

perform in the first instance as it considers the wide variety of cases that come before it.”<sup>226</sup> In that case, the Court suggested that, “even when concerted activity comes within the scope of the ‘mutual aid or protection’ clause, *the forms such activity permissibly may take may well depend on the object of the activity.*”<sup>227</sup> In this excerpt, the Court suggested that the Board could use its substantial discretion to find that the purpose of the Act would be best effectuated in certain circumstances by considering the *form* of the concerted activity. In the social networking cases, such a test would balance the employer’s interest in putting forth a positive online image with the employee’s right to engage in concerted activity to make changes in the workplace.

This language from *Eastex* has been cited in only one other opinion: *Pacemaker Yacht Co. v. NLRB*.<sup>228</sup> In that case, employees were discharged for instigating a strike to protest the failure of a company welfare fund to pay claims to employee beneficiaries.<sup>229</sup> The Third Circuit resolved the dispute without deciding whether the company violated section 7. In concurrence, Judge Garth repeated the well-established rule that “employee activities aimed at improving terms and conditions of employment can lose their Section 7 protection if carried out in a disruptive or otherwise inappropriate manner.”<sup>230</sup> Then, he generalized the trend of circumstances that leads to an employee losing protection. “[T]he general rule adopted by the courts has been to look at a variety of factors, including the reasonableness of the means of protest, in order to determine if the employees’ activities were protected.”<sup>231</sup> Judge Garth articulated a rule that would deny employees protected status “when the actions of employees unnecessarily and unfairly inflict economic harm on an employer who is neither responsible for the complained-of condition nor has any power to correct it.”<sup>232</sup>

This rationale would be particularly applicable to the social networking cases and lead to fairer results. Employee activity on a social network can have unfortunate effects because the material could go viral or be

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226. 437 U.S. 556, 568 (1978).

227. *Id.* at 568 n.18 (emphasis added). This reasoning was consistent with Professor Getman’s suggestion that employees’ concerted activity that imposes “economic pressure” on the employer “should be unprotected.” Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1221 (1967).

228. 663 F.2d 455, 463 (3d Cir. 1981) (Garth, J., concurring).

229. *Id.* at 456.

230. *Id.* at 461.

231. *Id.* at 462 (quoting *Abilities & Goodwill, Inc. v. NLRB*, 612 F.2d 6, 9 (1st Cir. 1979)) (internal quotation marks omitted).

232. *Id.*

broadcast to customers that the employee connects with online. At some expense to the employer's public image, the opportunity for unfettered online social networking activity only marginally furthers the cause of employees.<sup>233</sup> Using discretion under section 7 to scrutinize the form of the concerted activity in relation to its purpose would reward good behavior among employees who bring problems directly to supervisors, while allowing them to continue taking stronger measures when necessary.<sup>234</sup> Such a standard would neither "nullify the right to engage in concerted activities" nor "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions."<sup>235</sup> It would continue to allow employees to use technology, such as private e-mail messages or social network communications,<sup>236</sup> to organize concerted activity.<sup>237</sup>

Such a test also would not be inconsistent with precedents, which already regulate the form of employee-concerted activity by withdrawing protection in a number of circumstances. Section 7 protection is denied if employees are violent,<sup>238</sup> unlawful,<sup>239</sup> in breach of contract, or disloyal.<sup>240</sup> Courts have recognized the importance of the employer's public image in the context of Title VII discrimination<sup>241</sup> and other provisions of section

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233. "[E]mployers can only hope the NLRB will find a common sense balance between the employee's right to concerted activity under the NLRA, and the employer's right to keep workplace issues reasonably private and out of the public eye." Evans, *supra* note 137.

234. For example, in *B & P Motor Express Inc. v. NLRB*, the employees first discussed their various complaints against the employer, then brought their concerns to their office manager. 413 F.2d 1021, 1022 (7th Cir. 1969). When the situation went unresolved, they went a step further and spoke with the terminal manager. *Id.* at 1023. Finally, still unsatisfied at their company's unresponsiveness, they walked off the job. *Id.* The court held that their activities were protected under section 7. *Id.*

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

236. *See, e.g.*, *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 59–61 (D.C. Cir. 2009); *Timekeeping Sys., Inc.*, 323 NLRB 244 (1997); *see also Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002) (protecting under the Railway Labor Act statements that an employee made on a secure website); *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003) (protecting from tort liability an employee who sent to his co-workers e-mails that were critical of his employer).

237. Critics may allege that limitations on the form of concerted activity would simply be "judicial hostility toward employees using alternative methods of bringing about change in the workplace." Bill Hylen, *NLRB v. Motorola: A Narrow Interpretation of the "Mutual Aid or Protection" Clause of the National Labor Relations Act*, 26 ARIZ. ST. L.J. 253, 253 (1994).

238. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939).

239. *Hagopian & Sons, Inc. v. NLRB*, 395 F.2d 947, 952 (6th Cir. 1968).

240. *Tex. Instruments, Inc. v. NLRB*, 637 F.2d 822, 830 (1st Cir. 1981).

241. *Brown v. F.L. Roberts & Co.*, 419 F. Supp. 2d 7, 16 (D. Mass. 2006) (employer would suffer undue hardship through damage to its "desired public image" if it were required to allow an employee to have contact with customers, where that employee did not shave or cut hair because of Rastafarian beliefs); *see also Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004) (citing cases supporting the proposition that "[c]ourts considering Title VII religious discrimination claims have

7.<sup>242</sup> Additionally, in the context of section 7 as it applies to hospitals, courts apply special rules that limit the form of the employee-protests by not protecting conversations that occur around patients.<sup>243</sup>

Given these precedents and the special problems that concerted activity can create on the Internet, courts should not extend section 7 protection to employees who, instead of preparing for some constructive activity at work, choose at the outset a form of concerted activity that is harmful to their employer's public image. Particularly when these employees show little interest in taking further concerted activity to change a term or condition of employment, the protection does not seem to further the purpose of the NLRA.

## VI. CONCLUSION

The NLRB in *Timekeeping Systems* noted that “unpleasantries uttered in the course of otherwise protected concerted activity do not strip away the Act's protection.”<sup>244</sup> In that case, however, the “unpleasantries” were sent through a private email to other employees—not over a medium that intrinsically would broadcast the information to the outside world.<sup>245</sup> The Board is tasked with the “responsibility to adapt the Act to changing patterns of industrial life,”<sup>246</sup> and as the social network cases increase in number, courts should take special care to make sure the litigants meet the burdens of precedent. Case law has placed important elements into the definition of concerted, protected activity, and those requirements will ensure that the statute does not protect new forms of online discussion that would not be protected if they occurred in similar “offline” mediums. Employer policies and practices that result in the termination of employees who take their grievances to the Internet do not hinder the employees' ability to constructively communicate or engage in concerted activity.

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also upheld dress code policies that . . . are designed to appeal to customer preference or to promote a professional public image”).

242. For example, an employee has a right under section 7 to wear union insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795–804 (1945). However, this right may “be curtailed if the employer makes an affirmative showing that the union insignia that the employee seeks to wear will negatively impact a certain public image that the employer seeks to project.” *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1217 (6th Cir. 1997).

243. “These rules require striking a balance between the employees' statutory rights and the needs of the health care employer to provide undisrupted patient care in a tranquil atmosphere. Thus, the Board has held that health care facilities may prohibit solicitation in immediate patient care areas.” *Aroostook Cnty. Reg'l Ophthalmology Ctr.*, 317 N.L.R.B. 218, 218 (1995).

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

245. *Id.* at 246.

246. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

Rather, they restrict discussions to non-public forums that are equally accessible and more constructive for people who want to change the terms and conditions of their job.

The NLRB has “substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA,”<sup>247</sup> but now that the agency is logged on to cyberspace, it is sanctioning activities that arguably fall outside what precedent protects. If the law will “protect an employee from discipline or discharge related to any social media conduct,” it will go far beyond what the NLRA should accomplish.<sup>248</sup> The social network cases give the agency an opportunity to adopt a framework that will allow employees and employers to use the Internet in ways that will help make the workplace better for everyone.

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247. Prill v. NLRB, 755 F.2d 941, 952 (D.C. Cir. 1985).

248. Shilling, *supra* note 26.

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