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# CONCERTED ACTIVITY STANDARDS: EMPLOYEE RIGHTS AT THE EMPLOYER'S DETRIMENT

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## EDITORIAL BOARD



# *CONCERTED ACTIVITY STANDARDS: EMPLOYEE RIGHTS AT THE EMPLOYER'S DETRIMENT*

Written By

Countess D. Dudley

## I. INTRODUCTION

Going to work on a daily basis can become a mundane task that employees continually repeat. However, employees rarely stop to think about all of the laws that protect them and give them rights at work. If an employee is injured on their job, they can more than likely rely on workers' compensation to cover their medical expenses.[1] Although unable to work, the employee would still be able to receive livable wages.[2] Minimum wage law ensures that nonexempt employees are paid a minimum of $7.25 per hour.[3] Employees can even plan and save for retirement.[4] If an employee does not like their job or career, they have the option to go and change it.[5]

Now, take a brief moment and think about a work environment where all your protections and rights are taken away. Think about a work environment where there are no laws to protect you from an abusive boss. Although hard to conceptualize in a society saturated with laws and built-in protection, there was once a time when employees did not have any rights. In fact, at its earliest stage, the employer-employee relationship was seen as a master-servant relationship.[6] Employees were not able to leave a job because there was no guarantee where or when they would get another one. Employees attempted to join unions to improve their work conditions but were met with opposition from their employers.[7] Employers would often retaliate against employees who

[1] U.S. Dep't of Pub. Safety, *Workers' Compensation*, https://www.dol.gov/general/topic/workcomp.
[2] *Id.*
[3] U.S. Dep't of Pub. Safety, *Minimum Wage*, https://www.dol.gov/general/topic/wages/minimumwage.
[4] U.S. Dep't of Pub. Safety, *Retirement Savings*, https://www.dol.gov/general/topic/retirement/retirementsavings.
[5] Alana Samuels, *How the relationship between employers and workers changed*, L.A. TIMES, Apr. 7, 2013, http://articles.latimes.com/2013/apr/07/business/la-fi-mo-harsh-work-history-20130405.
[6] David Yamada, *"Master and servant": The roots of American employment law*, MINDING THE WORKPLACE, Sept. 23, 2013, https://newworkplace.wordpress.com/2013/09/23/master-and-servant-the-roots-of-american-employment-law/.

[7] Irvin Berstein, *Americans in Depression and War*, U.S. DEP'T OF LAB., https://www.dol.gov/oasam/programs/history/chapter5.htm.

attempted to join unions.[8] The opposition between the employers and employees often led to employees going on strike.[9]

The National Labor Relations Act was enacted at a time when employer-employee tensions were high.[10] This act gave employees an opportunity to improve their work conditions, unlike before.[11] Under the Act, employees were free to unionize without fear of retaliation from their employer. A board was even created to ensure employers abided by the Act.[12] The Act, however, only protected employee's concerted activity from the employer's retaliation. Surprisingly, the law created back then is still in effect now. The only challenge is that society is not that same as it was when the Act was created. Technology and social media have added a layer of difficulty in understanding and enforcing the Act. Additionally, the Act continues to expand employee's rights and harshly diminishes what employers can do. This article will discuss how the Act was not equipped to keep up with the current social media-driven society and how the Act, created to aid employees, goes too far and essentially takes away an employer's right to govern the workplace.

## II. NATIONAL LABOR RELATION BOARD BACKGROUND

Before the Great Depression, American employees fought to have the right to organize unions.[13] Employers declined to recognize or bargain with unions, which resulted in employee strikes.[14] The National Labor Relations Act ("NLRA"), enacted in 1935, was created to prohibit private employers from retaliating against employees who joined unions.[15] Along with not being

[8] *Id.*
[9] *Id*.
[10] Nat'l Lab. Rel. Board, *National Labor Relations Act*, https://www.nlrb.gov/resources/national-labor-relations-act.
[11] *Id.*
[12] *Id.*
[13] Kimberly Phillips-Fein, *How employers broke unions by creating a culture of fear*, WASH. POST. (Aug. 2, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/08/02/how-employers-broke-unions-by-creating-a-culture-of-fear/?utm_term=.fe1b1d663760.

[14] *Id.*
[15] *Supra* note 10.

able to retaliate against employees who joined unions, employers were prohibited from interfering with collective bargaining through unions and concerted activities, like striking.[16] The Act protects employees that do not hold a managerial position, whether they are in the union or not.[17] To ensure employee rights were not abused, even after NLRA was enacted, the National Labor Relations Board was created ("NLRB") or ("Board").[18] The Board, made up of a small group of five members, is responsible for "acting as a quasi-judicial body in deciding cases."[19] Any employee who believes their employment rights have been violated may file a charge with the Board, which investigates and collects evidence.[20] Disputes that have not been settled go before the Administrative Law Judges ("ALJ").[21] ALJ's opinions can be appealed.[22] The ALJ's decisions are not "binding legal precedent," "unless…adopted by the Board."[23] The ALJs and the Board determine whether an activity is concerted before they take any action against an employer.

## III. UNDERSTANDING CONCERTED ACTIVITY

Not all activity is protected under the NLRA, however. Section 7 of the NLRA provides that employees conduct is safe as long as it is a concerted activity.[24] The NLRA established that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .[25]

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[16] *Id.*
[17] Nat'l Lab. Rel. Board, *Rights We Protect*, https://www.nlrb.gov/rights-we-protect.
[18] Nat'l Lab. Rel. Board, *Who We Are*, https://www.nlrb.gov/who-we-are.
[19] *Id.*
[20] Nat'l Lab. Rel. Board, *Investigate Charges*, https://www.nlrb.gov/what-we-do/investigate-charges.
[21] *Id.*
[22] Nat'l Lab. Rel. Board, *Administrative Law Judge Decision*, https://www.nlrb.gov/cases-decisions/administrative-law-judge-decisions.
[23] *Id.*
[24] 29 U.S.C.S. § 157.
[25] *Id.*

Concerted activity is a challenge to define because the language in the Act is subject to various interpretations. Employees who act according to Section 7 are safe from employer retaliation under Section 8(a)(1).[26] Interpretation of Section 7 of the NLRA is analyzed in two separate ways.[27] First, the employee's activity has to be considered "concerted," and second, the employee's activity has to be considered for the "mutual aid or protection" of fellow employees.[28] Section 7 of the NLRA failed to define "concerted," which has left it to judicial interpretation and the Board's interpretation.[29] Concerted activities are interpreted as "formation of or assistance to a group, or action as a representative on behalf of a group."[30] Concerted generally includes "two or more employees" working together in order to "improve…working conditions."[31] Individual acts are not automatically excluded from protection under Section 7.[32] For example, individuals who act alone will be protected if they serve as a representative on behalf of others or other employees are involved with the individual's act.[33] The problem comes in when interpretations change with respect to the meaning of concerted activity. Case law shows that interpretations on how to define "concerted" were and still are in a constant state of flux, continuously yielding different outcomes.

[26] *Id.*
[27] Ronald Meisburg, *NLRB Divides Sharply on Employee Concerted Activity for "Mutual Aid or Protection*," THE NATIONAL LAW REVIEW (Jan 13, 2017), http://www.natlawreview.com/article/nlrb-divides-sharply-employee-concerted-activity-mutual-aid-or-protection.
[28] *Id.*
[29] Meyers Industries Inc., 268 N.L.R.B. 493, 493 (1984).
[30] *Id.* at 494.
[31] Nat'l Lab. Rel. Board, *Protected Concerted Activity*, https://www.nlrb.gov/rights-we-protect/protected-concerted-activity.
[32] *Id.*
[33] *Id.*

## A. CONCERTED ACTIVITY IN PRACTICE

### 1. THE OLD CONCERTED ACTIVITY STANDARD: ALLELUIA

One of the first standards for concerted activity was developed in the *Alleluia* case. Henley, an employee, began working at a facility.[34] Henley complained about safety conditions, lack of training, and lack of management communication with Spanish-speaking employees.[35] Henley was informed the facility would be closing and was transferred to another location with similar conditions.[36] As a result, he complained to OSHA regarding the facility conditions.[37] Before Henley sent the letter to OSHA, there was "no evidence that at any time prior to complaining to Respondent or sending this letter Henley discussed the safety problems with the other employees, solicited their support in remedying the problems, or requested assistance in the preparation of the letter."[38] The facility reprimanded Henley and terminated him after an OSHA inspector visited the facility.[39]

The Administrative Judge found no evidence that Henley's conduct was an "outgrowth or extension" of speaking with other employees and no evidence that he even knew of other employee's grievances.[40] Thus, the Administrative Judge did not classify Henley's conduct as concerted, and his complaint was dismissed.[41] The General Counsel disagreed, finding that Henley's conduct was an "obvious mutual concern" and therefore no requirement of explicit mutual interest was required.[42] The *Alleluia* case created the concept of "implied consent," which

[34] Alleluia Cushion Co., Inc., 221 N.L.R.B. 999 (1975).
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 1000.
[41] *Id.*
[42] Alleluia Cushion Co., Inc., 221 N.L.R.B. 999, 1000 (1975).

is considered concerted because it has the potential to benefit all employees.[43] This interpretation of concerted is broad and does not require corroboration or concrete evidence that the activity was for a mutual or community benefit with other employees. A broader interpretation could be problematic because employee's activity could be protected if it gives the slightest appearance of being tied to a collective grievance. The Board recognized this potential problem and created a new standard for concerted activity.

**2. THE NEW CONCERTED ACTIVITY STANDARD: MEYERS**

In the *Meyers* case, however, the ALJ quickly abandoned the standard for concerted activity established in *Alleluia*.[44] In *Meyers*, the Respondent hired Prill, who was assigned to drive trucks that transport boats across the country.[45] Prill filed complaints regarding the truck's brakes and steering.[46] Another employee, Gove, also filed a complaint regarding the same truck, and Prill overheard his complaint.[47] The mechanic was unable to fix the truck, and while Prill was on a job, the truck was cited for defects.[48] The citation was sent back to the office.[49] Still driving the defective truck, Prill was later involved in an accident because of the malfunctioning brakes.[50] Prill contacted management and was instructed to get the truck serviced.[51] Without management's knowledge, Prill contacted the Tennessee Public Service Commission to get the truck inspected.[52]

[43] *Id.*
[44] Meyers Industries Inc., 268 N.L.R.B. 493, 493 (1984).
[45] *Id.* at 504.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 505.
[52] Meyers Industries Inc., 268 N.L.R.B. 493, 505 (1984).

The Commission issued a citation, and the truck was declared out of service.[53] Prill was later questioned as to why he contacted the Commission and was terminated.[54]

Using the standard of concerted activity established in *Alleluia*, the judge erroneously found that Prill's conduct could be concerted activity because it was a "common concern," much like the scenario in *Alleluia*.[55] The judge also found that the Respondent violated Section 8(a)(1) by terminating Prill, whose conduct was protected under Section 7.[56] The Board, contrary to the judge, found that the Respondent did not violate Section 8(a)(1) because Prill's conduct was not concerted activity.[57] The Board also rejected the judge's reliance on *Alleluia*.[58] Prill acted alone and on his behalf.[59] The judge viewed Prill's conduct as concerted activity because Gove filed a similar complaint regarding the same truck upon which Prill had previously filed a complaint.[60] Additionally, Prill overheard Gove's complaint because they were in the office at the same time, but there is no evidence to suggest that they discussed their complaints with one another.[61] Thus, the Board found that the employees were individually concerned and made individual complaints.[62] The interpretation of concerted, based on *Meyers*, would require some evidence or showing that the employee acted to resolve a common grievance.

The NLRB upheld their decision after Prill filed a petition for review. On remand, the Board examined the effect their decision had on interpreting concerted activity. The Board held:

> The new definition will be strictly construed to include only activity clearly joined in or indorsed [sic] by other employees. Thus, to find that a complaint by

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[53] *Id.*
[54] *Id.*
[55] *Id.* at 498.
[56] *Id.*
[57] *Id.*
[58] Prill v. NLRB, 755 F.2d 941, 942 (1985).
[59] *Id.* at 947.
[60] Meyers Industries Inc., 268 N.L.R.B. 493, 508 (1984).
[61] *Prill*, 755 F.2d at 947.
[62] *Id.*

> an individual employee was made "on behalf of" others, the Board in effect will require that the complaint have [sic] been specifically authorized by other employees. Further, a single employee who files a complaint with a state agency will not be held to have engaged in concerted activities, regardless of how clearly his concern is shared by other employees.[63]

The Board argued that the language in Section 7 was originally meant to tie conduct to a common goal and not individual action.[64] *Pre-Alleluia*, the Board maintained the common goal approach to concerted activity, with the *Alleluia* case being the outlier.[65] Thus, the Board argued that concerted activity, as interpreted in *Alleluia*, is contrary to the interpretation set forth in Section 7.[66] Concerted activity should be interpreted under the objective standard established by cases before *Alleluia*.[67] The Board also examined the *Meyer* case in conjunction with the Supreme Court's interpretation of what individual conduct can be considered concerted activity in *City Disposal*.[68] In both *Alleluia* and *City Disposal*, truck drivers were terminated for refusal to drive trucks with defective brakes.[69] The truck driver in *City Disposal*, however, had a collective bargaining agreement.[70] The Supreme Court's decision, in this case, was determined by their interpretation of the "Interboro doctrine."[71] An "Interboro doctrine" is when "an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as "concerted activity" and therefore accorded protection under §7."[72] The truck driver in *City Disposal* was protected under the Interboro doctrine.[73] The Sixth Circuit, however, held that the "Interboro doctrine" was

[63] *Prill*, 755 F.2d at 948-49.
[64] *Id.* at 949.
[65] *Id.*
[66] *Id.* at 950.
[67] *Id.*
[68] NLRB v. City Disposal Systems, Inc. 465 U.S. 822, 830 (1984).
[69] *Id.* at 828.
[70] *Id.* at 829.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 842.

inconsistent with concerted activity.[74] The Supreme Court reversed stating that there is no "narrowly tailored interpretation to follow" because it can be subject to various meanings.[75] In fact, the Supreme Court agreed that the interpretation of concerted activity in *Meyers* effectively emphasized the "common goal" in Section 7.[76]

The Board continues to add to a long list of conduct that can be protected under concerted activity. The new additions could potentially harm work environments and change work relationship dynamics. In 2012, the Board held a "courtesy policy" to be unlawful.[77] The Board has "continued to create more and more tension between the NLRA and employers' legitimate interests in maintaining and enforcing workplace guidelines governing courtesy in a nondiscriminatory fashion."[78] As a precautionary measure, employers should carefully examine their existing "courtesy policy" to ensure they meet NLRA requirements.[79] The Board is only concerned with how an employee would interpret a courtesy policy.[80] If the courtesy language is vague, an employee could interpret it to prohibit protected behavior under Section 7, it is deemed unlawful.[81] In 2014, the Board put employers in tough positions by allowing concerted activity to include profanity.[82] This presents a challenge to employers, who would normally terminate an employee due to their conduct, but can't because the employee is safe within the confines of

[74] *Id.* at 825.
[75] *Id.* at 826.
[76] *Id.*
[77] Aurora Kaisor, The Death of Courtesy and Civility Under the National Labor Relations Act, SociallyAwareBlog (Oct. 1, 2014), http://www.sociallyawareblog.com/2014/10/01/the-death-of-courtesy-and-civility-under-the-national-labor-relations-act/.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] Stuart Buttrick, *Profanity Protection: It's Now A 'Concerted Activity*,' LAW360 (June 20, 2014, 11:23 AM), https://www.law360.com/articles/549362/profanity-protection-it-s-now-a-concerted-activity.

protected, concerted activity. Employers have to measure how far is too far for an employee to go when handling a dispute at work.

### 3. PLAZA AUTO CENTER

The *Plaza Auto Center Inc.* case illustrates the freedom employees are given that is reasonably tied to concerted activity. In *Plaza Auto Center Inc.*, Aguirre was hired as a salesman for a company called PAC.[83] While working a tent sale, Aguirre inquired about lunch and bathroom breaks, and the manager replied "you're always on break buddy…you just wait for customers all day."[84] The manager also told Aguirre that he could leave if he did not like the policy.[85] At the next tent sale, Aguirre inquired about compensation, and when asked to take a bathroom and lunch break, the manager said no.[86] Aguirre sold a vehicle that had a normal commission of $1,000 to $2,000, but he only received a $150 check.[87] Aguirre continued to inquire about his position, compensation, and a break schedule. A manager later reported that Aguirre always complained, and Aguirre was told that he asked too many questions.[88] Aguirre continued to inquire about his position, and the manager replied the Aguirre could leave the company.[89] Aguirre became angry and pushed office furniture around.[90] Aguirre also used profanity, which was directed at the manager.[91] Aguirre told the manager that if he were fired, "Plaza would regret it."[92]

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[83] Plaza Auto Ctr., Inc. v. NLRB, 664 F.3d 286, 289 (9th Cir. 2011).

[84] *Id.*
[85] *Id.* at 290.
[86] *Id.*
[87] *Id.*
[88] John Ferrer, *NLRB rules that employee who launched "f-bombs" at company owner did not lose protection under Federal Labor Law*, LEXOLOGY (June 13, 2014), http://www.lexology.com/library/detail.aspx?g=fb40741a-b461-401b-910b-abf8b2caf598.
[89] *Id.*
[90] *Id.*
[91] Plaza Auto Ctr., Inc. v. NLRB, 664 F.3d 286, 289 (9th Cir. 2011).
[92] *Id.*

Although Aguirre lost his temper, the court still had to evaluate whether he was afforded protection under Section 7. The Board considers four factors, which were established in *Atlantic Steel Company*, before they terminate an employee's protection under section 7.[93] The Board considers: "(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 the employer's unfair labor practice."[94] As a sub-rule to the first element, the court considered the rule in *Stanford Hotel*.[95] The rule states that, "[w]hen the discussion occurs in a private location away from the normal work area and other employees, such that it causes no disruption to order or discipline in the workplace, this factor normally weighs in favor of protection."[96] Since the meeting was held in the manager's office, the court concluded that Aguirre met the first element.[97] The subject matter of the conversation was directly related to Aguirre's position as a salesman.[98] The court also agreed, stating the subject matter should not be segregated from his position at the company.[99] Additionally, the nature of Aguirre's outburst remained protected, as the manager often used profanity when speaking with employees.[100] Aguirre did not physically threaten or make physical contact with the manager.[101] Aguirre's outbursts were provoked because of how management treated him.[102] The court found that Aguirre was still entitled to protection under Section 7.[103] Employees should have the right to improve their work conditions, but an act that

[93] Atlantic Steel Company, 245 N.L.R.B. 814, 816 (1979).
[94] *Id.*
[95] *Plaza Auto Ctr., Inc*., 664 F.3d at 292.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 293.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 295.
[103] Plaza Auto Ctr., Inc., 664 F.3d at 296.

allows employees to use profanity and to be hostile is counterproductive and will lead to more workplace tension.

## B. WHAT IS NOT CONSIDERED CONCERTED ACTIVITY

### 1. ATLANTIC STEEL COMPANY

Protection under Section 7 has many limitations that employees should consider before engaging in what they believe to be concerted activity. Employers wanting to know what activity or conduct is not protected should look at the limited scope in *Atlantic Steel Company*. In *Atlantic Steel Company*, an employer was found to have violated Section 8(1) and (3), but the employee lost protection under the NLRA because of "opprobrious conduct" unrelated to his grievance.[104] Employee, Chastian, approached his employer regarding overtime work based on seniority.[105] The employer told the employee he assigned overtime work to everyone, including temporary employees.[106] The employee then called his employer an obscene name, which resulted in the employee's suspension and termination.[107] The employee argued his termination was a result of the employer's retaliation, after the employee had started a petition over benefits.[108] The arbitrator concluded, based on the evidence, that the employer had good cause to terminate the employee, based on the employee's previous suspensions and work performance.[109] The employee's original question regarding overtime was legitimate and answered by the employer.[110] Obscene conduct, even if tied to a concerted activity, will not be protected under the Act.

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[104] Atlantic Steel Company, 245 N.L.R.B. 814, 816 (1979).
[105] *Id.* at 818.
[106] *Id.*
[107] Keith Brodie, *Reality vs. "Objectivity" – The BLRB's Use of Atlantic Steel to Sanction A Coarsening Of the Workplace*, THE NATIONAL LAW REVIEW (June 11, 2014), http://www.natlawreview.com/article/reality-vs-objectivity-nlrb-s-use-atlantic-steel-to-sanction-coarsening-workplace.
[108] *Id.*
[109] Ferrer, *Supra* note 88.
[110] *Id.*

### 2. MUSHROOM TRANSPORATION CO.

In *Mushroom Transp. Co.*, the employee was not protected under Section 7 of the NLRA, in part, because his activity was not considered a "group action."[111] The employer maintained a list of temporary truck drivers.[112] The company's president removed a temporary truck driver employee from the work list.[113] The Board, after an investigation, came to the conclusion that the employee was fired because he told other drivers that "they were not getting what they were entitled to under the existing union contract."[114] The employee would often advice other drivers of their rights, which the Board considered to be concerted activity and protected under Section 7.[115] The Board ordered the employer to reinstate the employee.[116] The court, however, did not find the employee's conduct concerted because it was not "initiating or inducing or preparing for group action."[117] There was no evidence that group action would be produced from the employee's conversations.[118] The Board's order to reinstate the employee was set aside.[119] In these cases, it is fairly easy to determine whether or not an employee was engaged in concerted activity, but when employee's concerted activity rights collide with social media, it is not so easy to determine what activity should be protected.

## IV. SOCIAL MEDIA AND CONCERTED ACTIVITY

The workplace and social media are intersections that that cannot be separated. At its inception, the Board could not have imagined how difficult it would be to categorize what behavior is protected under Section 7 in a world driven by technology and social media. As the workforce

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[111] Mushroom Transp. Company, Inc., 330 F.2d 683 (3d Cir. 1964).
[112] *Id.* at 684.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 685.
[118] *Id.*
[119] Mushroom Transp. Company, Inc., 330 F.2d 683, 686 (3d Cir. 1964).

changes, interpretations of what conduct should be protected as concerted activity will also change. The Board and employees have expanded what conduct falls under concerted activity within social media. Employees are not grabbing white signs and collectively going on strikes, but employees are grabbing their mobile devices and getting on their computers to discuss workplace frustrations and concerns.

**1. HISPANICS UNITED OF BUFFALO, INC.**

Cole-Rivera and Cruz-Moore were hired by the Respondent to help domestic violence victims.[120] Both employees frequently used their phones to communicate with each other throughout the workday.[121] Cole-Rivera admitted that Cruz-Moore would criticize other employees by phone, and she was also vocal about their performance at work.[122] While at home, Cole-Rivera received a message sent from Cruz-Moore, which expressed Cruz-Moore's desire to speak with the Executive Director regarding employee performance.[123] Cole-Rivera responded to Cruz-Moore's message and posted this message on Facebook from her home computer:

> "Lydia-Cruz, a coworker feels that we don't help our clients enough at [Respondent]. I about had it! My fellow coworkers how do u feel?"[124]

Four employees, who were not at work at the time, responded to Cole-Rivera's Facebook post.[125] Cruz-Moore, on defense after seeing the post, responded that Cole-Rivera had told a lie.[126] Cruz-Moore complained to the supervisor, and as a result, Cole-Rivera and the four employees who

[120] Hispanics United of Buffalo, Inc., 2012 NLRB LEXIS 852 (2012).
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Steven Michael, *NLRB holds employer unlawfully discharged employees due to critical Facebook posts*, LEXOLOGY (Dec. 28, 2012), http://www.lexology.com/library/detail.aspx?g=0fcc6ee9-cb35-4949-998a-fcfb00e229dd.
[126] *Id.*

responded to her Facebook post were all terminated.[127] The supervisor argued that that Cole-Rivera's Facebook post violated their "zero tolerance" policy for "bullying and harassment."[128] The judge applied the interpretations of Section 7 and Section 8(a)(1) from the *Meyers* cases.

The court uses four elements to determine if the employer violated Section 8(a)(1).[129] First, the employee conduct has to be "concerted" as interpreted in Section 7.[130] Second, the employer knew of the concerted activity.[131] Third, the activity is protected under the Act.[132] Fourth, discipline resulted from the employee's concerted conduct.[133] By posting the message on Facebook after learning what Cruz-Moore planned to do, Cole-Rivera created a "mutual aid" among the employees.[134] Facebook posts regarding workplace conditions are protect as concerted activity under Section 7.[135] Cole-Rivera posted a work complaint on Facebook, and the response to her post from the four other employees showed that they all had a "common cause."[136] The Facebook post initiated group action among the employees to defend themselves.[137] The Respondent argued that the employees could still be fired because they violated the "zero tolerance" policy against bullying and harassment.[138] The judge found that the posts cannot be interpreted to fall within the "zero tolerance."[139] Even if the post did violate the "zero policy," "managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected

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[127] *Id.*
[128] Hispanics United of Buffalo, Inc., 2012 NLRB LEXIS 852 (2012).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Michael, *supra* note 125.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] Hispanics United of Buffalo, Inc., 2012 NLRB LEXIS 852 (2012).
[139] *Id.*

activity."[140] Terminating the employees based on their Facebook post comments violated Section 8(a)(1).[141]

**2. THREE D, LLC**

In addition to posting a comment to Facebook and responding, simply liking a Facebook post is also protected under concerted activity.[142] In *Three D, LLC*, three employees, who worked at the Respondent's restaurant, were not pleased that they had to pay more income taxes than expected.[143] The Respondent held a meeting to discuss employee complaints.[144] A former employee posted on her Facebook page:

> "It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it bc he still owes me about 2000 in paychecks."[145]

Spinella, still an employee for the Respondent, liked the Facebook post.[146] Sanzone, another employee also made a few comments in the conversation thread regarding the Respondent.[147] Sanzone was later terminated, and when asked why, the Respondent replied that she was not "loyal enough."[148] Spinella was also questioned because he had liked the Facebook post.[149] Spinella was terminated and the Respondent threatened to sue him for defamation for liking the post.[150]

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[140] *Id.*
[141] *Id.*
[142] Michael C. Harrington & Jennifer A. Corvo, *Facebook: Second Circuit "Likes" Employee Rights Under the NLRA*, THE NATIONAL LAW REVIEW (Oct. 28, 2015), http://www.natlawreview.com/article/facebook-second-circuit-likes-employee-rights-under-nlra.
[143] Chris Dimarco, *NLRB decision further solidifies Facebook 'likes' as concerted protected activity*, INSIDE COUNSEL (Aug 26, 2014), http://www.insidecounsel.com/2014/08/26/nlrb-decision-further-solidifies-facebook-likes-as.
[144] Nat'l Lab. Rel. Board, *Triple Play Sports Bar*, https://www.nlrb.gov/case/34-CA-012915.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*

Terminating the employees was illegal.[151] The Facebook post was protected as a concerted activity because there were several employees on the post, and the post explicitly mentioned the employer and employee grievances regarding taxes.[152] The employee's conduct met the standard as applied in *Meyers* as well.[153] Spinella liking the Facebook post was an expression of support.

**3. KNAUZ BMW**

Concerted activity on social media requires express support on the post. *Knauz BMW* is the first time where the Board affirmed employee termination because of a Facebook post.[154] This decision could give context to other employers in determining whether to fire an employee based on social media posts.[155] Becker, an employee at BMW, wrote several posts about his employer.[156] One posts criticized the food selection for the launch of a new car because he felt that it would hurt sales.[157] In another post, Becker made a joke about a 13-year-old boy who was injured after he accidently drove a car into a pond at a Land Rover car dealership.[158] Becker wrote, "This is your car: This is your car on drugs" and included a picture.[159] Becker was later terminated because of his post, and the Board initially defended him, arguing that his conduct was protected under concerted activity.[160] Becker's post about the Land Rover incident was not protected as a concerted activity.[161] When determining concerted activity on social media posts, it is important to look for

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[151] Brian Hall, *Second Circuit upholds NLRB finding that Triple Play Sports Grille unlawfully terminated employees for Facebook posting*, EMPLOYER LAW REPORT (Oct. 30, 2015), http://www.employerlawreport.com/2015/10/articles/labor-relations/second-circuit-upholds-nlrb-finding-that-triple-play-sports-grille-unlawfully-terminated-employees-for-facebook-postings/.
[152] *Id.*
[153] Nat'l Lab. Rel. Board, *Triple Play Sports Bar*, https://www.nlrb.gov/case/34-CA-012915.
[154] Ben James, *NLRB Sides With Car Dealer In 1st Facebook Firing Decision*, LAW360 (Oct. 1, 2012), https://www.law360.com/articles/383387/nlrb-sides-with-car-dealer-in-1st-facebook-firing-decision.
[155] Laura Friedel, *NLRB decision limit employer action over social media activity*, INSIDE COUNSEL (Apr. 24, 2014), http://www.insidecounsel.com/2014/04/24/nlrb-decisions-limit-employer-action-over-social-m.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] James, *supra* note 154.

"group actions of workers discussing or seeking to improve their terms and conditions of employment."[162] Becker's post had nothing to do with improving his or his co-worker's terms or conditions at the dealership.[163] *Knauz BMW* is a victory for employers who struggled to find a balance between what is and is not protected as concerted activity on social media.

The Board's stance on social media does not give employees guaranteed protection under Section 7. From the outcome of the cases, social media posts are more likely to fall under concerted activity if it centers around co-workers or previous office discussions pertaining to workplace terms and conditions.[164] Social media posts lose protection under Section 7 once it becomes "an individual complaint about working conditions specific to the employee and is not directed to co-workers or meant to induce group action."[165] The NLRA was tailored to workplace standards in 1953 and has not been able to keep up with the technology and social media revolution. Before the revolution, it was not difficult to determine whether there had been concerted activity among employees. Employees now have social media accounts, and concerted activity is harder to track. Concerted activity was found where an employee referred to an employer as a "scumbag" after a workplace dispute.[166] As established, Facebook posts and likes also qualify as concerted activity.[167] Allowing concerted activity to be found from Facebook likes basis it almost solely on probability. An employee could make a post regarding workplace concerns and receive likes from co-workers; however, it may not have been the employee's desire to "induce group action."[168]

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[162] *Id.*
[163] *Id.*
[164] Susy Hassan, *The NLRB's Evolving Stance on Regulating Employee Social Media Use*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/publications/blt/2011/11/01_hassan.html.
[165] *Id.*
[166] Nat'l Lab. Rel. Board, *Acting General Counsel releases report on social media cases*, https://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-releases-report-social-media-cases.
[167] Ginny Kipling, *'My Boss is a Scumbag*,' BENEFITSPRO, http://www.benefitspro.com/2011/05/26/my-boss-is-a-scumbag?t=employer-paid&slreturn=1484437147&page=4.
[168] Hassan, *supra* note 164.

Similarly, an employee who likes a post may not have even read it or accidentally liked it. The standard does not take into account the dynamics of social media. The Board, instead of creating another act which would encompass the dynamics of social media, has turned their attention to employers.

## V. SOCIAL MEDIA POLICY

### 1. LANDRY', INC.

The Board has turned their attention to language in employer's social media policy.[169] Maintaining updated employee handbook policies that meet federal regulations presents a challenge because there is no way to predict what the Board will accept or reject.[170] New members of the Board can be elected, and policies may, once again, change.[171] The Board released a memorandum to help employers avoid federal violations.[172] Even with the Board's handbook policy guidance, what is lawful and unlawful can quickly become muddled.[173] It is unlawful for an employee handbook to prohibit employees from voicing their opinion regarding unfavorable work conditions.[174] Prohibiting an employee from making "disparaging remarks" about employees and management would also be considered unlawful because it can be construed as a concerted activity under Section 7 of the NLRA.[175] Ambiguous rules are construed in favor of the employee.

[169] George Patterson, *NLRB Continues Aggressive Crackdown on Social Media Policies*, THE NATIONAL LAW REVIEW (Sep. 3, 2014), http://www.natlawreview.com/article/nlrb-continues-aggressive-crackdown-social-media-policies.
[170] Mike Underwood, *NLRB General Counsel provides roadmap for handbook policies*, EMPLOYER LAW REPORT (2015), http://www.employerlawreport.com/2015/04/articles/labor-relations/nlrb-general-counsel-provides-roadmap-for-handbook-policies/.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*

[176] Employer's, however, may be confused on how to draft handbook language after the decision in *Landry's Inc.*

The Boards' decision to affirm an Administrative Judge's decision to reject an employer's policy on social media should be considered an outlier.[177] Landry's Inc. operates different business chains nationwide, which includes Bubba Gump Shrimp Co. Restaurants.[178] Employees are subject to Landry's employee handbook.[179] Flores, an employee at Landry's, tendered a two-week resignation and later posted information online, which management became aware of at a routine shift meeting.[180] As a result of the post, the employee was relieved of her two-week resignation early.[181] All employees were notified of revisions to the employee handbook and a copy was available for all employees to view.[182] The employee bringing the charge against Landry's did not obtain a new copy of the handbook.[183] Landry's Inc., enacted a new social media policy, which was placed in the employee handbook and read:

> While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to other and their opinion, and not posting personal information about others unless you received their permission.[184]

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[176] Lafayette Park Hotel, 326 NLRB 824, 825 (1998).

[177] Alexander Nestor, *Surprise! NLRB Approves Employer's Challenged Social Media Policy*, THE NATIONAL LAW REVIEW (July 22, 2015), http://www.natlawreview.com/article/surprise-nlrb-approves-employer-s-challenged-social-media-policy.

[178] Nat'l Lab. Rel. Board, *Landry's, Inc. and its Wholly Owned Subsidiary Bubba Gump Shrimp Co. Restaurants*, Inc., https://www.nlrb.gov/case/32-CA-118213.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Nestor, *supra* note 177.

Employees and the General Counsel believed the employee handbook policy infringed on the employee's ability to engage in concerted activity and that it was a violation of Section 7 of the NLRA.[185] The Board found that the policy was lawful.[186] The policy could be interpreted as the employer urging employees to be "civil" with one another when discussing work-related topics on social media.[187] The Board also concluded that posting personal information could lead to morale problems, or harassment, which would have a negative effect on the business.[188]

**2. CHIPOTLE MEXICAN GRILL**

The Board recently found Chipotle Mexican Grill's social media policy unlawful and in violation of Section 7.[189] Chipotle forced a worker to delete Twitter posts that discussed work-related issues.[190] This case is significant because the Board reached into a "unionized" workspace.[191] Kennedy, an employee at Chipotle, posted an article that discussed hourly restaurant workers coming to work on snow days with no public transportation.[192] Kennedy also sarcastically replied to a Chipotle customer's tweet.[193] Kyllo, Chipotle's national media strategist, is responsible for reviewing the restaurant's social media accounts.[194] Kyllo contacted a manager, who in turn asked Kennedy to delete his Twitter posts.[195] The social media policy presented to Kennedy was outdated.[196] The policy included language which stated that "employees may not share confidential

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[185] *Id.*
[186] Jon Hyman, *NLRB Signs Off on Employer Social Media Policy as Legal*, WORKFORCE (Apr. 27, 2015), http://www.workforce.com/2015/04/27/nlrb-signs-off-on-employer-social-media-policy-as-legal/.
[187] *Id.*
[188] *Id.*
[189] Vin Gurrieri, *Chipotle Wrong To Make Worker Nix Tweets, NLRB Judge Says*, LAW360 (Mar. 15, 2016), https://www.law360.com/articles/771737/chipotle-wrong-to-make-worker-nix-tweets-nlrb-judge-says.
[190] *Id.*
[191] Richard Prosser, *NLRB Continues to Target Employers' Social Media Policies*, THE NATIONAL LAW REVIEW (Mar. 30, 2016), http://www.natlawreview.com/article/nlrb-continues-to-target-employers-social-media-policies.
[192] *Id.*
[193] Gurrieri, *supra* note 189.
[194] *Id.*
[195] *Id.*
[196] Prosser, *supra* note 191.

information online or anywhere else."[197] The policy also included language that "employees may not make disparaging, false, misleading, harassing, or discriminatory states about Chipotle or its employees."[198] The policy is vague and could be interpreted in a way that violates Section 7.[199] Social media policies should not be vague and should remain current according to the Board's standards.[200]

The standard for the Board's decision was based on the three-part test in *Lutheran Heritage Village-Livonia*.[201] An employer's policy or rules may violate the NLRA if: "[e]mployees would reasonably construe the rule's language to prohibit activity under Section 7 of the NLRA, included protected, concerted activity; [t]he rule was issued in response to union activity, or the rule was applied to restrict the exercise of Section 7 rights."[202] Chipotle's policy did not define confidential interpretation, which left it open to employee interpretation.[203] Additionally, the word disparaging, a synonym for derogatory, are statements that could be protected under Section 7, so it is unlawful to prohibit the word in the policy.[204] Other than Chipotle's policy, Kennedy's social media post was interpreted as concerted activity.[205] Although he did not speak with other employees about wages or inclement weather, his posts dealt with concerns that would pertain to all Chipotle's employees, not just himself.[206] Among other violations, the ALJ found that Chipotle violated Section 8(a)(1) by asking Kennedy to delete his Twitter post.[207]

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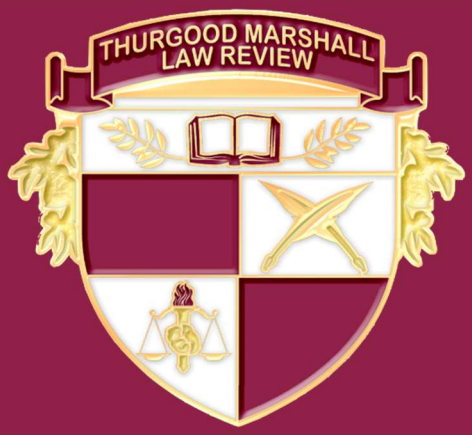
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] Allen Smith, *Old Chipotle Social Media Policy Was Unlawfully Vague*, SHRM (Aug 26, 2016), https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/chipotle-outdated-policy-vague.aspx.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*

## VI. CONCLUSION

The NLRA was created to bring an end to turbulent employer-employee work environments. The Act gave employees power to fight for better wages and terms. The Board has firmly upheld their duty to ensure that employers do not interfere with employee's rights to unionize. Giving employees more freedom under Section 7, however, came at the expense of employers and their ability to govern the workplace. Employees can call their employer a "scumbag" and even use profanity when speaking with their employer, as long as it pertains to concerted activity under Section 7. While the Act does not protect employees that display "opprobrious conduct," it will protect employees that stop just short of it. Name calling, and hostility should not be a prelude to better terms and conditions. The NLRA fails because it does not compel agreements between employers and employees.[208] Additionally, the Board places strict rules on employers to update their social media policy when the Board is still struggling to define concerted activity within social media. Section 7 unfairly focuses all of its attention on the employer when it should be shared equally with the employee. The Board should enact a more equitable solution that will foster agreements between employers and employees and not place all of the heavy lifting on the employer.

[208] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).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