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## Concerted Activity and Social Media: Why Facebook Is Nothing Like the Proverbial Water Cooler

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# Concerted Activity and Social Media: Why Facebook Is Nothing Like the Proverbial Water Cooler

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### I. INTRODUCTION

Mark Zuckerberg, the twenty-eight-year-old<sup>1</sup> founder and chief executive officer of Facebook,<sup>2</sup> said in 2010 that “[u]p until recently, the default on the Web has been that most things aren’t social and most things don’t use your real identity. . . . We’re building towards a Web where the default is social.”<sup>3</sup> And social it is: during the past eight years, people across the globe have developed a voracious appetite for social media and show no signs of slowing down.<sup>4</sup> Facebook, founded in 2004, had one billion active monthly users and 584 million daily users by the close of 2012.<sup>5</sup> Twitter,<sup>6</sup> founded as recently as 2006,<sup>7</sup> boasted over 500 million accountholders by 2012.<sup>8</sup> YouTube,<sup>9</sup> launched in 2005, currently facilitates over four billion video views per day.<sup>10</sup> Google+,<sup>11</sup> the newest addition, began in June 2011

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1. *World's Most Powerful People—Mark Zuckerberg*, FORBES, <http://www.forbes.com/profile/mark-zuckerberg/> (last updated Nov. 2011).

2. *Management*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=1> (last visited Jan. 11, 2013). Facebook is a social networking website that allows users to create personal profiles, add other users as “friends,” and communicate with those friends by sharing updates, photos, videos, and other content. See *Facebook—About*, FACEBOOK, <https://www.facebook.com/facebook?sk=info> (last visited Jan. 11, 2013).

3. Mark Zuckerberg, Founder, Facebook, Keynote Speech at the F8 Conference (Apr. 21, 2010), available at [http://www.livestream.com/f8conference/video?clipId=pla\\_e7a096b4-3ef9-466d-9a37-d920c31040aa](http://www.livestream.com/f8conference/video?clipId=pla_e7a096b4-3ef9-466d-9a37-d920c31040aa).

4. See *infra* text accompanying notes 5–10.

5. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Jan. 11, 2013).

6. Twitter is a social media website self-described as a “real-time information network” whereby users can post Tweets of 140 characters or less and connect with other users by following them and sending personal messages. *About*, TWITTER, [twitter.com/about](http://twitter.com/about) (last visited Jan. 11, 2013).

7. Nicholas Carlson, *The Real History of Twitter*, BUSINESS INSIDER (Apr. 13, 2011), [http://articles.businessinsider.com/2011-04-13/tech/29957143\\_1\\_jack-dorsey-twitter-podcasting](http://articles.businessinsider.com/2011-04-13/tech/29957143_1_jack-dorsey-twitter-podcasting).

8. *Twitter Reaches Half a Billion Accounts*, SEMIOCAST (July 30, 2012), [http://semiocast.com/publications/2012\\_07\\_30\\_Twitter\\_reaches\\_half\\_a\\_billion\\_accounts\\_140m\\_in\\_the\\_US](http://semiocast.com/publications/2012_07_30_Twitter_reaches_half_a_billion_accounts_140m_in_the_US).

9. YouTube is a website that hosts video content and allows people to watch and upload videos. *About YouTube*, YOUTUBE, [www.youtube.com/t/about\\_youtube](http://www.youtube.com/t/about_youtube) (last visited Jan. 15, 2013).

10. Andrew Couts, *YouTube: Now Serving 4 Billion+ Video Views Daily*, YAHOO! NEWS (Jan. 23, 2012), <http://news.yahoo.com/youtube-now-serving-4-billion-video-views-daily-173018803.html>.

and reported a user base of 90 million within six months.<sup>12</sup> The memorable line from the film *The Social Network*<sup>13</sup> echoes louder and louder as social media solidifies its grip on the modern world: “We lived on farms and then we lived in cities and now we’re gonna live on the [I]nternet.”<sup>14</sup>

All this living on the Internet raises a myriad of issues in the employment context.<sup>15</sup> On one hand, companies embrace social media as a powerful marketing tool that facilitates employee connections with clients, potential customers, and other industry professionals.<sup>16</sup> Employers can further utilize social media to help locate new talent; in 2011, eighty-nine percent of companies said they used social media for recruitment purposes.<sup>17</sup>

11. Google+ is a social networking and identity service operated by Google, which incorporates existing services such as Google Profiles with new ones—namely, Circles, Hangouts, and Games—and allows users to tailor their online sharing to specific groups. *Learn More*, GOOGLE, <http://www.google.com/+/learnmore/> (last visited Jan. 15, 2013); *see also* Martin Kaste, *Facebook’s Newest Challenger: Google Plus*, NPR (June 29, 2011, 5:35 PM), <http://www.npr.org/2011/06/29/137507567/facebooks-newest-challenger-google-plus>.

12. Lucas Shaw, *Google 4Q Earnings Miss the Mark, Google Plus Hits 90M Subs*, REUTERS (Jan. 19, 2012, 5:21 PM), <http://www.reuters.com/article/2012/01/19/idUS427563801220120119>. For more information regarding social media’s steep rise in popularity, *see generally* Jenise Uehara Henriskson, *The Growth of Social Media: An Infographic*, SEARCH ENGINE J. (Aug. 30, 2011), <http://www.searchenginejournal.com/the-growth-of-social-media-an-infographic/32788/>.

13. *The Social Network* is a feature film released in 2010 about the founders of Facebook. *See* THE SOCIAL NETWORK, <http://www.thesocialnetwork-movie.com/> (last visited Jan. 15, 2013).

14. AARON SORKIN, THE SOCIAL NETWORK, 155 (screenplay), *available at* [http://flash.sonypictures.com/video/movies/thesocialnetwork/awards/thesocialnetwork\\_screenplay.pdf](http://flash.sonypictures.com/video/movies/thesocialnetwork/awards/thesocialnetwork_screenplay.pdf).

15. *See infra* notes 16–20 and accompanying text.

16. *See* Rhianna Collier, *SIIA Survey: Marketing Executives Believe Social Media Is an Effective Tool; Not Yet Investing Significant Resources*, SOFTWARE & INFO. INDUSTRY ASS’N (Feb. 8, 2012), <http://www.siia.net/blog/index.php/2012/02/siia-survey-marketing-executives-believe-social-media-is-an-effective-tool-not-yet-investing-significant-resources/>. “Social media has clearly become a widely used tool among [business-to-business] marketers and few doubt that it is helping their business.” *Id.*; *see also* Joshua Tucker, *CEO Bans Email, Encourages Social Networking*, ENGADGET (Dec. 1, 2011, 12:33 PM), <http://www.engadget.com/2011/12/01/ceo-bans-email-encourages-social-networking/> (reporting that the chief executive officer of a French information technology firm plans to “wean 80,000 employees off” of email during the next eighteen months, and instead promotes a “collaborative social network similar to Facebook or Twitter to fill email’s void and suffice as an easily accessible global network”).

17. Kristin Piombino, *Infographic: 89 Percent of Companies Use Social Media to Find New Hires*, RAGAN’S HR COMM. (Dec. 12, 2011), [http://www.hrcommunication.com/SocialMedia/Articles/Infographic\\_89\\_percent\\_of\\_companies\\_use\\_social\\_med\\_7260.aspx](http://www.hrcommunication.com/SocialMedia/Articles/Infographic_89_percent_of_companies_use_social_med_7260.aspx). LinkedIn, a dominant player in social media recruitment, “isn’t the only social network that’s used for recruiting. Fifty percent of companies use Facebook to find talent, and [forty-five] percent use Twitter.” *Id.*

By the same token, the Internet affords “a potential, and tempting, treasure trove of information about prospective employees,” and employers must be careful not to use social media websites to obtain improper data concerning applicants (including, for example, race, national origin,

On the other hand, social media websites can raise significant liability issues for employers.<sup>18</sup> Whereas “[d]isgruntled employees . . . once griped to each other in person,” they are now free to “complain about their workplace” on Facebook, Twitter, YouTube, personal blogs, or whatever other Internet outlet they choose.<sup>19</sup> Social media websites can thus “expose employers to risks of potential defamation claims, improper disclosure of confidential information, and damage to an employer’s reputation.”<sup>20</sup> The National Labor Relations Board (NLRB or Board) began addressing these types of issues in late 2009,<sup>21</sup> and, since then, the Board has heard a steadily increasing number of social media cases across the country.<sup>22</sup>

Consider, for example, the headline-grabbing<sup>23</sup> 2010 case of *American Medical Response of Connecticut, Inc.*,<sup>24</sup> which illustrates the nature of the

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or religion in order to screen applicants based on a protected class). Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 HOFSTRA LAB. & EMP. L.J. 395, 398–99 (2008). Furthermore, twenty-nine states have adopted “lifestyle statutes” that prohibit employers from considering off-duty conduct (such as drinking, smoking, overeating, and personal relations) in hiring or firing decisions “so long as the off-duty activities have no employment-related consequences.” Carolyn Elefant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 15 (2011).

18. Peter J. Pizzi, *Where Cyber and Employment Law Intersect, Risks for Management Abound*, in UNDERSTANDING DEVELOPMENTS IN CYBERSPACE LAW 29, 29 (2011), available at 2011 WL 3020563.

19. *Id.*

20. *Id.*; see generally Julianne Pepitone, *6 Painful Social Media Screwups*, CNNMONEY, [http://money.cnn.com/galleries/2011/technology/1104/gallery.social\\_media\\_controversies/index.html](http://money.cnn.com/galleries/2011/technology/1104/gallery.social_media_controversies/index.html) 1 (last visited Jan. 20, 2013).

21. In *Sears Holdings*, the Board interpreted the validity of an employer’s social media policy; it refrained, however, from addressing what constitutes protected employee activity in the social media realm. *Sears Holdings*, N.L.R.B. Gen. Couns. Advice Mem. Case No. 18-CA-19081 (Dec. 4, 2009), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45802d802f> [hereinafter *Sears Holdings*]. The Board developed its position on the matter in later cases. See *infra* notes 136–75. In *Sears Holdings*, an electrical workers’ union, throughout its campaign to organize service technicians, utilized several types of social media—including Facebook, Myspace, and a specifically tailored website and group email subscription service—for the purpose of fostering communication among employees. *Sears Holdings*, *supra*, at 1–2. The employer later issued a social media policy that prohibited employees from using social media for “[d]isparagement of [the] company’s or competitors’ products, services, executive leadership, employees, strategy, and business products.” *Id.* at 3. The Board ultimately concluded that Sears’ policy was valid because it could not be reasonably interpreted to chill employees’ protected speech under the National Labor Relations Act; rather, a reasonable reading of the policy showed that it only prohibited “online sharing of confidential intellectual property or egregiously inappropriate language and not . . . protected complaints about the [e]mployer or working conditions.” *Id.* at 6–7. For a detailed discussion concerning the history and meaning of protected employee activity, see *infra* notes 47–135 and accompanying text. For further information about lawful social media policies under the National Labor Relations Act, see *infra* notes 233–53 and accompanying text.

22. See *infra* notes 136–75 and accompanying text.

23. See Sam Hananel, *Woman Fired over Facebook Rant; Suit Follows*, NBC NEWS.COM (Nov. 10, 2010, 9:43 AM), <http://www.msnbc.msn.com/id/40097443/>; Renée M. Jackson, *Media Frenzy over NLRB Complaint Against Connecticut Employer for Terminating Employee Who Criticized Employer on Facebook Not Warranted—Yet*, NIXON PEABODY (Nov. 16, 2010),

problem facing employers and employees in the current virtual landscape. There, the NLRB addressed for the first time whether an employee could publish disparaging speech against her employer on a social media website.<sup>25</sup> The employee Souza posted a series of negative comments about her supervisor to her Facebook page following a confrontation with him at work.<sup>26</sup> Specifically, she referred to her supervisor as a “scumbag,” a “17 [AMR code for a psychiatric patient],” and a “dick.”<sup>27</sup> Several of Souza’s current and former coworkers chimed in and commented on her post, saying things like “I’m so glad I left [AMR]” and encouraging Souza to “[c]hin up!”<sup>28</sup> AMR later fired Souza, listing her Facebook comments as one of the reasons for her termination.<sup>29</sup> The social media policy at AMR prohibited “making disparaging, discriminatory or defamatory comments when discussing the [c]ompany or the employee’s superiors, co-workers and/or competitors.”<sup>30</sup> The Board’s regional office filed a complaint against AMR, alleging that the employer violated federal labor law by terminating Souza for her Facebook comments.<sup>31</sup> Though the case ultimately settled, as part of the settlement AMR agreed to narrow the scope of its social media policy.<sup>32</sup>

Granted, the Board never actually decided *AMR*.<sup>33</sup> The case is especially important, however, because it prompted the NLRB Acting General Counsel Lafe Solomon to declare the Board’s position on social media cases—namely, that communicating via social network websites is

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[http://www.nixonpeabody.com/files/ELA\\_Alert\\_11\\_16\\_10.pdf](http://www.nixonpeabody.com/files/ELA_Alert_11_16_10.pdf); Sara Yin, *Connecticut Woman Fired Over Facebook Rant*, PCMAG.COM (Nov. 10, 2010, 1:29 PM), <http://www.pcmag.com/article2/0,2817,2372465,00.asp>.

24. *Am. Med. Response of Conn., Inc. (AMR)*, N.L.R.B. Gen. Couns. Advice Mem. Case No. 34-CA-12576 (Oct. 5, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055b9c4> [hereinafter *AMR*].

25. *Id.* at 1; Hananel, *supra* note 23 (indicating that the Board referred to the case as “the first complaint [it had] issued over comments on Facebook . . .”).

26. *AMR*, *supra* note 24, at 3.

27. *Id.* (alteration in original).

28. *Id.* at 3–4.

29. *Id.* at 4–5.

30. *Id.* at 5.

31. *Settlement Reached in Case Involving Discharge for Facebook Comments*, NLRB (Feb. 8, 2011), <http://nlrb.gov/news/settlement-reached-case-involving-discharge-facebook-comments>.

32. *Id.* AMR agreed “to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.” *Id.*

33. *See id.*

“the same as talking at the water cooler.”<sup>34</sup> The proverbial water cooler, in the context of the National Labor Relations Act (NLRA or Act), is the quintessential safe haven for employees.<sup>35</sup> It traditionally referred to the place where employees came together and discussed working conditions, and the NLRA mandates that those types of discussions be protected from adverse employment actions.<sup>36</sup> The General Counsel’s analogizing Facebook to the water cooler indicates the Board’s strong push, from the outset, toward shielding employee statements on social media websites from employers. Indeed, the Board’s recent decisions since *AMR* demonstrate that it has continued along the same line of analysis.<sup>37</sup> In this respect, the Board is misguided.<sup>38</sup> Facebook—as well as Twitter, YouTube, Google+, and all the other burgeoning social media websites available to employees in the United States today—is nothing like a water cooler, and should not be understood as such.<sup>39</sup> Rather, social media deserves a separate analytical framework that recognizes the unique and evolving character of modern communication.<sup>40</sup>

This Comment explores whether employees engage in protected concerted activity under the NLRA when they post negative statements about their employers to social media websites. Part II explains the definition of protected concerted activity under the NLRA, as interpreted by the Board through several landmark decisions from the past several decades.<sup>41</sup> Part III discusses the Board’s current application of its precedent to recent cases involving social media.<sup>42</sup> Part IV argues that such precedent is inadequate to address the distinct qualities of social media and that the Board has misapplied dated law to recent cases involving social media.<sup>43</sup> Part V sets forth recommendations for alternate ways to analyze social media communication and makes suggestions regarding how employers can

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34. David Alim-Young, *NLRB Weighs in on Social Networking—“The Facebook Complaint,”* NLRB INSIGHT (Feb. 8, 2011), <http://www.nlrbinsight.com/2011/02/nlr-b-weighs-in-on-social-networking-the-facebook-complaint/>.

35. See *NLRB Judge Finds Firings Based on Facebook Posting Unlawful*, HRWATCHDOG (Sept. 12, 2011, 9:42 AM), <http://calchamber.typepad.com/hrwatchdog/2011/09/nlr-b-judge-finds-firings-based-on-facebook-posting-unlawful.html>.

36. *Id.* “The typical example of a protected activity is when employees gather around the water cooler to complain about their supervisor.” *Id.* For more information as to what it means to be a protected activity, see *infra* Part II.

37. See *infra* notes 136–75 and accompanying text.

38. See *infra* notes 233–66 and accompanying text.

39. See *infra* notes 233–66 and accompanying text.

40. See *infra* notes 233–66 and accompanying text.

41. See *infra* notes 47–135 and accompanying text.

42. See *infra* notes 136–75 and accompanying text.

43. See *infra* notes 176–232 and accompanying text.

tailor their social media policies to comply with Board standards.<sup>44</sup> Part VI examines the impact of this Comment's approach on both employers and employees.<sup>45</sup> Part VII concludes.<sup>46</sup>

## II. WHAT CONSTITUTES PROTECTED CONCERTED ACTIVITY UNDER THE NLRA

In 1935, Congress passed the National Labor Relations Act, which gave employees the federal right to organize and bargain collectively.<sup>47</sup> The purpose of the Act was to prevent "unfair practices" between employers and employees that had the effect of obstructing the free flow of commerce.<sup>48</sup> Its current version incorporates the original Wagner Act of 1935,<sup>49</sup> the Taft-Hartley amendments of 1947,<sup>50</sup> and some small changes from the Landrum-Griffin Act of 1959.<sup>51</sup> Indeed, the text of the NLRA "has remained virtually untouched since 1959."<sup>52</sup> The Act covers employer-employee relations in

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44. See *infra* notes 233–53 and accompanying text.

45. See *infra* notes 254–66 and accompanying text.

46. See *infra* notes 267–81 and accompanying text.

47. 29 U.S.C. §§ 157–158 (2006).

48. *Blankenship v. Kurfman*, 96 F.2d 450, 454 (7th Cir. 1938). The Act's policy declaration reads:

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

29 U.S.C. § 151 (2006).

The Board website states that the NLRA was enacted "to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses, and the U.S. economy." *National Labor Relations Act*, NLRB, <http://nlrb.gov/national-labor-relations-act> (last visited Jan. 21, 2013).

49. National Labor Relations Act (Wagner-Connery Labor Relations Act), ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

50. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

51. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

52. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533 (2002). Estlund writes, "[o]ne of the most striking features of American labor law is the age of its basic governing text." *Id.* at 1532.



the context of labor disputes affecting interstate commerce.<sup>53</sup> The National Labor Relations Board and its General Counsel constitute the enforcement mechanism of the NLRA, acting through regional and field offices across the country.<sup>54</sup>

Section 7 of the Act expressly provides for the following employee rights, the last of which is at issue in cases involving employee speech via social media: “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 . . .*.”<sup>55</sup> Employees who engage in “concerted activities” are therefore sheltered from adverse employment actions in retaliation.<sup>56</sup> The Act prohibits employers from interfering with, restraining, or coercing employees who choose to exercise these rights.<sup>57</sup> The NLRA does not specifically state what constitutes a “concerted activity,” and so the Board has interpreted and defined the term through case-by-case determinations since the Act’s inception.<sup>58</sup>

Concerted activities encompass lawful union activities as well as nonunion group activities.<sup>59</sup> The most important aspect of a concerted activity is that it relates to wages, hours, or working conditions.<sup>60</sup> Once this

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53. 29 U.S.C. § 152 (2006). The term “employee” includes non-supervisory employees who are either members of a union or trying to unionize. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563–64 (1978).

54. See 29 U.S.C. § 153 (2006); *What We Do*, NLRB, <http://www.nlr.gov/what-we-do> (last visited Jan. 25, 2013).

55. 29 U.S.C. § 157 (2006) (emphasis added).

56. Calvin William Sharpe, “*By Any Means Necessary*”—*Unprotected Conduct and Decisional Discretion Under the National Labor Relations Act*, 20 BERKELEY J. EMP. & LAB. L. 203, 206 (1999).

57. 29 U.S.C. § 158 (2006) (“It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .”).

58. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (“The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, that Act left to the Board the work of applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a ‘rigid scheme of remedies’ is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation.”).

59. See *Salt River Valley Water Users’ Ass’n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (“Concerted activity may take place where one person is seeking to induce action from a group.”); *NLRB v. Phx. Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948) (“A proper construction [of section 157 of the Act] is that the employees shall have the right to engage in concerted activities . . . even though no union activity be involved, or collective bargaining be contemplated.”).

60. See *Evergreen Helicopters, Inc.*, 223 N.L.R.B. 317, 319 (1976). The administrative law judge held, and the NLRB affirmed, that “[i]t is the public policy of the United States, however, embodied in the Act, to insulate from discharge or discipline any employee who refuses to work in

threshold is met, the activity remains protected regardless of whether it is illogical or unreasonable in nature.<sup>61</sup> In previous cases, the NLRB has been careful to shield concerted activities from adverse employment actions—even in situations where an individual’s conduct arguably may be inappropriate or, in some cases, categorically outrageous—in order to uphold the important rights of employees to organize and work together to address working conditions.<sup>62</sup>

#### A. Board Precedent: The Landmark Cases

The NLRB has relied on several important decisions in determining whether an activity in the online social media context is concerted, and thus protected, under the NLRA.<sup>63</sup> Of the five cases highlighted below, four were decided before 1985 and have nothing to do with the Internet, much less social media in the workplace.<sup>64</sup> The fifth case, decided in 2007, touches

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order to pressure his employer to make concessions concerning his wages, rates of pay, hours, or working conditions.” *Id.*

61. *Id.* The employer in *Evergreen Helicopters, Inc.* argued that its employees’ conduct was unreasonable and therefore not protected. *Id.* In that case, ten employees refused to work until they were paid the higher wages that the company promised to them, even when their supervisor offered to pay them out of his own pocket if they would go back to work. *Id.* at 318–19. The administrative law judge ruled that the employer’s argument was “irrelevant” because “it is not necessary that employees strike for a reasonable objective in order to enjoy the Act’s protection, it is only necessary that the object be related to securing wages, etc.” *Id.* at 319.

62. *See* *NLRB v. Allied Aviation Fueling of Dall. LP*, 490 F.3d 374 (5th Cir. 2007) (holding that union employee who forged another employee’s signature on a grievance he filed on the other employee’s behalf was engaging in protected activity because he did not act for his own benefit but rather for the protection of the other employee’s rights); *Roadmaster Corp. v. NLRB*, 874 F.2d 448 (7th Cir. 1989) (holding that a union officer’s public speech regarding a company mislabeling a controversy was protected concerted activity); *Nordstrom, Inc.*, 347 N.L.R.B. 294 (2006) (determining that when employees refused to speak to a coworker who testified in a Board hearing on behalf of the employer, they were engaged in protected concerted activity; the Board reasoned that their nonverbal solidarity related to wages, hours, and terms of employment, and such behavior was similar to verbal outbursts toward antiunion employees), *overruled on other grounds by* *J & R Flooring, Inc.*, 356 N.L.R.B. 9 (2010); *Oakes Mach. Corp.*, 288 N.L.R.B. 456 (1990) (holding that employees’ sending a letter to the employer’s chairman that was unsigned and criticized the president’s ability to manage the company was protected concerted activity); *Lumbee Farms Coop.*, 285 N.L.R.B. 497 (1987) (stating employees’ activity was protected when they walked out to protest the employer’s hiring of “foreigners” and to demand a wage increase); *Millcraft Furniture Co.*, 282 N.L.R.B. 593 (1987) (deciding that conduct was protected when employees insisted on delivering grievances to a manager other than the manager who was assigned to receive grievances).

63. *See infra* notes 66–135 and accompanying text.

64. *See infra* notes 66–101, 110–14 and accompanying text. There are two additional cases to which the Board has looked frequently in social media cases, but they are not included in this Comment. The first is the Supreme Court case of *NLRB v. Washington Aluminum Co.*, 370 U.S. 9

briefly on Internet publication; however, the facts do not involve social-media-related concerted activity, but instead revolve around more traditional forms of union activity and expression against employers.<sup>65</sup>

1. *Meyers Industries, Inc.*<sup>66</sup> and Its Progeny: Focusing on Group Action, Not Individual Interests

The *Meyers* line of cases,<sup>67</sup> decided in the 1980s, established that an individual employee's activity must be linked to the actions of fellow employees in order to be classified as "concerted" under the NLRA.<sup>68</sup> These four cases involved Kenneth Prill, a truck driver who was hired by Meyers Industries, Inc. to drive a company-issued truck and trailer and haul boats from the employer's facility in Michigan to dealers across the United States.<sup>69</sup> Prill began experiencing brake and steering problems with his equipment and complained about these deficiencies to the president of the company, his supervisor, and the company's mechanic.<sup>70</sup> Despite these complaints, Meyers Industries never fully addressed the problems with Prill's equipment, and the trailer brakes continued to cause Prill trouble.<sup>71</sup> On a return trip from a drive to Florida, Prill was involved in an accident in Tennessee.<sup>72</sup> Prill contacted the company president several times, and when the president requested that Prill tow the trailer back to Michigan, Prill

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(1962), and the second is the First Circuit case of *NLRB v. Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981). These decisions deal primarily with employers' authority to discipline employees when they engage in protected activities, as well as the nature of unfair labor practices in similar types of situations. See *Wash. Aluminum*, 370 U.S. at 17–18; *Wright Line*, 662 F.2d at 908–09. Although issues surrounding discipline and adverse employment actions generally arise when employees are punished for engaging in protected activities, those subjects exceed the scope of this Comment, which focuses on the modern limits of concerted activity in the Internet realm.

65. See *infra* notes 102–09 and accompanying text.

66. *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493 (1984).

67. The procedural history of these four cases is as follows. In *Meyers I*, 268 N.L.R.B. 493 (1984), the Board dismissed employee Prill's complaint and held that Prill's activities were not "concerted" under the NLRA. In *Prill v. NLRB (Prill I)*, 755 F.2d 941, 957 (D.C. Cir. 1985), on Prill's petition for review, the District of Columbia Circuit Court of Appeals remanded to the Board for further consideration. On remand, in *Meyers Industries, Inc. (Meyers II)*, 281 N.L.R.B. 882, 888–89 (1986), the Board reached the same conclusion as it did in *Meyers I*, but modified its reasoning based on the decision of the circuit court. Finally, in *Prill v. NLRB (Prill II)*, 835 F.2d 1481, 1485 (D.C. Cir. 1987), the D.C. Circuit affirmed the Board's ruling in *Meyers II*.

68. See *Prill II*, 835 F.2d at 1484–85; *Meyers II*, 281 N.L.R.B. at 889; *Meyers I*, 268 N.L.R.B. at 497, 499.

69. *Meyers I*, 268 N.L.R.B. at 497.

70. *Id.* The "most significant problem" was that the brakes on his trailer failed to operate properly. *Id.* at 504.

71. *Id.* at 497.

72. *Id.* at 497, 504. The accident was not Prill's fault, as the malfunctioning brakes caused the accident. See *id.* at 497, 504. Meyers Industries asserted that the crash was not a consideration in Prill's later termination. *Id.* at 504–05.

refused, citing safety concerns.<sup>73</sup> Prill further arranged to have the local public service commission inspect his equipment following the accident, which resulted in a citation prohibiting the unsafe operation of a vehicle.<sup>74</sup> When Prill returned to work after the conclusion of his trip, Meyers Industries terminated Prill, stating, “[W]e can’t have you calling the cops like this all the time.”<sup>75</sup>

The Board determined that Prill did not engage in concerted activity when he complained about the unsafe conditions of his equipment to both the company president and state authorities and when he refused to drive the truck and trailer for safety reasons following an accident.<sup>76</sup> In so doing, the Board created a new definition for concerted activity, which remains in place today: an employee’s conduct does not qualify for protection under the Act unless it is “*engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.*”<sup>77</sup> Because Prill was acting alone and “solely on his own behalf” when he made his complaints, his conduct did not fall within the protected category of concerted activity under the NLRA.<sup>78</sup> The District of Columbia Circuit Court of Appeals later

73. *Id.* at 504–05.

74. *Id.* at 497. Following this citation, Meyers Industries determined that the trailer was not worth returning or even being repaired. *Id.* Rather, the company decided to leave the trailer and sell it for scrap. *Id.* Prill drove his truck back to Meyers Industries’ facility in Michigan without the trailer. *Id.*

75. *Id.* at 498. Prior to this incident, on another trip to Ohio, Prill had voluntarily stopped at an Ohio State roadside inspection station where officials cited the trailer for defects. *Id.* at 497. Prill provided the citation information to Meyers Industries at that time. *Id.*

76. *Id.* at 498. The Board emphasized the individualized nature of Prill’s activity and complaints: “Prill alone refused to drive the truck and trailer; he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. Prill acted solely on his own behalf.” *Id.*

77. *Id.* at 497 (emphasis added). The Board honed in on the “united-action interpretation” of concerted activity when it stated that Section 7 “envisions ‘concerted’ action in terms of collective activity: the formation of or assistance to a group, or action as a representative on behalf of a group.” *Id.* at 493–94. This type of group effort stands in stark contrast to Prill’s self-serving behavior, as characterized by the Board. *See supra* note 76.

78. *Id.* at 498. *Meyers I* overruled the “per se standard of concerted activity” that prevailed at the time under *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975). *Meyers I*, 268 N.L.R.B. at 495, 499. In *Alleluia*, an employee, Henley, repeatedly complained to his employer about safety concerns in the workplace. *Alleluia*, 221 N.L.R.B. at 999. Henley never enlisted the help of his fellow employees in voicing those complaints, and the administrative law judge who heard the case determined that “Henley was acting . . . purely on the basis of his individual concern with safety . . . . There is no evidence that Henley was acting in conjunction with any other employee in protesting . . . or that his activity had been an outgrowth or extension of discussions with other employees.” *Id.* at 1004 (citations omitted). Despite this finding, the Board ultimately ruled on appeal that Henley was engaged in concerted activity because he sought to compel compliance with

affirmed the Board's conclusion in *Meyers I* and *Meyers II*, stating that protection under the Act extends when "individual employees seek to initiate or to induce or to prepare for group action," as well as when "individual employees bring[] truly group complaints to the attention of management."<sup>79</sup> Thus, had Prill merely contacted his coworkers to contest the violation of statutory safety provisions, he would have been protected under the Act.<sup>80</sup> The test for concerted activity elucidated in *Meyers* continues to be the principal guidepost for the NLRB today.<sup>81</sup>

## 2. *Atlantic Steel Company*: Setting Boundaries and Losing Protection Due to Opprobrious Conduct

The 1979 case of *Atlantic Steel Co.*<sup>82</sup> demonstrates the way in which employees engaged in protected concerted activities can, by the nature of their conduct, lose the protection afforded to them under the Act.<sup>83</sup> Here, the employee Chastain approached his foreman during work hours and made an inquiry regarding the assignment of overtime by seniority, as he was concerned that an employee with probationary status had been assigned to work overtime.<sup>84</sup> Upon hearing the foreman's response that all of the crew was asked to take overtime, Chastain turned to a coworker as the foreman was walking away and either called the foreman a "lying son of a bitch" or said that the foreman told a "'m—f—lie' (or was a 'm—f—liar')." <sup>85</sup> The foreman heard Chastain's statement, and Chastain was suspended pending discharge and eventually terminated.<sup>86</sup>

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safety standards that "encompassed the well-being of his fellow employees." *Id.* at 1001.

*Meyers I* criticized *Alleluia* as "transform[ing] concerted activity into a mirror image of itself" whereby the Board could decide "what *ought to be* of group concern and then artificially presume[] that it *is* of group concern." *Meyers I*, 268 N.L.R.B. at 495, 496. In rejecting the *Alleluia* precedent, *Meyers I* held that "finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity 'concerted' within the meaning of Section 7." *Id.* at 496. In *Prill II*, then, the court highlighted that although Prill's complaints about his truck and refusal to tow it may have benefited his fellow employees, "Prill acted alone" and was thus not engaged in concerted activity. *Prill II*, 835 F.2d 1481, 1485 (D.C. Cir. 1987).

79. *Prill II*, 835 F.2d at 1484. The court noted that Congress intended Section 7 to equalize employees' bargaining power by enabling employees to "band together in confronting an employer" regarding issues affecting the terms and conditions of their employment. *Id.* (emphasis omitted).

80. *Id.* at 1485. The concept of reaching out to one's fellow employees is especially relevant in analyzing current social media cases. See *infra* notes 215–32 and accompanying text.

81. See *infra* notes 136–75 and accompanying text.

82. 245 N.L.R.B. 814 (1979).

83. *Id.* at 817.

84. *Id.* at 814.

85. *Id.*

86. *Id.*

Chastain's questions regarding overtime fell within the realm of protected concerted activity, as he was voicing a "legitimate concern" on behalf of his fellow employees regarding working conditions.<sup>87</sup> However, the offensive and disparaging nature of Chastain's conduct was such that the activity could no longer be shielded under the NLRA.<sup>88</sup> The Board stated: "[E]ven an employee who is engaged in concerted protected activity can, by *opprobrious conduct*, lose the protection of the Act."<sup>89</sup> A determination regarding whether an employee "has crossed that line" involves balancing the following four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice in any way.<sup>90</sup>

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87. *Id.* at 817. "Chastain had properly questioned the foreman about overtime, and . . . the foreman had acted promptly to answer the question." *Id.* at 814.

88. *Id.* at 816–17. The fact that Chastain's comments took place on the production floor made the case distinguishable from situations where employee statements occurred in "formal grievances or negotiating sessions which were conducted away from the production area." *Id.* at 816. An employee may be permitted to utter obscenities or use strong language "in the heat of discussion" when it occurs as part of the grievance procedure. *Id.* at 816; see *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 586–87 (7th Cir. 1965) (stating that an employee's use of an obscenity in superintendent's office during a grievance meeting did not remove protection under the Act); see also *NLRB v. Cement Transp., Inc.*, 490 F.2d 1024, 1030 (6th Cir. 1974) (holding that an employee's statement, referring to the company president as a "son-of-a-bitch," was still protected when it took place during an organizational campaign).

89. *Atlantic Steel*, 245 N.L.R.B. at 816 (emphasis added); see also *Care Initiatives, Inc.*, 321 N.L.R.B. 144, 151 (1996) ("Among the specific types of conduct that could exceed the protection of the Act are vulgar, profane, and obscene language directed at a supervisor or employer . . .").

In *Atlantic Steel*, the Board upheld the arbitrator's conclusion that Chastain's use of insulting language "to other employees about their supervisor in the hearing of the supervisor cannot be regarded as 'mere disrespect.' On the contrary it shows a willful disregard for constituted industrial authority . . . . Under any definition, this, in the setting it was found, constitutes insubordination." 245 N.L.R.B. at 815.

90. *Atlantic Steel*, 245 N.L.R.B. at 816. In applying these factors to the instant case, the arbitrator's analysis took into account that the incident was on the production floor during work hours and not at a grievance meeting. *Id.* at 816–17. The arbitrator further noted that even though Chastain's questions and the foreman's response were both legitimate, Chastain's reaction was so obscene—and without provocation—in a setting where such behavior was not normally permitted that Chastain's conduct fell outside the protections of the Act. *Id.* at 817.

On November 9, 2010, the NLRB posted this four-pronged test from *Atlantic Steel* on its Facebook page in the form of a wall post. *National Labor Relations Board's Profile*, FACEBOOK (Nov. 9, 2010, 12:23 PM), <http://www.facebook.com/NLRBpage/posts/141052949280338>. The post read, "What's the line? When do Facebook comments lose protected concerted activity status under the National Labor Relations Act? A four point test applies . . ." and it went on to list the four factors. *Id.*

The NLRB also added two comments under this same post. *Id.* The first comment dealt more broadly with the subject of protected concerted activity: "The NLRA protects employees' rights to engage in protected concerted activities with or without a union. Included is the right of

The Board affirmed the arbitrator's decision and held that based on the above factors, Chastain's statements were not protected, and his discharge was therefore warranted.<sup>91</sup>

3. *Jefferson Standard*: Relating to an Ongoing Labor Dispute; Must Not Be So Disloyal, Reckless, or Untrue as to Lose the Protections of the Act

The 1953 United States Supreme Court case of *NLRB v. Local Union No. 1229 (Jefferson Standard)*<sup>92</sup> is also important in determining when employees can lose the protection of the Act. It involved technicians working for the radio station WBT, which was located in Charlotte, North Carolina and broadcasted both radio and television daily.<sup>93</sup> The technicians were represented by the International Brotherhood of Electrical Workers, and when their negotiations with the station reached an impasse over an arbitration provision, the union began conventional and peaceful picketing outside the station.<sup>94</sup> Over a month after the picketing had begun, several technicians "launched a vitriolic attack on the quality of the company's television broadcasts" by printing and distributing five thousand handbills which read:

IS CHARLOTTE A SECOND-CLASS CITY?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBT.

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two or more employees to discuss terms and conditions of employment." *Id.* It also provided a link to the NLRB website page explaining protected concerted activity. *Id.*

The second comment narrowed in on the specific issue of employees' Facebook comments, in light of the November 2010 NLRB case in which social media speech was analyzed for the first time under the NLRA. *Id.* It noted that Lafe Solomon, the Board's acting General Counsel, was quoted in the New York Times as saying: "This is a fairly straightforward case under the National Labor Relations Act—whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that." *Id.* The comment then posted a link to the New York Times news story. See 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>.

91. *Atlantic Steel*, 245 N.L.R.B. at 816–17. The Board noted that a contrary result in this case "would mean that any employee's offhand complaint would be protected activity which would shield any obscene insubordination short of physical violence." *Id.* at 817.

92. *NLRB v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). The case is known as "*Jefferson Standard*" after the name of the employer, Jefferson Standard Broadcasting Company.

93. *Id.* at 466.

94. *Id.* at 467. The union also had placards and handbills on the picket line, which named the union as the representative of the technicians and accused the company of acting unfairly with respect to the arbitration provision at issue. *Id.*



Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?<sup>95</sup>

These handbills did not reference the union, nor did they indicate that there was a pending labor controversy; they simply bore the "WBT Technicians" designation.<sup>96</sup>

The Supreme Court upheld the company's decision to terminate the technicians who disseminated the disparaging handbills.<sup>97</sup> The Court reasoned that because the communication in the handbills was not identified as being related to an ongoing labor dispute—even though a labor dispute was in fact occurring at the time the handbills were disbursed—the activity was not protected under the NLRA, and the employer therefore had the right to terminate the employees for cause.<sup>98</sup> The technicians in this case made a "concerted separable attack purporting to be . . . in the interest of the public rather than in that of the employees."<sup>99</sup> As such, because the attack was separated from the labor controversy, the company was permitted to

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95. *Id.* at 468 (internal quotation marks omitted). The workers distributed the handbills on the picket line and in the public square several blocks away from where the company was located. *Id.* They were also distributed in barbershops, restaurants, and buses, and some were mailed to local businesses. *Id.* The distribution continued for ten days. *Id.* at 471.

96. *Id.* at 468.

97. *Id.* at 472.

98. *Id.* at 476–77.

99. *Id.* at 477. The only connection the court could find between the handbill and the labor dispute was "an ultimate and undisclosed purpose or motive on the part of some of the sponsors that, by the hoped-for financial pressure, the attack might extract from the company some future concession." *Id.* This requirement of explicitly tying the communication to a labor dispute has not changed in more recent Board analyses. The Board reached the very same conclusion when analyzing similar facts in the 2000 case *American Golf Corp.*, which held that an employee's public distribution of a flyer that was damaging to his employer's product and business policies was not protected activity, as the attack was made with the undisclosed purpose of influencing negotiations. *Am. Golf Corp.*, 330 N.L.R.B. 1238, 1241–42 (2000).



discharge the technicians based on their conduct “as if the labor controversy had not been pending.”<sup>100</sup> Finally, the Court held that even if the employees’ distribution of the handbills had constituted a concerted activity, they were still barred from receiving protected status because the nature of their conduct conflicted with the purpose of the NLRA.<sup>101</sup>

#### 4. *Valley Hospital Medical Center, Inc.*: Introducing Online Communication to the Canon of Protected Concerted Activity Cases, But Just Barely

The 2007 case of *Valley Hospital Medical Center, Inc.*<sup>102</sup> is the most recent decision that the Board has relied on in analyzing current social media cases.<sup>103</sup> Here, the Board determined that an employee’s statements on a website relating to the terms and conditions of her employment constituted a concerted activity, and as such, the employer’s decision to discipline her in response to those protected statements was unlawful.<sup>104</sup> The employee, a nurse, wrote an article published on the union’s website in which she criticized the employer hospital’s policies and discussed staffing level problems that negatively impacted the nurses’ ability to perform their jobs (as well as compromised patients’ health).<sup>105</sup> The hospital suspended the employee following publication of the online article.<sup>106</sup> On review, the

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100. *Jefferson Standard*, 346 U.S. at 477.

101. *Id.* at 477–78. The Court cites to, among other decisions, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939) (“[T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act.”). Thus in *Jefferson Standard*, the technicians’ conduct was apparently held to be disloyal or reckless enough to go against the principles contained in the Act, therefore causing the employees to lose protection.

102. 351 N.L.R.B. 1250 (2007), *enforced sub nom.* Nev. Serv. Emps. Union, Local 1107 v. NLRB, 358 F. App’x 783 (9th Cir. 2009).

103. *See infra* note 143.

104. *Valley Hosp.*, 351 N.L.R.B. at 1252–54. In its current analysis of social media cases, the Board asserts that *Valley Hospital* stands for the proposition that a finding of protected activity does not change if employee statements are communicated via the Internet. NLRB, OFFICE OF THE GENERAL COUNSEL, MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES, 4 (Aug. 18, 2011), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743> [hereinafter MEMORANDUM OM 11-74].

105. *Valley Hosp.*, 351 N.L.R.B. at 1252–54. The employee made two other public statements against her employer, and the Board addressed them as well in its decision. *Id.* First, she made comments at a union press conference while the parties were involved in negotiations regarding staffing levels, and the comments were published in a newspaper article. *Id.* at 1250. Second, she distributed a flyer in which she was quoted as saying she was suspended for standing up with her coworkers against management. *Id.* at 1251. The Board determined that, in addition to her online article, these two statements were also protected concerted activities, and the hospital was therefore prohibited from engaging in an adverse employment action against her. *Id.* at 1254.

106. *Id.* at 1251.

Board held that her statements “clearly were related to the ongoing labor dispute over staffing” because they were made on the union’s website the day after a union rally took place that addressed staffing levels.<sup>107</sup> There was no evidence that the online statements were disloyal or maliciously false, which would therefore forfeit protection under the NLRA.<sup>108</sup> Thus, as long as protected concerted activity “is not unlawful, violent, in breach of contract, or disloyal,” employees who engage in such activity will not lose protection under the Act “simply because their activity contravenes an employer’s rule or policies.”<sup>109</sup>

#### 5. *Mushroom Transportation Company*: Mere Gripping Is Not Enough to Deserve Protection

The case of *Mushroom Transportation Co. v. NLRB*<sup>110</sup> also provides a helpful illustration of the limits on protected speech under the Act. In this case, the Third Circuit Court of Appeals stated that simply griping over employment conditions between two employees is not concerted activity.<sup>111</sup> The employee whose conduct was in question had a regular “habit” of talking to his coworkers and discussing their rights, and he was later terminated.<sup>112</sup> The court held that just because the employee’s conversations related to the interests of other employees, this was not enough to grant the speech protection under the NLRA, as his conversations were not part of a broader attempt to take action alongside his coworkers.<sup>113</sup> Rather, the court elucidated the proper test, stating, “Activity which consists of mere talk must, in order to be protected, be talk looking toward group action,” and if the conversation fails to meet this criterion, “it is more than likely to be mere ‘griping.’”<sup>114</sup>

107. *Id.* at 1253.

108. *Id.* “[T]hese statements were intended not to disparage or harm [Valley Hospital] but to pressure [it] to increase staffing and thereby improve nurses’ working conditions.” *Id.*

109. *Id.* at 1254 (citing *Comm’n Workers of Am., Local 9509*, 303 N.L.R.B. 264, 272 (1991)). Additionally, employers may not interfere with their employees’ right to engage in concerted activities by mandating some specific internal process for expressing work-related concerns. *Id.*

110. 330 F.2d 683 (3d Cir. 1964).

111. *Id.* at 685.

112. *Id.* at 684. The employee’s conversations dealt primarily with holiday pay, vacations, and employer practices regarding work assignments. *Id.* The court looked “in vain” for evidence showing that the employee’s conversations related to “any effort[s] . . . to initiate or promote any concerted action to do anything[.]” *Id.* at 684–85.

113. *Id.* at 685.

114. *Id.* “[I]t must appear at the very least that [a conversation] was engaged in with the object of

## *B. Standards for Employers' Social Media Policies*

Today, forty percent of employers have a formal social media policy.<sup>115</sup> Employers may violate Section 8(a)(1)<sup>116</sup> of the NLRA by simply maintaining improper work rules, even if they do not enforce them.<sup>117</sup> It is important for employers to craft lawful and effective social media policies in order to avoid any potential liability before the NLRB.<sup>118</sup> A two-step inquiry governs whether the maintenance of a rule violates the NLRA.<sup>119</sup> First, if the rule explicitly restricts Section 7 protected activities, it is unlawful.<sup>120</sup> Second, if the rule does not explicitly restrict protected activities, then it will only violate Section 8(a)(1) if it is shown that: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”<sup>121</sup>

The NLRB held that the above inquiry must begin with a reasonable reading of the rule in question, and it cautioned against “reading particular phrases in isolation.”<sup>122</sup> The Board will not find a violation simply because a policy could possibly be understood to restrict protected activity.<sup>123</sup> Rather, context is key—it provides the best indication as to the reasonableness of a particular construction.<sup>124</sup> Take, for example, a rule proscribing “negative conversations” about managers, which was contained in a list of policies regarding working conditions and contained no further clarification or

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initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.” *Id.*

115. *SHRM Survey: More than Half of Employers Will Increase Social Media Outreach in 2012*, SOC’Y FOR HUM. RESOURCE MGMT. (Jan. 12, 2012), <http://www.shrm.org/about/pressroom/PressReleases/Pages/SHRMSurveyincreaseSocialMedia2012.aspx>.

116. “It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . .” National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158 (2006).

117. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

118. *See Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, slip op. at 1 (Sept. 7, 2012) (stating that the employer “violated Section 8(a)(1) by maintaining a rule prohibiting employees from electronically posting statements that ‘damage the Company . . . or damage any person’s reputation.’”).

119. *See Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. 646, 646–47 (2004).

120. *Id.* at 646.

121. *Id.* at 647.

122. *Id.* at 646.

123. *Id.* at 647 (“[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.”); *see also Fiesta Hotel Corp.*, 344 N.L.R.B. 1363, 1368 (2005) (“We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.”).

124. *See Martin Luther Mem’l Home*, 343 N.L.R.B. at 647.

examples.<sup>125</sup> This rule was determined to be unlawful because of its potential chilling effect on Section 7 protected activity; in the absence of further guidance from the employer, an employee could reasonably interpret the policy to limit his right to protected speech.<sup>126</sup>

By contrast, the Board stated that a rule forbidding “statements which are slanderous or detrimental to the company,” which appeared on a list of other prohibited conduct such as “sexual or racial harassment” and “sabotage,” could not be reasonably understood to restrict protected activity.<sup>127</sup> There, the Board determined that because the rule appeared alongside examples of harmful misconduct, “employees would not reasonably believe that the . . . rule applie[d] to statements protected by the Act.”<sup>128</sup>

### C. Summary of Rules Regarding Concerted Activity

Under Board precedent, therefore, concerted activity is a collective endeavor “engaged in with or on the authority of other employees” for the purpose of advancing group interests.<sup>129</sup> Individualized efforts undertaken “solely by and on behalf of the employee himself” do not meet the threshold for concerted activity.<sup>130</sup> A communication must also relate to an ongoing labor dispute in order to be concerted.<sup>131</sup> Employees who engage in concerted activity may still lose the protections of the Act if their conduct is sufficiently opprobrious, reckless, disloyal, or maliciously false.<sup>132</sup> Mere griping does not, on its own, amount to concerted activity.<sup>133</sup>

As to employer policies, the NLRA prohibits employers from retaliating against employees who engage in protected concerted activity.<sup>134</sup> Overbroad

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125. KSL Claremont Resort, Inc., 344 N.L.R.B. 832, 836 (2005).

126. *Id.* at 832.

127. Tradesmen Int’l, 338 N.L.R.B. 460, 462 (2002).

128. *Id.* On May 30, 2012, the NLRB Office of the General Counsel issued Memorandum OM 12-59, which included a sample social media policy that the NLRB found did not violate the NLRA. NLRB, OFFICE OF THE GENERAL COUNSEL, MEMORANDUM OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (May 30, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd> [hereinafter MEMORANDUM OM 12-59].

129. See *supra* notes 77–78 and accompanying text.

130. See *supra* notes 77–78 and accompanying text.

131. See *supra* notes 98–100 and accompanying text.

132. See *supra* note 89 and accompanying text.

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

134. See *supra* note 118 and accompanying text.

social media policies that explicitly restrict protected activity—or that can be reasonably understood to do so—are unlawful.<sup>135</sup>

### III. TRYING TO FIT A SQUARE PEG IN A ROUND HOLE: THE BOARD’S MISAPPLICATION OF DATED PRECEDENT TO CURRENT SOCIAL MEDIA CASES

The Board’s Office of the General Counsel regularly issues “periodic reports of cases raising significant legal or policy issues.”<sup>136</sup> On August 18, 2011; January 24, 2012; and May 30, 2012; the Office issued memoranda on case developments involving social media.<sup>137</sup> The reports, which describe recent decisions concerning social media, provide guidance as to the Board’s current position on what types of communications constitute protected concerted activities under the NLRA.<sup>138</sup> The following provides descriptions of a few selected cases from the memoranda that were most helpful in clarifying the Board’s views on concerted speech.

#### A. Hispanics United<sup>139</sup>

In this case, an employee posted on Facebook that one of her coworkers, Cruz-Moore, was criticizing the job performance of their fellow employees.<sup>140</sup> The employee’s Facebook post also asked coworkers how they felt about the situation, and four employees subsequently responded to the post.<sup>141</sup> The next day at work, the employer fired the employee who wrote the initial Facebook post as well as the four employees who responded.<sup>142</sup>

The Board ultimately determined that the employees’ statements on Facebook constituted concerted activity under the *Meyers* standard, regardless of the fact that the activity took place on a social network

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135. See *supra* notes 120–21 and accompanying text.

136. MEMORANDUM OM 11-74, *supra* note 104, at 2.

137. See *id.*; NLRB, OFFICE OF THE GENERAL COUNSEL, MEMORANDUM OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (Jan. 24, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567> [hereinafter MEMORANDUM OM 12-31]; MEMORANDUM OM 12-59, *supra* note 128.

138. See generally *Operations-Management Memos*, NLRB, <http://nlrb.gov/publications/operations-management-memos> (last visited Jan. 24, 2013).

139. Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37 (Dec. 14, 2012).

140. *Id.* slip op. at 7.

141. *Id.* slip op. at 7–8. The Facebook post that started the conversation read, “Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB I about had it! My fellow coworkers how do [you] feel?” *Id.* slip op. at 7. Several employees posted responses, including the following: “What the f . . . Try doing my job I have [five] programs”; “What the Hell, we don’t have a life as is, What else can we do???”; “Tell her to come do [my f—ing job and see] if I don’t do enough, this is just dum[b].” *Id.*

142. *Id.* slip op. at 8.

platform.<sup>143</sup> The Board reasoned that the employee who made the first Facebook post was appealing to her coworkers for assistance, and that because their discussions related to job performance and staffing level issues in preparation for a meeting with the Executive Director, all of the five employees' statements were protected under the Act.<sup>144</sup> The Board stated that the employees were "taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management."<sup>145</sup> Further, the Board noted that protection under Section 7 "does not depend on whether organizing activity was ongoing," nor on "whether the employees herein had brought their concerns to management before they were fired, or *that there is no express evidence that they intended to take further action, or that they were not attempting to change any of their working conditions.*"<sup>146</sup> Moreover, the employees' postings were not "opprobrious" under the *Atlantic Steel* test so as to lose the Act's protection.<sup>147</sup>

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143. *Id.* slip op. at 8–10. In its memorandum describing *Hispanics United*, the NLRB Office of the General Counsel cited *Valley Hospital* for the proposition that a "finding of protected activity does not change if employee statements were communicated via the internet." MEMORANDUM OM 11-74, *supra* note 104, at 4.

144. *Hispanics United*, 359 N.L.R.B. No. 37, slip op. at 9–10. The Board thus interpreted the instigating employee's question ("My fellow coworkers, how do [you] feel?") as a call for assistance, even though the employee failed to propose a course of action or remedy to the problem. *See id.*

145. *Id.* slip op. at 9. This argument seems attenuated at best. The facts show minimal evidence of any intent to participate in group efforts to address working conditions. If anything, this is a case of mere griping; under *Mushroom*, such behavior is not protected concerted activity under the NLRA. *See supra* note 114 and accompanying text.

146. *Hispanics United*, 359 N.L.R.B. No. 37, slip op. at 9 (emphasis added). Here, the Board's analysis seems to fly in the face of *Meyers*, which specifically required some sort of group action in order for activity to be protected under the Act. *See supra* notes 66–81 and accompanying text.

147. *Hispanics United*, 359 N.L.R.B. No. 37, slip op. at 9–10. The case is especially disturbing because the Board appears to be protecting cyber-bullying in the employment context under the guise of upholding concerted activity. Cyber-bullying is a growing concern in the workplace, and this aggressive behavior is damaging to both employees and to corporate culture. *See Anita Bruzzese, Workplace Becomes New Schoolyard for Bullies*, USA TODAY, Aug. 24, 2011, <http://www.usatoday.com/money/jobcenter/workplace/bruzzese/story/2011/08/Workplace-becomes-new-schoolyard-for-bullies/50081460/1>. When the employees in *Hispanics United* engaged in a targeted discussion on Facebook concerning Cruz-Moore, using both expletives and an arguably threatening tone, they essentially ganged up on her while on the job.

## B. Collections Agency<sup>148</sup>

Here, the Board found that an employee at a collections agency was engaged in protected concerted activity when she posted a Facebook status update to her wall, including expletives, saying that her employer had “messed up” by transferring her to another department and “that she was done with being a good employee.”<sup>149</sup> The employee was Facebook friends with several of her coworkers; one coworker responded and said she was “right behind” the employee.<sup>150</sup> Another coworker put forth a similar affirmation, and a few former employees also chimed in about management.<sup>151</sup> One former coworker suggested filing a class action lawsuit.<sup>152</sup> The employer later discharged the employee for her Facebook comments.<sup>153</sup>

The Board concluded that the employee’s Facebook statement, as well as the ensuing conversation it created, involved complaints about working conditions because the conversation related to a job transfer.<sup>154</sup> Further, the Board determined that the activity encompassed employees’ initiation of group action; specifically, the Board interpreted the former coworker’s statement concerning a class action lawsuit to refer to participating in group activity.<sup>155</sup> Based on these two considerations, the Board determined that the

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148. MEMORANDUM OM 12-31, *supra* note 137, at 3–6.

149. *Id.* at 3.

150. *Id.* at 4.

151. *Id.*

152. *Id.*

153. *Id.* at 3.

154. *Id.* at 5.

155. *Id.* The Board applies its precedent too liberally here, as it appears the employee was simply complaining and not calling for group action. Arguably, if the employee was the one who mentioned a class action lawsuit from the outset, that might constitute a collective solicitation to improve working conditions. However, her initial post merely said that she was done with being a good employee, which seems individualized and self-serving and thus outside the scope of *Meyers*. See *supra* notes 66–81 and accompanying text.

In a complete departure from the type of analysis found in the Collections Agency case, however, the Board indicated earlier in its August 2011 Memorandum that very similar behavior by an employee at a retail store was not concerted activity. See MEMORANDUM OM 11-74, *supra* note 104, at 17. The employee posted a profane comment on Facebook complaining about the “tyranny” at the store and suggested that the employer would get a wakeup call. *Id.* Several coworkers responded to his comment and expressed support. *Id.* The employee wrote back that the Assistant Manager was being a “super mega puta” (“puta” is Spanish for prostitute). *Id.* When the employer fired the employee, the Board upheld the termination, saying that the employee’s postings were merely an expression of “individual gripe,” and that they contained “no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; rather they expressed only his frustration regarding his individual dispute with the Assistant Manager.” *Id.* This interpretation of the case seems entirely accurate. However, it is unclear why the Board did not adopt the very same reasoning in the Collections Agency case.

Such inconsistency in the Board’s analysis from one social media case to the next may be

employee's communications were protected concerted activity under the NLRA.<sup>156</sup>

### C. Karl Knauz Motors<sup>157</sup>

In this case, the Board ruled that where the employee Becker, a salesperson at a BMW dealership, posted photographs and commentary criticizing his employer's sales event on his Facebook page, the posts were part of a protected activity.<sup>158</sup> Specifically, Becker posted photographs of the food and beverages served at a major sales event, as well as images of his coworkers posing next to the food and a large banner advertising the new car model.<sup>159</sup> Becker also posted the following remark:

I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years . . . . A car that will generate tens [of] millions of dollars in revenues for Knauz over the next few years. The small 8 oz bags of chips, and the \$2.00 cookie plate from Sam's Club, and the semi fresh apples and oranges were such a nice touch . . . but to top it all off. . .the Hot Dog Cart. Where our clients could attain a[n] over[-]cooked wiener and a stale bun[ ].<sup>160</sup>

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partially due to the fact that the issue is young; however, the Board's approach is no less confusing, and it should modify its analysis so that practitioners, employees, and employers alike can have a clear idea as to the Board's position on concerted activity in the social media realm. See *infra* notes 176–253 and accompanying text.

156. MEMORANDUM OM 11-74, *supra* note 104, at 5. Another case in the August 2011 Memorandum illustrates employee conduct that does not qualify as concerted under the NLRA. *Id.* at 16–17. Here, an employee at a nonprofit facility for the homeless was working the overnight shift when she had a conversation on her Facebook wall with two Facebook friends, neither of whom were her coworkers. *Id.* at 16. She posted that it was spooky being alone at night at a mental institution, that one client was cracking her up, and that she "did not know whether the client was laughing at her, with her, or at the client's own voices." *Id.* The employer discovered the employee's posts and promptly terminated her. *Id.* The Board upheld the termination under *Meyers* because the employee's conversation did not involve any of her coworkers, nor did she seek to induce or prepare for any group action. *Id.* at 16–17. Incidentally (though the Board did not address this possibility), even if the employee had engaged in the same online conversation with her coworkers, the fact that she was making fun of individuals suffering from mental illness would seem to render her conduct so opprobrious as to lose protection under the Act. See *supra* notes 82–91 and accompanying text.

157. Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (Sept. 28, 2012).

158. *Id.* slip op. at 6–7, 12.

159. *Id.* slip op. at 7.

160. *Id.*



The dealership fired the employee upon discovering the Facebook posts.<sup>161</sup>

The Board concluded that, under *Meyers*, Becker engaged in concerted activity when he posted his comments and photographs regarding the sales event.<sup>162</sup> The Board reasoned that Becker expressed the sentiment of the group by voicing the salespersons' disappointment in the dealership (prior to the sales event, the employees informed management they were not happy with the choice of refreshments).<sup>163</sup> Further, the Board ruled that the concerted activity was related to the employees' terms and conditions of employment, as the salespersons were paid entirely on commission and were concerned about the impact the employer's choice of refreshments would have on sales, and thus, their commissions.<sup>164</sup> Finally, the Board found that the employee's activity was not so opprobrious as to lose NLRA protection.<sup>165</sup>

#### D. Triple Play<sup>166</sup>

Here, the employer, a sports bar and restaurant, fired two employees who took part in a Facebook conversation initiated by a former coworker about the employer's tax-withholding policy.<sup>167</sup> When several of the restaurant's former and current employees discovered that they owed state income taxes related to their earnings at the restaurant, at least one employee raised the issue with the employer, and a staff meeting was arranged to address the issue.<sup>168</sup> Thereafter, a former employee posted a statement and a shorthand expletive on her Facebook page expressing dissatisfaction at owing the taxes and stating that the employer's owners could not even do paperwork correctly.<sup>169</sup> Another employee "Liked" her post; in addition, three other employees commented, and one referred to mentioning to the

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161. *Id.* slip op. at 8. The dealership also fired Becker for posting photos involving a car accident online; however, that involves a separate analysis from the issue here. *Id.* slip op. at 9.

162. *Id.* slip op. at 10.

163. *Id.* The Board noted that the employee told his coworkers he would put the photographs on Facebook, and it interpreted this to mean that the employee was speaking on all of their behalf. *Id.*

164. *Id.*

165. *Id.*

166. *Three D, L.L.C. (Triple Play)*, JD(NY)-01-12, Case No. 34-CA-12915 (NLRB Jan. 3, 2012), available at <http://www.nlr.gov/case/34-CA-012915>.

167. *Id.* at 2-3. From the outset, the fact that a former employee—and not a current employee—initiated the conversation suggests that the purpose was to gripe, and not to improve terms of employment; a former employee no longer has an interest in improving working conditions at the company.

168. *Id.* at 3, 8.

169. *Id.* at 3.

employer that they would discuss the matter at the meeting.<sup>170</sup> Several of the employer's customers also joined in on the conversation.<sup>171</sup>

The Board determined that the Facebook conversation related to employees' mutual concerns about the employer's administration of income tax withholdings, which is a term and condition of employment.<sup>172</sup> Additionally, the Board highlighted that the conversation "contemplated future group activity," as one of the employees mentioned that she had requested the matter be discussed at an upcoming management meeting.<sup>173</sup> With respect to one employee's use of the Facebook "Like" button, the Board stated that it "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity."<sup>174</sup> Based on these considerations, the Board therefore deemed the activity both concerted and protected under the *Meyers* standard.<sup>175</sup>

170. *Id.* at 3–4.

171. *Id.*

172. *Id.* at 8.

173. *See id.*; MEMORANDUM OM 11-74, *supra* note 104, at 10.

174. *Triple Play*, JD(NY)–01–12 at 8–9. The Board went on to state that the employee's selection of the "Like" option amounted to, "in the context of Facebook communications, an assent to the comments being made, and a meaningful contribution to the discussion." *Id.* Here, the Board attributes much more weight to a simple click of a button than the action deserves. Furthermore, the Board ignores how easy it is to "Like" a post on Facebook; the gesture has very little in common with actually banding together with a fellow employee at work and joining in his cause. Moreover, it is difficult to deduce a person's intent from a simple Facebook "Like," let alone from his or her wall posts and status updates. For the Board to elevate a "Like" to the level of "meaningful contribution to the discussion" seems forced and artificial within the context of concerted activity. *See infra* Part IV.B.

The Board's position is especially interesting in light of the United States District Court for the Eastern District of Virginia's recent decision in April 2012 that a Facebook "Like" is not constitutionally protected speech under the First Amendment:

Simply liking a Facebook page is insufficient. It is not the kind of substantive statement that has previously warranted constitutional protection. The Court will not attempt to infer the actual content of [a plaintiff's] posts from one click of a button on [a] Facebook page. For the Court to assume that the Plaintiffs made some specific statement without evidence of such statements is improper. Facebook posts *can* be considered matters of public concern; however, the Court does not believe Plaintiffs . . . have alleged sufficient speech to garner First Amendment protection.

*Bland v. Roberts*, 857 F. Supp. 2d 599, 604 (E.D. Va. 2012). It is surprising that a federal court would offer less protection—and under a broader standard—to Facebook "Likes" than the NLRB would under the narrower NLRA.

175. *Triple Play*, JD(NY)–01–12 at 8–9.

#### IV. SOCIAL MEDIA AS A CATEGORY ALL ITS OWN: THE INADEQUACY OF TRADITIONAL TESTS, AND WHAT MAKES SOCIAL MEDIA DIFFERENT FROM THE PROVERBIAL WATER COOLER

The Board is misguided when it broadly asserts that communication over the Internet does nothing to alter a finding of protected activity.<sup>176</sup> Not all Internet speech shares the same qualities.<sup>177</sup> An email conversation between coworkers or an article appearing on a union website<sup>178</sup> is markedly different from an employee's rant about his boss on Facebook.<sup>179</sup> The Board's unwavering adherence to dated law and failure to recognize the uniqueness of social media communication not only hinders its interpretation of current cases, it also makes it more difficult to break away from backward-looking precedent in the future.<sup>180</sup>

##### *A. The Public Factor: Acknowledging the Omnipresent Audience Built into Social Media Websites*

The principal aspect of social media communication that makes it different from traditional face-to-face interaction at the company water cooler<sup>181</sup> is its public nature.<sup>182</sup> Indeed, sites like Facebook and Twitter have paved the way in diminishing the modern concept of privacy, especially among younger generations who have grown up with the Internet.<sup>183</sup> Facebook founder Mark Zuckerberg claims that privacy is no longer a "social norm" and that people are now comfortable "not only sharing more information and different kinds, but more openly and with more people."<sup>184</sup>

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176. See MEMORANDUM OM 11-74, *supra* note 104, at 4.

177. See *infra* Part IV.A-B.

178. Arguably, these two examples could comport nicely with the Board's view that Internet speech deserves the same analysis as anything else, because they do not contain the public element of social media websites. See *infra* Part IV.A-B.

179. See *infra* Part IV.A-B.

180. See *infra* notes 233-53.

181. See *supra* text accompanying notes 35-36.

182. See Sprague, *supra* note 17, at 396-97.

183. See *id.*; see generally Catharine P. Taylor, *Facebook Oversharing Clogs the Feed*, SOC. MEDIA INSIDER (Jan. 26, 2012, 1:22 PM), <http://www.mediapost.com/publications/article/166621/facebook-oversharing-clogs-the-feed.html>.

184. Emma Barnett, *Facebook's Mark Zuckerberg Says Privacy is No Longer a 'Social Norm,'* THE TELEGRAPH, Jan. 11, 2010, <http://www.telegraph.co.uk/technology/facebook/6966628/Facebooks-Mark-Zuckerberg-says-privacy-is-no-longer-a-social-norm.html>.

At the same time, however, some level of privacy protection is critical to the success of social media giants, as indicated by Facebook's February 2012 filing with the United States Securities and Exchange Commission to sell its stock to the public. Mark Milian, *What scares Facebook: Privacy and Phones*, CNN (Feb. 1, 2012, 5:36 AM), <http://cnn.com/2012/02/01/tech/social-media/facebook-ipo-risks/index.html>. In its initial public offering registration, Facebook listed users' concerns regarding privacy as a risk to business because

On Twitter, for example, a user's "tweets" are visible either to everyone who visits the profile page (if the account is public) or to all of the user's followers (if the account is protected).<sup>185</sup> Likewise, when an individual creates a status update or wall post on Facebook, it is customary for all of her "friends"—whether they be close friends, acquaintances, distant classmates, or her mother and father—to have access to it.<sup>186</sup> In November 2011, the average Facebook user had 190 friends.<sup>187</sup> With the single click of a button, then, social media users are able to broadcast statements, images, links, and videos to hundreds, if not thousands, of people instantaneously.<sup>188</sup>

This omnipresent public audience is precisely what renders social media a category all of its own, separate from the traditional work environment addressed by the NLRA.<sup>189</sup> *Meyers*—the leading test for the Board's concerted activity analysis—focused on the importance of employees communicating directly with one another for an activity to be protected under the NLRA.<sup>190</sup> But when it comes to employee communications via

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it could cause users to temper their use of the website. *Id.* Facebook cited the mishandling of user information as its primary concern (i.e., improper disclosure of personal data or hacker activity). *Id.* Although information security breaches are a far cry from the subject of this article, the fact that Facebook identifies a direct relationship between its finances and users' privacy concerns demonstrates that individuals across the globe do in fact have some basic expectation of privacy in the digital age. *Id.* This, in itself, is noteworthy: in November 2011, a district court decision held that Twitter users had no expectation of privacy in their Internet Protocol (IP) addresses as collected and stored by Twitter, and that even if they did, the users forfeited that expectation when they voluntarily disclosed the information to third parties in order to access Twitter. *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 830 F. Supp. 2d 114, 131–33 (E.D. Va. 2011); see generally Kevin Poulsen, *Judge Rules Feds Can Have WikiLeaks Associates' Twitter Data*, WIRED.COM (Nov. 10, 2011, 2:23 PM), <http://www.wired.com/threatlevel/2011/11/wikileaks-twitter-ruling/>.

185. *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/articles/14016> (last visited Mar. 24, 2013). The default account setting for Tweets is public. *Id.*

186. Facebook provides customizable privacy settings, whereby the user can choose to make all posts public—meaning they are visible even to non-Facebook users—or to restrict certain content so that only specified persons or groups can see it. *Data Use Policy—Sharing and Finding You on Facebook*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info-on-fb> (last visited Mar. 24, 2013). For purposes of this article, however, assume that the typical Facebook user allows all of his or her friends to see content posted on a wall or news feed.

187. Lars Backstrom, *Anatomy of Facebook*, FACEBOOK (Nov. 21, 2011, 5:04 PM), [https://www.facebook.com/note.php?note\\_id=10150388519243859](https://www.facebook.com/note.php?note_id=10150388519243859). The median friend count was 100. *Id.* Though Backstrom noted that the median figure "may seem surprisingly low" because "a quick survey of [his] own friends reveals that they almost all have more than 100" connections, this is the result of a "classic paradox regarding social networks" whereby "for most people, the median friend count of their friends is higher than their own friend count." *Id.*

188. See *supra* text accompanying notes 186–87.

189. See *infra* text accompanying notes 191–208.

190. *Meyers I*, 268 N.L.R.B. 493, 497 (1984).

social media, third parties (i.e., non-employees) can become just as involved—if not more—in the conversation, and this has a significant impact on the employer–employee relationship.<sup>191</sup>

Social media builds third parties into every communication by providing a constant group of listeners who can participate in the dialogue as they wish.<sup>192</sup> This is significantly different from a standard workplace environment.<sup>193</sup> When an employee posts a negative statement about his employer on a social media website, he reaches a far greater number of viewers than if he makes the same comment verbally at the office.<sup>194</sup> He also reaches a more diverse group of people, many of whom are likely not his fellow coworkers.<sup>195</sup> Customers, competitors, and members of the community alike may be able to see the employee’s statement.<sup>196</sup> From an employer’s perspective, then, social media can injure the company’s interests more swiftly and severely than traditional forms of discourse because of the widespread nature of the communication.<sup>197</sup>

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191. See *infra* notes 254–66 and accompanying text.

192. See Daniel Flanberg, *The Psychology of Facebook*, IMEDIA CONNECTION (Feb. 7, 2012, 3:17 PM), <http://blogs.imediaconnection.com/blog/2012/02/07/the-psychology-of-facebook/>. Flanberg writes, “Facebook means you never have to be alone. Facebook insures you always have someone to talk to and something to see and react to.” *Id.*

193. See *infra* notes 254–66 and accompanying text.

194. See Sprague, *supra* note 17, at 417.

195. See Adam D. I. Kramer, *Connecting with... Sam Gosling: Facebook Psychologist*, THE FACEBOOK BLOG (Feb. 2, 2010, 12:56 PM), <http://blog.facebook.com/blog.php?post=283497147130>. In this way, social media converges the workplace realm with that of home life and recreation. Dr. Sam Gosling, a psychologist and professor who has researched social media expression, asserts that as new technologies emerge, individuals are bringing their distinct identities—i.e., the “home or family self, a friend self, a leisure self, a work self”—together via online social networking. *Id.* He states:

On my Facebook profile, I have colleagues, I have family members, I have students, I have people who’ve read my book, I have all kinds of different people there and it’s much harder now to maintain that separation. So I think one of the things we are being forced to do is accept the merging of identities that we may have tried to keep apart before.

*Id.*

196. See *id.*

197. It could be argued that because standard print publication bears some similarity to social media websites in terms of scope of readership, social media does not deserve its own separate analysis. See generally Adam Clark Estes, *New York Times Print Circulation Rises, Sort of*, THE ATLANTIC WIRE (Nov. 1, 2011), <http://www.theatlanticwire.com/business/2011/11/new-york-times-print-circulation-rises-sort-of/44392/> (stating that the circulation of the New York Times as of September 2011 hovered at 992,383). It is certainly true that a print newspaper may have a greater number of readers than hypothetical employee John Smith’s Facebook wall. However, the difference between the two media is the type of content generated by each one. The newspaper has a process behind it that involves approval for publication, edits, review, etc., so that an employee rant would generally not take up the front-page headline. John Smith, on the other hand, can get home after a day of work, log onto his Facebook account, and publicly accuse his boss of being a terrible manager or his company of being discriminatory. His every post is essentially a leading headline. As long as another one of Smith’s coworkers chimes into the online conversation (which purportedly

One additional consequence of social media's public nature is that any and all statements made online are permanent.<sup>198</sup> Users' profile pages on social media websites contain a record of everything the individual ever said or did on the site.<sup>199</sup> Again, this can be more harmful for employers; an employee's passing remark about his supervisor in the hallway may fade into the ether, but if he makes that same comment on the Internet, it is memorialized on-screen and forever searchable by individuals in his online social network.<sup>200</sup> Although print publications such as magazines, pamphlets, and newspapers all share this quality, the difference is in the accessibility of the material.<sup>201</sup> It is much easier to click through a person's profile page to see what she said about her company back in August of 2006 than it is to sift through stacks of archives in a library.<sup>202</sup>

Even if employees' rants about their employers on social media websites are determined to constitute concerted activity, the Board has misapplied its precedent, as both *Atlantic Steel* and *Jefferson Standard* suggest that such conduct is still unprotected.<sup>203</sup> First, under the *Atlantic Steel* factors for determining whether an employee has forfeited protection under the NLRA, the first thing to consider is the place of the discussion.<sup>204</sup> The Board decided *Atlantic Steel* in 1979, long before the days of the Internet, when it could not have imagined the term "place" to mean an online social network.<sup>205</sup> Regardless, the Board today insists that the character of an employee's speech does not change whether it takes place in

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changes it from individual to group action), this activity counts as protected under current NLRB analysis.

198. Sarah Worsham, *Social Media is Your Permanent Record*, SAZBEAN (Sept. 22, 2010), <http://sazbean.com/2010/09/22/social-media-is-your-permanent-record/>.

199. *Id.*

200. *See id.*

201. *See id.*

202. Although posts may decrease in popularity the longer they are online, making them arguably less injurious to an employer over time, the fact that individuals can still retrieve the information relatively easily is the distinguishing element. *See* Pamela Vaughan, *Shelf Life of Social Media Links Only 3 Hours*, HUBSPOT BLOG (Sept. 8, 2011, 8:00 AM), <http://blog.hubspot.com/blog/tabid/6307/bid/24507/Shelf-Life-of-Social-Media-Links-Only-3-Hours-Data.aspx>. This is especially true with Facebook's "Timeline," which organizes users' wall posts, photos, and other activity by date and makes old information even more readily accessible. *See Introducing Timeline*, FACEBOOK, <http://www.facebook.com/help/467610326601639/> (last visited Mar. 24, 2013).

203. *See supra* notes 87–100 and accompanying text.

204. *Atl. Steel, Inc.*, 245 N.L.R.B. 814, 816 (1979).

205. *Id.* at 814.

the office or on Facebook.<sup>206</sup> Based on the discussion above regarding the exceedingly public nature of social media websites, however, the place factor in the *Atlantic Steel* analysis takes on a more important meaning than the Board acknowledges.<sup>207</sup> Thus, when a discussion occurs on a social media website where third-party viewers can see it, the place factor should always weigh heavily in favor of the employer.<sup>208</sup>

Second, in *Jefferson Standard*, the Supreme Court emphasized that employee appeals to third parties will only remain protected if the communication relates to an ongoing labor dispute and is not so disloyal, reckless, or maliciously untrue as to lose the Act's protections.<sup>209</sup> As applied to social media cases, this requires the employee to adequately identify that his comments are related to a pending labor dispute.<sup>210</sup> Additionally, and perhaps most importantly, the employee's statement must be in line with the purposes of the Act: to "promot[e] industrial peace and stability."<sup>211</sup> In *Jefferson Standard*, the Court deemed workers' public distribution of handbills containing disparaging remarks against their employer disloyal enough to go against the purpose of the Act and to lose its protection.<sup>212</sup> Given the Court's disfavor toward involving third parties in the conversation, employees who attack their employers on social media websites in full view of third-party readers should likewise forfeit protection under the NLRA.<sup>213</sup> The NLRB has thus failed to appropriately apply both *Atlantic Steel* and *Jefferson Standard* to recent social media cases by maintaining protected status for online speech that is both public and widespread.<sup>214</sup>

#### *B. The Intent Factor: Who Are You Talking to, and Why?*

Another important aspect of social media communication that makes it different from the company water cooler is the employee's intent behind his statements.<sup>215</sup> *Meyers* contemplated the need for an employee to involve his

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206. MEMORANDUM OM 11-74, *supra* note 104, at 4.

207. *See supra* notes 90–91 and accompanying text.

208. *See supra* notes 90–91 and accompanying text.

209. *Jefferson Standard*, 346 U.S. 464, 473–75 (1953).

210. *See id.* at 474–75. Thus, for a worker to come home at the end of the day and voice generalized complaints about his supervisor or company practices should not be protected. *See id.* In *Jefferson Standard*, it was not enough that the timing of the disparaging handbills coincided with a labor dispute. *Id.* at 476. The employees needed to properly disclose both the context and reasons behind the handbill distribution. *Id.* at 476–77.

211. *Id.* at 476.

212. *Id.* at 472–75.

213. *See id.* at 472–77.

214. *See supra* notes 136–75 and accompanying text.

215. *See supra* note 184.

fellow employees in discussions about work in order for speech to be a protected concerted activity under the NLRA.<sup>216</sup> Indeed, when employees gather together to discuss the workplace, we can infer that they intend to talk specifically with one another.<sup>217</sup> However, with sites such as Facebook and Twitter, an employee need not intend to communicate with anyone in particular when he posts a rant on his status update about the workday; he speaks to no one and yet speaks to everyone.<sup>218</sup> Statements on social media websites extend very broadly, and individuals can never be sure as to how many friends—if any—will comment on or respond to a particular post. If a conversation ensues between coworkers, it may be merely incidental.<sup>219</sup>

Surely, employees who publish negative statements about their employers online are intending to communicate with *someone*.<sup>220</sup> But given the nature of social media websites, it is unlikely that employees' primary intent when they post bad things about their company online is to band together with coworkers and discuss the terms of their employment. This does not seem to be the type of situation that *Meyers* addressed.<sup>221</sup> *Meyers* presented two possible categories for employee conduct: activity that is either "engaged in with or on the authority of other employees" or carried out "by and on behalf of the employee himself."<sup>222</sup> Using the facts from *AMR* as an example, where Souza called her boss a scumbag on Facebook,<sup>223</sup> such communication does not fit neatly within either of the *Meyers* classifications. At first glance, Souza's statement may seem like group activity, in that she conversed with her fellow employees about her boss after they responded to her post.<sup>224</sup> But at the same time, Souza in no way directed her words toward her fellow coworkers; rather, she made a statement to all of her Facebook friends, which resembles individual activity

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216. *Meyers I*, 268 N.L.R.B. 493, 497 (1984).

217. *See id.*

218. *See* Flamberg, *supra* note 192.

219. Under current Board analysis, though, when a coworker responds to an employee's post about work, the conversation almost always automatically constitutes protected concerted activity. *See supra* notes 136–75 and accompanying text.

220. It is difficult to argue that by posting something in a public online forum, an individual intends not to communicate anything to anyone. *See* Flamberg, *supra* note 192. If a person really wishes to keep her thoughts to herself, she presumably does not choose to broadcast them over the Internet. *See id.*

221. *See infra* note 222 and accompanying text.

222. *Meyers I*, 268 N.L.R.B. at 497.

223. *See supra* note 27 and accompanying text.

224. *See supra* text accompanying notes 26–28.



carried out on her own behalf.<sup>225</sup> Thus, because *Meyers* does not address the distinct nature of employees' social media communication, the Board should not rely on it in determining whether the activity is protected concerted activity under the NLRA. Moreover, even if *Meyers* applies, employee complaints on social media websites are much more akin to activity focusing on individual rather than group interests, and as such, they are unprotected.<sup>226</sup>

Finally, employees' intent in posting rants on Facebook also goes to the griping rule laid down in *Mushroom Transportation*—namely, that mere griping is not protected under the NLRA.<sup>227</sup> It appears that much of the negative communication posted to social media websites simply amounts to griping, and for the NLRB to elevate such talk to the level of protected discourse is inappropriate. Take, for example, *Hispanics United*, where the employee posted on Facebook that one of her coworkers was criticizing her coworkers' job performance.<sup>228</sup> She seemed to intend to complain and vent to anyone who would listen rather than to initiate group action among her coworkers.<sup>229</sup> Likewise, in *Triple Play*, where a former employee posted an expletive on Facebook stating that the employer's owners could not do paperwork correctly, was she really seeking to address working conditions on behalf of her old coworkers?<sup>230</sup> This is unlikely because her publication more closely resembles the comments made in *Mushroom Transportation*.<sup>231</sup> There, the court held that even though the employee's statements related to shared concerns among his coworkers, he did not seek to initiate group action when he spoke and, therefore, engaged in mere griping.<sup>232</sup> The Board has thus failed to heed its own rules by ignoring the standards set forth in *Mushroom Transportation* and by hastily concluding that the Act protects just about anything said between coworkers—even when what is said has no relationship to group activity.

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225. See *supra* text accompanying notes 26–28.

226. See *supra* notes 66–81 and accompanying text.

227. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 684 (3d Cir. 1964).

228. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, slip op. at 7 (Dec. 14, 2012).

229. See *id.* Such behavior is also quite damaging to the individual's fellow employees, i.e., the ones who are being griped about on Facebook. See *supra* notes 139–45. This further supports the argument that the activity should not rise to the level of protection offered under the NLRA.

230. *Triple Play*, JD(NY)–01–12, Case No. 34-CA-12915, at 3 (NLRB Jan. 3, 2012), available at <http://www.nlr.gov/case/34-CA-012915>. The fact that the individual was a former employee, and not a current employee, only strengthens the argument that she was merely complaining rather than trying to band together with people who were no longer her coworkers. See *supra* notes 148–53.

231. See *Mushroom Transp. Co.*, 330 F.2d at 684.

232. *Id.* at 685. Here, an employee who repeatedly griped about employment conditions was not engaged in concerted activity. *Id.* In order to be protected, “[a]ctivity which consists of mere talk must . . . be . . . looking toward group action.” *Id.*

## V. DEVELOPING A NEW FRAMEWORK: PROPOSALS FOR THE FUTURE

A. *Shifting the Focus in the Board's Current Analysis of Online Social Media Communications*

Given the above considerations as to the uniqueness of social media,<sup>233</sup> the Board should modify its current analysis of protected concerted activity when employee speech takes place on social media websites. First, with respect to the *Meyers* test, the Board should focus more closely on the employee's intent when he posts an online statement.<sup>234</sup> Although the identity of the speakers (i.e., coworkers or third parties) is a certainly an important consideration, the purpose of the communication is more indicative of whether the employee acts individually or for the group.<sup>235</sup> In this way, activities will not automatically gain protected status simply because two or more employees exchange a handful of comments in response to a Facebook status update.<sup>236</sup> If an employee intends to speak to the whole world, and a short discussion among coworkers ensues, this should not be considered protected; the employee has not demonstrated the requisite intent to initiate group action.<sup>237</sup>

Additionally, the Board should modify its treatment of the first *Atlantic Steel* factor—the place of the activity.<sup>238</sup> Currently, Board analysis fails to appropriately reflect the extremely public character of social media speech and its potential for harming employer interests.<sup>239</sup> The place factor should automatically weigh in favor of the employer any time an employee makes a statement via social media websites. In this way, the *Atlantic Steel* test will acknowledge the public quality of statements made on social networking sites.<sup>240</sup>

B. *Employers' Social Media Policies: An Opportunity for Employers to Create Their Own Social Networks*

Under the NLRA, employers can lawfully prohibit employees from

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233. See *supra* Part IV.

234. See *supra* Part IV.B.

235. See *supra* Part IV.B.

236. See *supra* Part IV.B.

237. See *supra* notes 219–32 and accompanying text.

238. *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

239. See *supra* Part III.

240. See *supra* Part IV.

making disparaging remarks about the company via social media, but with a hefty caveat: they may only do so with regard to unprotected speech.<sup>241</sup> In essence, this means that if an employer can prohibit an employee from engaging in sexual harassment in the office, it can also prohibit the employee from making sexually harassing statements on Facebook.<sup>242</sup> Granted, this is beneficial in guarding against egregious conduct by employees. However, it does nothing to help an employer that seeks to dissuade its employees from posting disparaging remarks about the company online. The Board has demonstrated a strong commitment to declaring most social media communication protected, meaning employers cannot restrict such activity in their policies.<sup>243</sup> Therefore, it is highly unlikely that the Board will uphold any social media policies that bar employees from making negative statements online about management, company practices, or the employer in general.<sup>244</sup>

If the Board refuses to permit curtailing employees' speech on social media websites, one attractive option for employers is creating their own social networks for employees only.<sup>245</sup> Dubbed "virtual water coolers,"<sup>246</sup> these platforms allow employees to create profiles, join groups, send messages, ask questions, and converse with one another without the information being exposed to the public.<sup>247</sup>

These systems offer a solution to many of the issues raised in this Comment.<sup>248</sup> First, they remove the problem of broadcasting employee speech across the Internet when it has the potential to damage an employer's reputation.<sup>249</sup> Without third-party viewers watching these conversations on corporate social networks, employers no longer have to worry about limiting employee speech to prevent harm to their company's image.<sup>250</sup> Second, these platforms resolve the problem of identifying individuals' intent in

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241. See *supra* Part II.B.

242. See *supra* Part II.B.

243. See *supra* Part II.B.

244. See *supra* Part II.B.

245. See, e.g., Debra Donston-Miller, *HCL's Homegrown Social Network Connects 60,000 Employees*, INFORMATIONWEEK (Jan. 30, 2012), [http://www.informationweek.com/thebrainyard/news/social\\_networking\\_private\\_platforms/232500686](http://www.informationweek.com/thebrainyard/news/social_networking_private_platforms/232500686); see also *Features*, CUBELESS, [http://www.cubeless.com/?page\\_id=7](http://www.cubeless.com/?page_id=7) (last visited Jan. 25, 2013).

246. Sarah Worsham, *Cubeless—A Virtual Water Cooler*, SAZBEAN (July 8, 2008), <http://sazbean.com/2008/07/08/cubeless-a-virtual-water-cooler/>.

247. See *id.* The term "virtual water cooler" is much more appropriate when applied to these types of websites because the forums are restricted to employees only and thus more closely resemble the traditional office environment.

248. See *supra* notes 18–20, 176–232 and accompanying text.

249. See *supra* note 20 and accompanying text.

250. See Donston-Miller, *supra* note 245.

making statements online.<sup>251</sup> Because only employees have access, workers' participation on the network indicates that they intend to communicate with their coworkers rather than voice an opinion to the public.<sup>252</sup> Finally, the employer can create rules prohibiting unprotected activities on these platforms in order to protect employee interests, and such rules will not violate Section 8(a)(1) under the Act.<sup>253</sup>

#### VI. IMPACT: BENEFITING THE EMPLOYER AND EMPLOYEE ALIKE

Narrowing the scope of what it means to engage in concerted activity on a social media website is critical for the benefit of workers and businesses throughout the United States.<sup>254</sup> The Board's trend of declaring that most employee speech on social media websites constitutes protected concerted activity is ultimately harmful to both employees and employers.<sup>255</sup> On one hand, though current Board precedent may afford employees greater freedom on the Internet by allowing them to post freely in the public arena, such laxity makes employees much more vulnerable to online attacks and cyber-bullying by coworkers.<sup>256</sup> Indeed, in the *Hispanics United*<sup>257</sup> case, whereby five individuals participated in a Facebook conversation berating one of their fellow employees, the Board upheld their behavior as protected concerted activity, meaning the employer could not punish them for it.<sup>258</sup> Such a workplace environment is damaging to all parties involved.<sup>259</sup> Additionally, employers have strong interests in both maintaining control and uniformity throughout the workplace and maintaining a desirable online

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251. See *supra* notes 215–32 and accompanying text.

252. See *supra* text accompanying note 218.

253. See *supra* notes 223–24 and accompanying text. It could be argued that this might have the countereffect of chilling employee speech; for example, if an employee knows that his employer owns the social network, this could deter him from posting his grievances online. However, the employer-owned social network does nothing to deter other forms of communication between an employee and his coworkers outside the network. The fact that an individual employee may choose to engage in the highest form of workplace protection by not participating in the network and refusing to voice any of his grievances in a public setting should not be used to suggest that employers' provisions regarding social networks actually limit protected activity under the NLRA.

254. See *infra* notes 255–66 and accompanying text.

255. See *supra* notes 136–75 and accompanying text.

256. See *supra* note 147.

257. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012).

258. *Id.* slip op. at 7–9. The conduct included using expletives and threatening remarks regarding their coworker. *Id.* slip op. at 7–8.

259. See *id.* slip op. at 7–9.

image.<sup>260</sup> The Board's current path lessens employers' authority to manage their employees in a consistent fashion (as seen in *Hispanics United*) and compromises their ability to create and foster their own brands on social media websites.<sup>261</sup>

The approach set forth in this Comment can temper these concerns by narrowing the scope of what constitutes concerted activity in the social media context.<sup>262</sup> Removing that shield from employee conduct online will benefit employees and employers alike.<sup>263</sup> First, employees will be protected from harmful statements or cyber-bullying from their coworkers.<sup>264</sup> They can enjoy consistency in treatment, and no single employee or group of employees will be allowed to attack others without consequence.<sup>265</sup> Second, employers can regain autonomy over their online presence and not have to worry about their employees making inappropriate statements that compromise the identity of the brand or management.<sup>266</sup>

## VII. CONCLUSION

Social networks are a very recent phenomenon, and they continue to develop and evolve at a whirlwind pace.<sup>267</sup> The Board has only just begun to address the many issues raised by this new mode of communication.<sup>268</sup> Thus far, however, it has missed the mark.<sup>269</sup> During the past several years, the Board consistently found that employees engaged in protected concerted activity when they posted negative statements about their employers on social media websites.<sup>270</sup> In so doing, the Board failed to acknowledge or appreciate the important aspects of social media that make it wholly distinct from the traditional workplace environment.<sup>271</sup>

The Board tries to force a square peg into a round hole when it insists on

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260. See *supra* notes 190–204.

261. Stephanie Chen, *Workplace Rants on Social Media are Headache for Companies*, CNN (May 12, 2010, 12:48 PM), <http://www.cnn.com/2010/LIVING/05/12/social.media.work.rants/index.html>.

262. See *supra* Part IV.

263. See *supra* notes 186–220.

264. See *supra* note 147.

265. See *infra* notes 267–68 and accompanying text.

266. Philip Gordon, *NLRB Report Challenges Validity of Many Commonly Used Social Media Policies*, WORKPLACE PRIVACY COUNS. (Jan. 27, 2012), <http://privacyblog.littler.com/2012/01/articles/labor-relations/nlr-report-challenges-validity-of-many-commonly-used-social-media-policies/>.

267. See *supra* notes 4–14 and accompanying text.

268. See *supra* notes 21–22 and accompanying text.

269. See *supra* notes 176–232 and accompanying text.

270. See *supra* notes 136–75 and accompanying text.

271. See *supra* notes 176–232 and accompanying text.

applying dated law to current social media cases.<sup>272</sup> Rather than taking this opportunity to develop a new analytical framework and apply it to social media, the Board instead fell back on old precedent.<sup>273</sup> Although the canon of protected activity cases (*Meyers*, *Atlantic Steel*, *Jefferson Standard*, *Mushroom Transportation*, etc.) is helpful to a certain degree in assessing employee communications via social media websites, these cases cannot adequately resolve all of the issues that spring forth from this novel territory.<sup>274</sup>

The Board should consider both the public nature of social media as well as employees' intent in broadcasting their thoughts online when determining whether an activity is concerted protected activity.<sup>275</sup> These significant factors enable the Board to more accurately identify whether employees' speech seeks to initiate group action or to further individual interests.<sup>276</sup> Under the proposed analysis above, then, employees must lose the protection of the Act when they post negative statements about their employer on social media websites for three reasons.<sup>277</sup> First, they lack the requisite intent to initiate group activity.<sup>278</sup> Second, the public appeal to third parties renders the action so disloyal as to lose protection under the NLRA.<sup>279</sup> Finally, when employees simply complain about the workplace instead of seeking to band together to address their working conditions, they engage in mere griping, which is always unprotected.<sup>280</sup> For the foregoing reasons, the Board should alter its current analysis of social media cases and allow employers to prohibit employees from making disparaging remarks about their organizations on social network websites.<sup>281</sup>

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272. See *supra* notes 176–220 and accompanying text.

273. See *supra* notes 184–208 and accompanying text.

274. See *supra* notes 47–135 and accompanying text.

275. See *supra* notes 233–40 and accompanying text.

276. See *supra* notes 233–40 and accompanying text.

277. See *supra* notes 215–32 and accompanying text.

278. See *supra* notes 181–214 and accompanying text.

279. See *supra* notes 157–67 and accompanying text.

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

281. See *supra* notes 204–35 and accompanying text.

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