CALL FOR CONSISTENCY: A PROPOSED OBJECTIVE FRAMEWORK FOR DEFINING "CONCERTED ACTIVITY" FOR FACEBOOK POSTS

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I. INTRODUCTION

Employers beware. Actions against employees who post negative comments on social media about their employer could violate federal law. The National Labor Relations Board (Board or NLRB) will sanction employers if an employee's Facebook comment was "concerted activity." The Board will sanction businesses small and large. The National Labor Relations Act (Act or NLRA) protects an employee's right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[1] Section 8 of the Act prohibits, among other things, employers from taking action against employees who engage in section 7, "concerted activity."[2] As "concerted activity" is not defined in the Act, its meaning changes according to the Board's discretion.[3]

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[1] National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

[2] *Id.* § 8. These types of actions are known as "retaliation." The Act defines retaliation as "taking action against an employee because the employee engaged in some type of activity that is protected by law." Robin E. Shea, *Employers, You Might (or Might Not) Be Liable for Retaliation if. . .*, EMP. & LAB. INSIDER (Jan. 27, 2012), http://www.employmentandlaborinsider.com/discrimination/our-friend-judy-greenwald-from/. The three components of a retaliation claim are (1) "The employee engages in some type of legally protected activity," (2) "Adverse employment action is taken by the company," and (3) "There is a 'causal nexus' . . . between the protected activity and the adverse action." *Id.*; *see also* Alchris Corp., 301 N.L.R.B. 182, 182 (1991) (noting that the employer did not know the concerted nature of the activity when terminating the employee).

[3] The Board has the authority to define concerted activity. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975); *see also* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984) ("The term 'concerted activit[y]' is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals." (citations omitted)); NLRB v. Enter. Ass'n of Steam Local 638, 429 U.S. 507, 528 (1977) ("[C]ourts should defer to the agency's understanding of the statute which it administers."); Associated Grocers of New Eng., Inc. v. NLRB, 562 F.2d 1333, 1336 (1st Cir. 1977) ("The Board is entitled to considerable deference in its determination of the scope of § 7 and its

The meteoric rise of claims regarding the termination of employees because of their Facebook posts—coined "Facebook Firings"[4]—has caused employers to struggle to find guidance regarding if and when they are able to take action against their employees. Though the NLRB may adapt the NLRA as needed,[5] there must be limitations in applying "old-law" to Facebook posts.[6] Facebook posts can be concerted activity under some circumstances. Currently, the Board grants the status of concerted activity to Facebook posts based on the decisionmaker's subjective interpretation.

To highlight the issue with subjective interpretation, compare the language of the following two Facebook posts. The first belongs to Dawnmarie Souza, the plaintiff in *American Medical Response of Connecticut*, who was discharged for several violations of American Medical Response's employee standards of conduct.[7] Her post read: "Looks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor."[8]

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application of the Act to the varying circumstances of industrial relations." (citations omitted)).

[4] *See* MICHAEL J. EASTMAN, A SURVEY OF SOCIAL MEDIA ISSUES BEFORE THE NLRB 22 n.79, U.S. CHAMBER OF COMMERCE (Aug. 5, 2011). The Board has seen an influx of social media cases; as of August 5, 2011, there have been a reported 129 cases that have involved social media in some way. *Id.* at 1.

[5] *See J. Weingarten, Inc.*, 420 U.S. at 266 ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[6] Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1281 & n.24 (2002). The definition of "old-law," as Lee puts it, includes "statutes or doctrines that were created before the Internet even existed and, therefore, could not possibly have anticipated application to the Internet." *Id.* at 1281; *see also* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221, 228 (2005) ("Congress, however, has made no comprehensive changes in the NLRA since 1959. As a result of this legislative inaction, the Board enjoys neither a renewed mandate nor additional powers and responsibilities. Instead, it relies on an aging regulatory structure to monitor and respond to labor relations realities that could scarcely have been anticipated sixty or seventy years earlier." (footnote omitted)).

[7] Advice Memorandum on American Medical Response of Connecticut, Case 34-CA-12576 from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Jonathan B. Kreisberg, Reg'l Dir., Region 34, at 2 (Oct. 5, 2010) [hereinafter American Medical Advice Memorandum].

[8] *Id.* at 3.

Compare that to an employee whose discipline was analyzed in the *Wal-Mart* advice memorandum.[9] The post stated:

> You have no clue [Employee 1] . . . [Assistant Manager] is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price . . . that's false advertisement if you don't sell it for that price . . . I'm talking to [Store Manager] about this shit cuz if it don't change walmart can kiss my royal white ass![10]

Though both posts make disparaging remarks without soliciting any concerted action, the first was held to be concerted activity while the second was not. Small and large business owners cannot rely on such varying outcomes.[11] To aid them, this comment proposes that the Board adopt a contemporary, objective framework that can be used to determine if an employee's Facebook post is concerted activity.[12]

Part II of this comment brings to the surface three prevalent factors in determining if activity—in the physical world—is concerted. These three factors serve as the basis for the suggested objective test. Part III discusses what modifications need to be made to the factors for "Facebook Firing" cases. Part IV takes four "Facebook Firing" cases and applies the test to the facts of each case to highlight the inconsistency in the Board's current approach.

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[9] Advice Memorandum on Wal-Mart, Case 17-CA-25030 from Barry J. Kearney, Assoc. Gen. Counsel, NLRB Div. of Advice, to Daniel L. Hubbel, Reg'l Dir., Region 17, at (July 19, 2011) [hereinafter Wal-Mart Advice Memorandum].

[10] *Id.* (alteration in original).

[11] The American Medical Response of Connecticut case will be analyzed under the proposed objective framework. *See infra* Part IV.

[12] There are many interconnected issues in a section 7 analysis that this comment will not address; first, this comment will not address whether the concerted activity is protected. For examples of the difference between concerted activity and protected concerted activity, see Crown Cent. Petrol. Corp. v. NLRB, 430 F.2d 724, 729 (5th Cir. 1970). The scope of this comment will be limited to whether interaction via social media is, in itself, concerted activity, not whether the interaction occurs in a such way that forfeits protection. However, "[b]efore it can be determined if a worker's actions are protected, the question must be answered whether or not those actions are concerted." Linda Barnard, *Individual Activities as "Concerted" Actions*, 53 UMKC L. REV. 495, 502 (1985); *see also* Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 828 (2003) (noting the "two-prong requirement" under section 7). Second, this comment will not address social media in the context of "cyber labor law." *Id.* at 830 n.6. Cyber labor law focuses on the interaction of the NLRA and the use of electronic technology in the workplace. *Id.*

II. THREE IMPLIED, BUT KEY, FACTORS IN DETERMINING IF ACTIVITIES OCCURRING IN THE PHYSICAL WORLD ARE CONCERTED

When determining if activity in the physical world is concerted, the NLRB always considers three key factors—key factors that it has all but ignored when deciding if communication via Facebook is concerted.[13] One of the Board's responsibilities is to define concerted activity.[14] Its decisions have shown that if any of the three factors—though not expressly mentioned by name—were not fulfilled, the activity was not concerted. This Part sifts through the analysis of several decisions and highlights those three key factors—which I coin as the "foundation requirement," the "substantive requirement" and the "procedural requirement." Without any one of these factors, the activity cannot be concerted.

A. *Foundation Requirement*

The first implied factor used to identify concerted activity is whether there had been a clearly communicated concern to someone in power before the employee engaged in the activity. Though this requirement is not mentioned specifically by name, it is well established. The foundation requirement can be inferred from past decisions because in each case, the employer had been put on notice of a concern prior to an employee's alleged concerted activity.[15] Essentially, the foundation requirement serves as an anchor. This anchor is necessary because retaliation for concerted activity usually "destroy[s] the bud of employee initiative aimed at bettering terms of employment and working conditions."[16] Therefore, it is

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[13] *See infra* Part III.

[14] NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984) ("We have often reaffirmed that the task of defining the scope of § 7 is for the Board to perform in the first instance as it considers the wide variety of cases that come before it, and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." (citations omitted) (internal quotation marks omitted)). It is worth noting that not all members of the Court agreed with the majority in *City Disposal Systems*. The three dissenters—Justices O'Connor, Powell and Rehnquist—disagreed with the majority for three reasons: (1) it was not within the legislative authority of the Board; (2) the complaint was of a personal nature; and (3) the original purpose of labor laws were "designed to encourage employees to work together." *Id.* at 841–47 (O'Connor, J., dissenting); Barnard, *supra* note 12, at 497.

[15] *See, e.g.*, Gold Coast Rest. Corp. v. NLRB, 995 F.2d 257, 263 (D.C. Cir.), *amended by* No. 91-1533, 1993 WL 444597 (D.C. Cir. Oct. 25, 1993); Silchia v. MCI Telecomm. Corp., 942 F. Supp. 1369, 1373 (D. Colo. 1996).

[16] Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347 (3d Cir. 1969). The case also stated that "[t]he concerted activities involved *were prompted by the employer's failure* . . . to pay an employees' bonus, as had been done during a number of preceding years." *Id.* at 1348–49 (emphasis added). The emphasized

only logical that the employer be—at the very least—aware of the terms that the employee seeks to improve. Regardless of whether the dispute was about group activity or individual action concerning union activity, a collective bargaining agreement or an ongoing dispute, the foundation requirement is well established.

The foundation requirement is established when there was concerted group activity and an ongoing dispute.[17] In *NLRB v. Washington Aluminum Co.*, the employer was well aware of the concern upon which the subsequent activity—a walkout—was based.[18] In *Washington Aluminum Co.*, the employees complained periodically about frigid temperatures in a machine shop.[19] Before the walkout—which was later held to be concerted activity—the managers were well aware of the employees' complaints regarding the inadequate heat: a working condition.[20] The foundation requirement is met because the walkout was anchored to a complaint made in the physical world that the managers were aware of before the concerted activity took place.[21]

Additionally, the foundation requirement is established when individual concerted activity was done based on the enforcement of a collective bargaining agreement. In the landmark case *NLRB v. City Disposal Systems, Inc.*, the Supreme Court upheld the *Interboro* doctrine.[22] In *City Disposal*, James Brown, an employee, complained that the brakes on his

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language suggests that the employer was aware of why the employees engaged in concerted activity.

[17] Ongoing disputes are the third category of concerted activity. They cover situations where the employee is not involved in union activity or enforcing a collective bargaining agreement. Typically, this situation surrounds a workplace issue—like having no heat in the working environment. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 10 (1962).

[18] *Id.* at 10–13 (stating that employees "complained from time to time" and "'huddled' together" because of the cold).

[19] *Id.* at 10.

[20] *Id.* at 11. In deciding that the activity was concerted—before the Supreme Court did—the Board noted that the testimonies of the employees showed that there were previous complaints made before the walkout. *Id.* at n.4.

[21] *Id.* at 12 (referring to when Jarvis, the shop foreman, informed the general foreman that all but one employee had left because of the temperatures in the shop).

[22] NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 841 (1984). The *Interboro* doctrine states "an individual's assertion of a right grounded in a collective-bargaining agreement is recognized . . . . [T]he assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement . . . the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement." *Id.* at 829 (citations omitted).

garbage truck were not functional and therefore that asking him to drive it violated a provision of his collective bargaining agreement.[23] The foundation requirement is established because the supervisors had notice of the faulty brakes because Brown had, over the period of two days, complained about the brakes.[24] Therefore, at the time that Brown actually refused to drive the truck, the supervisor was aware of why Brown was doing so.[25] The foundation requirement is met because Brown's refusal to drive the garbage truck was anchored to his complaint, which the managers were aware of before Brown engaged in the concerted activity—refusal to drive the garbage truck.

Lastly, the foundation requirement is established when individual concerted activity was based on union activity. In *Eastex v. NLRB*, the Court held that individuals had a right to engage in union activity for the mutual benefit of all employees.[26] Hugh Terry, an employee of Eastex, Inc., repeatedly asked his superiors for permission to hand out copies of a union newsletter.[27] When permission was denied, the union filed an unfair

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[23] *Id.* at 824–25. The collective bargaining agreement stated:

> The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

Id.; *see also* Monongahela Power Co. v. NLRB, Nos. 94-1905, 94-2036, 150 L.L.R.M. (BNA) 2192, *6–7 (4th Cir. Aug. 7, 1995) (finding that Bolyard's arguments with management over the scope of the thirty-minute rule constituted concerted activity within the meaning of the Act); NLRB v. P*I*E Nationwide, Inc., 923 F.2d 506, 515 (7th Cir. 1991) ("Though incorrect, however, an employee's understanding of the collective bargaining agreement may nevertheless be reasonable . . . . [And therefore] concerted activity."); Snyder v. Dietz & Watson, Inc., 837 F. Supp. 2d 428, 453 (D.N.J. 2011) ("[T]he NLRA protects individual employees who invoke rights contained in a CBA because their activity is a direct extension of the collective bargaining process." (citations omitted)).

[24] *City Disposal Sys.*, 465 U.S. at 826–27.

[25] *Id.* In fact, Brown stated outright why he was not going to drive the truck: "[T]here's something wrong with that truck . . . . [S]omething was wrong with the brakes . . . there was a grease seal or something leaking causing it to be affecting the brakes." *Id.* at 827.

[26] *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 567 (1978); *see also Monongahela Power Co.*, 150 L.L.R.M. (BNA) at *6 ("The Board reasonably found that Bolyard's daily consultations with Union Steward Hairston regarding the application of the 30-minute rule constituted union activity within the meaning of the Act."); NLRB v. CER, Inc., 762 F.2d 482, 485–86 & n. 3 (5th Cir. 1985) (section 7 protects the right of obtaining union assistance).

[27] *Eastex*, 437 U.S. at 560.

practice charge, alleging interference with employees' section 7 rights.[28] Though no other employees joined Terry, the Court held that the activity was concerted under section 7.[29] The foundation requirement was met in this case because handing out pamphlets was anchored to a complaint made in the physical world that the managers were aware of before the dispute was brought to the Board. As these cases demonstrate, the foundation requirement is well established. When an activity has been held to be concerted, the inciting incident has always occurred before the concerted activity.[30]

B. *Substantive Requirement*

The second implied factor necessary for identifying concerted activity is whether the employee's activity reasonably relates to the common goal—based on the anchor in the foundation requirement—of that activity. Though this factor is not mentioned specifically by a decisionmaker, if the activity that the employee engages in does not reasonably relate to the anchor, then the activity is not concerted. The substantive requirement ensures that the "spawning" notion of concerted activity[31] does not occur. The court in *NLRB v. Portland Airport Limousine Co.* stated that a subjective interpretation of concerted activity was "expressly rejected by the Board in the *Meyers* cases in favor of the Board's present test, which . . . asks whether there is any objective evidence" of an attempt to "band together . . . in pursuit of a common goal."[32] In other words, the substantive requirement requires an examination of the activity and objective determination of whether the activity relates to the anchor event.

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[28] *Id.* at 560–61.
[29] *Id.* at 570.
[30] Implementation of this requirement will be discussed *infra* Part V.
[31] *See* Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB, 81 F.3d 209, 214 (D.C. Cir. 1996) ("[B]ecause the employees were discussing vital elements of their employment, such communications are protected by the NLRA because they could 'spawn collective action.' We neither understand nor endorse the Board's 'spawning' theory, which, on its face, appears limitless . . . ."). Such inferential reasoning "finds no good support in the law." *Id.*
[32] NLRB v. Portland Airport Limousine Co., 163 F.3d 662, 667 (1st Cir. 1998); *see* Reef Indus., Inc. v. NLRB, 952 F.2d 830, 838 (5th Cir. 1991) ("Numerous cases confirm that activities for 'mutual aid or protection' under NLRA § 7 are not limited to either the employee's own employer-employee relationship or to activities intended to change specific conditions or terms of employment. There must, of course, be some nexus between the employees' concerted activities and the employment relationship . . . ." (footnote omitted)); *see also* E. Fredrick Preis, Jr. & Gregory A. McConnell, *Labor Law*, 38 LOY. L. REV. 871, 889 (1992).

In *Washington Aluminum Co.*, the substantive requirement of concerted activity was met because, objectively, the Board reasonably determined that the walkout was related to the anchored event.[33] The employees staged a walkout during which they made sure that their employer knew exactly why they were doing so: the frigid temperatures.[34] From an objective viewpoint, it could be reasonably determined that the walkout was because of the frigid temperatures, therefore it satisfied the substantive requirement.

In *Portland Airport Limousine Co.*, Wayne Speed, an employee truck driver, was fired for refusing to drive a tractor due to safety reasons.[35] After complaining of fumes to his operations manager, Speed had the truck inspected by the employer's usual repair and maintenance provider (R & R).[36] R & R detected no fumes and stated that the truck was safe to operate.[37] Notwithstanding a subsequent inspection and determination by a different maintenance operation that the tractor was safe to drive, Speed still refused to drive the truck.[38] Unlike in *Washington Aluminum Co.*, in this case there was no objective connection between refusing to drive the truck and the common goal of employee safety. The substantive requirement is not met here because a reasonable person would not believe that the motivation for Speed's refusal to drive the truck was because of safety concerns; the truck had been declared safe to drive on several occasions.[39]

Additionally, the substantive requirement exists in cases decided according to the Board's "spawning theory,"[40] which describes instances where the court or Board raises theories of concerted activity that the parties did not raise themselves. In *Aroostook*, four employees were terminated for violating the office policy that outlined how grievances should be handled.[41] The employees' grievance concerned changes in the work schedule; rather than address their concerns directly to their employer,

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[33] NLRB v. Wash. Aluminum Co., 370 U.S. 9, 12 (1962) (referring to the instance when Jarvis, the shop foreman, informed the general foreman that all but one employee had left because of the temperatures in the shop).
[34] *Id.*
[35] *Portland Airport Limousine*, 163 F.3d at 662.
[36] *Id.* at 663.
[37] *Id.*
[38] *Id.* at 662–64.
[39] *Id.*
[40] *See* Aroostook Cnty. Reg'l Ophthalmology Ctr., 81 F.3d 209, 214 (D.C. Cir. 1996); *see also* Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB, 253 F.3d 19, 28 (D.C. Cir. 2001) (criticizing the Board for attempting to find ambiguity in policies); Philip J. Moss, Aroostook County Regional Ophthalmology Center v. National Labor Relations Board: *The NLRB's Attempt to Expand the Definition of "Protected Concerted Activities" Under the National Labor Relations Act*, 12 ME. B.J. 68, 76 (1997).
[41] *Aroostook*, 81 F.3d. at 211.

the employees "voiced their complaints within earshot of [Aroostook] patients."[42] After being fired, the employees filed suit, stating that they had the "right to seek the assistance of, among others, spouses, families or friends on matters pertaining to their terms of employment."[43] Looking beyond the employee's complaint, the Board "spawned" the notion that the physicians intended to say that talking to family members was "directly linked to hours and conditions of work—both vital elements of employment—and [was] as likely to spawn collective action as the discussion of wages."[44] The court wisely rejected the Board's creation of concerted activity—through the spawning theory—when the employees did not raise the concerns that the Board, through inference, stated they did.[45] Unless the activity that the employee engages in reasonably relates to the anchor, then the substantive requirement is not met, and the activity is not concerted.

C. *Procedural Requirement*

The last implied factor is met if the activity was conducted in a way that affirmatively solicited the participation of another employee for the purpose of mutual aid or protection. This requirement only comes into play if the nature of the alleged concerted activity relates to an ongoing dispute. Therefore, if the substantive requirement shows that the activity concerns union activity or the enforcement of a collective bargaining agreement, then the inquiry ends and the activity is deemed concerted.[46] In the last instance, however, where an employee's dispute substantively relates to an ongoing dispute, the procedural requirement must be satisfied.

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[42] *Id.*

[43] *Id.* (internal quotation marks omitted).

[44] *Id.* at 212 (internal quotation marks omitted).

[45] *Id.* at 214 (describing the Board's "spawning" theory as "on its face . . . limitless and nonsensical"). The court also, hypothetically, stated that an argument could be made that the activity was concerted by relating the scheduling changes to an ongoing labor dispute. *Id.* Even if that were true, the court stated that the result would be the same. *Id.*

[46] This is in line with the holdings of *City Disposal* because such individual action, such as union activity or enforcement of a collective bargaining agreement, is deemed to be concerted and the inquiry of "mutual aid or protection" is not needed because such agreements "affect[] all the employees covered." *See* NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984). Also note the text of 29 U.S.C. § 157 which, in pertinent part, states "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining *or* other mutual aid or protection." (emphasis added). National Labor Relations Act § 7, 29 U.S.C. § 157 (2006); *see also* El Gran Combo de P.R. v. NLRB, 853 F.2d 996, 1002 (1st Cir. 1988) ("[R]easonable construction by the Board is entitled to considerable deference.").

While this requirement does not necessitate magic words or a provide a formulaic approach for gathering support, it does require some obviousness that the activity is being done for the mutual aid and benefit of other employees, rather than merely as a personal gripe.[47] This requirement exists on a continuum between the activity being done solely for personal matters—where the Board has no jurisdiction[48]—to instances in which the activity is truly done for mutual aid and protection. Another level of complexity arises if the subject of a personal gripe is a "topic of group concern"; such a gripe could be seen as being made for mutual aid and protection.[49] The solicitation needs to be quite explicit in order to pass this requirement. Mere *hinting* at involvement will not be sufficient to pass this portion of the test and be deemed concerted activity.[50]

Not all activity that solicits a fellow employee's participation is done for the purposes of mutual aid and protection. If the purpose was not for mutual aid or protection, then action against the employee is not prohibited under section 7.[51] In *Joanna Cotton Mills Co.*, the court noted that while the employee, Blakely, did solicit help, it was done "without thought of mutual aid or protection, and with no purpose other than to help [Blakely] get rid of an unpopular second hand who had angered him."[52]

If an employee seeks the participation of other employees, but the other employees denounce the employee's actions, this portion of the test may not be satisfied. For instance, if other employees explicitly denounce the actions of one employee, the actions of that employee will not be seen as being done for mutual aid and protection.[53] If the employee seeks to

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[47] *See* Rita Gail Smith & Richard A. Parr II, Note, *Protection of Individual Action As "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 375 (1983).

[48] *City Disposal Sys.*, 465 U.S. at 842 n.2 (O'Connor, J., dissenting) ("The Court and the Board agree that the Act cannot be read to cover, or to give the Board jurisdiction over, purely personal, though work-related, claims of individual employees.").

[49] Ewing v. NLRB, 861 F.2d 353, 361 (2d Cir. 1988); *El Gran Combo de P.R.*, 853 F.2d at 1005 (excluding "*mere* talk" and "*mere* griping"); *see also* NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp., 262 F.3d 184, 188 (2d Cir. 2001) (stating that concerted activity "includes the actions of a single employee, acting alone, who intends to initiate group activity").

[50] *City Disposal Sys. Inc.*, 465 U.S. at 842 n.2 (O'Connor, J., dissenting) ("[T]he mere fact that an asserted right can be *presumed* to be of interest to other employees is not a sufficient basis for labeling it 'concerted.'" (emphasis added)).

[51] *See, e.g.*, Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 753 (4th Cir. 1949).

[52] *Joanna Cotton Mills Co.*, 176 F.2d at 754.

[53] Del E. Webb Realty & Mgmt. Co., 216 N.L.R.B. 593, 594 (1975); *see also* R.J. Tower Iron Works, Inc., 144 N.L.R.B. 445 (1963) ("The complaints made by [the employee] to his foreman appear to me to fall in the category dealt with by the Board in this line of cases. In each instance, not only was [the] complaint purely

induce group activity with his or her actions, it will be seen as an affirmative solicitation.[54] For an activity to qualify as concerted, "it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees."[55]

The court in *Washington Aluminum Co.* confronted an ongoing employee dispute; therefore, the activity, in order to be concerted, needed to satisfy the third implied factor: the procedural requirement. The activity—the walkout—had to have been done in a way that affirmatively solicited the participation of other employees for the purposes of mutual aid or protection or it would not meet the procedural requirement. Based upon the facts of *Washington Aluminum Co.*, the employees that engaged in the walkout did so in a manner that affirmatively solicited the participation of other employees for the purposes of mutual aid or protection.[56] The "affirmative solicitation" and the "for the purposes of mutual aid or protection" requirements were satisfied because an employee mentioned "we *had all got together* and thought it would be a good idea *to go home*; maybe *we could get some heat brought into the plant that way*."[57]

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personal and either trivial or completely unjustified but, as shown even by his own testimony, his attitude and remarks were unreasonable and senselessly irritating to the foreman.").

[54] *El Gran Combo de P.R.*, 853 F.2d at 1003; *see* Cormier v. Simplex Techs., Inc., No. 98-500, 1999 WL 628120, at *4 (D.N.H. Mar. 4, 1999) ("When employees act together, they clearly satisfy the concerted activity requirement; courts, however, have also found that individual actions can be 'concerted activity' in some circumstances." (citations omitted)).

[55] Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964); *see also* E.I. Du Pont de Nemours & Co. (Chestnut Run) v. NLRB, 733 F.2d 296, 299 (3d Cir. 1984) ("A request for the assistance of another employee is protected . . . ." (citations omitted)); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347 (3d Cir. 1969) ("To protect concerted activities in full bloom, protection must necessarily be extended to 'intended, contemplated or even referred to' group action . . . ." (citations omitted)).

[56] NLRB v. Wash. Aluminum Co., 370 U.S. 9, 11–13 (1962).

[57] *Id.* at 12 (emphasis added). The emphasized portion, in fact, has the Court's basis of analysis for all three key factors. Compare the affirmative language here to what the Court in *Mushroom Transportation* required:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Mushroom Transp. Co., 330 F.2d at 685.

The court in *El Gran Combo* focused on what was necessary for an employee to intend to induce group activity. In that case, the activities of two employees were characterized as "repeated attempts to enlist the support of the other combo members."[58] That court noted that it was immaterial to the Board if the actual solicitation resulted in a successful joining together of employees.[59] The proper focus of the analysis is whether the employee "*intended*, contemplated, or even referred to" some type of group action.[60] The mutual aid or protection factor was also satisfied because the activity was about wages, and wages affected all employees.[61]

The procedural requirement is well established. In order for an activity to be considered concerted, the activity must have been done in a way that affirmatively solicited the participation of another employee for the purpose of mutual aid or protection.[62] The foundation, substantive and procedural requirements have been consistently present throughout the analysis of concerted activity. However, the Board has disregarded these three factors when analyzing concerted activity in the realm of social media.

III. TAILORING THE HIDDEN FACTORS TO FIT FACEBOOK

To implement an objective approach, the substantive requirement and the procedural requirement need to be modified because of the nature of Facebook.[63] Modification to substantive and procedural requirements is necessary because Facebook lacks the face-to-face interaction between employees that is assumed in situations where the concerted activity occurs in a physical space, such as a work environment.

A. *Modifying the Substantive Requirement for Facebook Posts*

The substantive requirement must be tailored for an objective interpretation. This comment calls for a four-corner approach to interpretation. While group interaction might occur, an employee's initial post or comment is what is to be used to determine whether the activity is concerted. The Board currently uses a subjective view of what the employee *meant* rather than what the employee actually *said*. The four-

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[58] *El Gran Combo de P.R.*, 853 F.2d at 1005.

[59] *Id.* at 1004–05.

[60] *Id.* at 1004 (emphasis added) (citations omitted).

[61] *See id.* at 1001; *see also* Cormier v. Simplex Techs., Inc., No. 98-500, 1999 WL 628120, at *5 (D.N.H. Mar. 4, 1999) ("[One employee] was clearly acting on behalf of other employees, with their knowledge and consent.").

[62] Implementation of this requirement will be discussed *infra* Part IV.

[63] The foundation requirement will remain the same because it will serve as an anchor to something that occurred in the physical world before an employee takes to virtual world to air his or her concerns.

corner approach is ideal for examining Facebook posts because the theory behind the approach lends itself to objective interpretation.[64] The substantive requirement's method is simple: trust the text.[65]

Imposing a fact-finder's interpretation on a social media post poses the same danger as imposing unstated congressional intent on the text of a statute; rather than following the expressed intentions of the drafter, it allows decisionmakers to pursue their own "objectives and desires."[66] A decision based on intent, which lacks a connection between what was said and what was meant, is a decision based on what a "wise and intelligent person *should* have meant; and that will surely bring [one] to the conclusion that the . . . [post means] what [one] think[s] it *ought* to mean."[67] Facebook posts must be interpreted in an objective manner.

B. *Modifying the Procedural Requirement for Facebook Posts*

The procedural requirement needs to be tailored to focus on how the Facebook post was made to determine if it was done in a way that affirmatively solicited other employees for the purpose of mutual aid or protection. Both components of the procedural requirement need to be based on objective evidence: the first component requires an employee's post to affirmatively solicit the participation of another employee; the second demands the purpose of the post to be for mutual aid or protection.

Three methods exist for objectively soliciting the participation of another employee: (1) the employee seeking to engage others can mention them by name, (2) employees can be mentioned in general or (3) an employee can post the activity on a fellow employee's Facebook "wall."[68]

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[64] *See* ANTONIN SCALIA, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1998).

[65] *See* Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1663 (1991). Justice Scalia argues that without stare decisis, consistent application of the law is in jeopardy. *See* SCALIA, *supra* note 64, at 7. There are several groups that decide what concerted activity is, and if they continue their subjective approach to interpreting a social media post, it will lead to inconsistent application of the "law." The text should take precedent over intent because it will lead to more uniform decisions. *See id.* at 38.

[66] *See* SCALIA, *supra* note 64, at 17–18.

[67] *Id.* at 18.

[68] Though not identified by name, the Board recognized these three factors in *Hispanics United.* The post read: "Lydia Cruz, a coworker feels that we don't help our clients enough at [Respondent] I about had it! My fellow coworkers how do u feel?" Read objectively, this post affirmatively solicits participation because (1) the post mentioned Cruz by name, (2) the post solicited the participation of employees

An employee's subsequent post is irrelevant to the analysis.[69] To objectively determine whether the post is done for mutual aid or protection, the content of the post will have to be examined. Mention of the anchored activity is objective evidence that the post is being done for mutual aid or protection. With the aforementioned modifications to the substantive and procedural requirements, the objective framework can be applied to social media cases.

IV. THREE-PART OBJECTIVE TEST FOR DETERMINING IF A FACEBOOK POST IS CONCERTED ACTIVITY

This Part takes the three-part test presented in Part III and retrofits it to four decisions handed down by the Board. To recap, the three requirements for the objective test in the context of social media are the foundation requirement, the substantive requirement and the procedural requirement. The foundation requirement will be satisfied if there has been a clearly communicated concern to someone in power before the social media post occurred. The substantive requirement will be satisfied if the common goal that the activity purports can be reasonably determined from the contents of the social media post. If the post does not concern union activity or a collective bargaining agreement, the procedural requirement must be satisfied as well. The procedural requirement will be satisfied if, by objective standards, the social media post was made in a way that affirmatively solicited the participation of another employee for the purpose of mutual aid or protection.

A. Bay Sys Technologies: *Objective Test and Board Reach the Same Outcome for the Same Reasons*

In this case, the three-part objective test and the Board come to the same conclusion, through the same reasoning, that the Facebook post of Bay Sys employee Dontray Tull was concerted activity. This result shows

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in general and (3) it was posted on another employee's wall. *See* Hispanics United of Buffalo, 359 N.L.R.B. No. 37, 2012 WL 6800769, at *4 (Dec. 14, 2012) (alteration in original); *see infra* Part IV.A.

[69] *See* Rick Ross, *NLRB Issues New Reports on Social Media*, EMPLOYER L. UPDATE (Feb. 3, 2012), http://employerlawupdate.com/nlrb-issues-new-report-on-social-media/ ("When co-workers are silent, the employee's posts are often not protected."). Focusing on subsequent communication goes against what is clearly established—hence the procedural requirement—that the focus should be on the attempt, not the actual success of that attempt. *See* El Gran Combo de P.R. v. NLRB, 853 F.2d 996, 1005 (1st Cir. 1988); *see also* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1348 (3d Cir. 1969) ("[A] single employee attempting to induce fellow workers to join in a petition regarding a common grievance is protected." (emphasis added) (citations omitted)).

that the Board does not need to rely on subjective interpretation when objective evidence is sufficient to reach the same conclusion. *Bay Sys* tasked the Board with deciding whether Tull's Facebook post was concerted activity and would, therefore, make Tull's subsequent firing a violation of section 8.[70] The employer learned of the Facebook post when the *Eastern Shore Post*, a local newspaper, published the conversation that Tull initiated.[71] The Board held that the Facebook post was concerted activity because the employer had notice of the employees' complaints about not receiving timely paychecks.[72] The Board further stated that the purpose of engaging in the Facebook conversation was for mutual aid and protection since the timely issuance of paychecks affected all Bay Sys employees.[73] For similar reasons, the decision is the same under the three-part objective inquiry.

1. *Foundation Requirement*

Tull's Facebook post satisfies the foundation requirement because Bay Sys was well aware of the employees' discontent with not receiving their paychecks in a timely manner. The numerous instances in which the employer did not pay employees on time was the anchor incident.[74] The employer, represented by the CEO, was well aware of the issue: before the Facebook post occurred, there was a press release sent out to the employees, stating that they would be paid within two days.[75] This evidence is sufficient to establish the foundation requirement.

2. *Substantive Requirement*

Tull's Facebook post satisfies the substantive requirement because, objectively, the post reasonably relates to the anchor event. The Facebook post stated: "Hopefully, next week starts off right with a paycheck or management gonna be installing cabinet themselves."[76] Judging by the content of the post itself, a reasonable person can easily deduce that the subject is about the receipt of paychecks.[77]

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[70] Bay Sys Techs., LLC, 357 N.L.R.B. No. 28, 2011 WL 3318495, at *1 (Aug. 2, 2011).
[71] *See id.* at *2. The news story is still available. Linda Cicoira, *Despite Claims of Financial Stability, BaySys Couldn't Make Payroll*, E. SHORE POST, Aug. 13, 2010, at 1.
[72] *See* Cicoira, *supra* note 71.
[73] *See Bay Sys Techs.*, 357 N.L.R.B. at *1.
[74] *See* Cicoira, *supra* note 71.
[75] *Id.*
[76] *Id.*
[77] *Id.*

3. *Procedural Requirement*

Tull's Facebook post satisfies the procedural requirement because the post was made in a way that affirmatively solicited the participation of another employee for the purpose of mutual aid or protection. The substantive requirement shows that this requirement will need to be met because the subject of the post is not about union activity or the enforcement of a collective bargaining agreement, but rather an ongoing dispute—not receiving paychecks on time.

The two parts of the procedural requirement are met here. First, the method by which Tull shared the information is critical; Tull did not post the Facebook message on his own page—which would not be an affirmative solicitation—but rather posted on the page of another co-worker.[78] This is sufficient to establish the affirmative solicitation requirement. Additionally, the post must have been made for the purpose of mutual aid or protection. From the contents of the post, there is nothing that suggests that it was merely a personal situation, since the analysis of the foundation requirement showed that this issue—not receiving paychecks in a timely fashion—affected all of the employees, not just Tull. Therefore, the post satisfies the procedural requirement as well.

Since all three prongs of the objective test are satisfied, Tull's Facebook post is indeed concerted activity. This result shows that if the objective evidence shows that the activity is concerted, the Board will not need to supply its own shifting, subjective interpretation.

B. Hispanics United of Buffalo*: The Objective Test and the Board Reach Different Outcomes*

The three-part objective test and the Board reached different conclusions in *Hispanics United* because the Board disregarded the foundation requirement. The Board examined the activity of five employees who were terminated by Hispanics United of Buffalo (HUB) based on their Facebook conversations critical of another employee.[79] Though the first post was that of Mariana Cole-Rivera, four other employees were terminated for the whole engagement.[80] HUB was not aware of any issue whatsoever; the first occasion on which the employer heard about the concern was in the

[78] Molly DiBianca, *NLRB and Facebook Firings: Employer's Worst-Case Scenario*, DEL. EMP'T L. BLOG (Aug. 10, 2011), http://www.delawareemployment lawblog.com/2011/08/nlrb-and-facebook-firings-empl.html ("On August 6, 2010, Mr. Tull posted comments to other employees' Facebook pages about the employer's failure to issue employees' paychecks on time.").
[79] Hispanics United of Buffalo, 359 N.L.R.B. No. 37, 2012 WL 6800769, at *1–2 (Dec. 14, 2012).
[80] *Id.*

Facebook post.[81] In holding that the Facebook posts were concerted, the Board ignored the foundation requirement. The primary reason why the objective test does not consider Cole-Rivera's Facebook post to be concerted activity is because the foundation requirement was not met: there was no anchor in the physical world before the post was made. For a complete analysis, all three portions of the objective test will be examined.

1. *Foundation Requirement*

Cole-Rivera's Facebook post does not pass the foundation requirement because HUB was not aware of any issues before the post was made. Without an anchor event, Cole-Rivera's post fails this requirement. In its opinion, the Board stated that it was irrelevant that the employer was not aware of the grievances.[82] In coming to this incorrect decision, the Board misread the facts of *Aroostook*.[83] Not only was the Board's determination in *Aroostook* overturned by the D.C. Circuit,[84] but the facts show that the employer was well aware of the employee's behavior before he or she engaged in the activity and that the employee was terminated because his "conduct on May 28 . . . was the last straw."[85] Additionally, stating that the employer does not need to be aware of the concerns is a misreading of precedent.[86]

Cruz-Moore only mentioned an intention to meet with her supervisor to discuss the job performance of another employee.[87] This never happened before the Facebook post. Because there is no anchor event, which would be a discussion that would raise awareness to HUB, the foundation requirement is not met.

2. *Substantive Requirement*

If there were an anchor event, the substantive requirement would be met because the post objectively reflects a concern that HUB is not doing enough to help employees. Mentioned earlier, the Facebook post said:

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[81] *See id.* at *2.

[82] *Id.* at *13 ("It is irrelevant to this case that the discriminatees . . . did not communicate their concerns to Respondent.").

[83] *See supra* note 40 and accompanying text.

[84] Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB, 81 F.3d 209 (D.C. Cir. 1996). The Administrative Law Judge should not have relied on *Aroostook* because the employees were fired for violating an office policy, not because they were discussing their hours. *See id.* at 214–15.

[85] Aroostook Cnty. Reg'l Ophthalmology Ctr., 317 N.L.R.B. 218, 219 (1995) (internal quotation marks omitted).

[86] *See supra* Part II.A.

[87] *Hispanics United of Buffalo*, 2012 WL 6800769, at *1.

"Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?"[88] Judging by the contents of the Facebook post, it can be reasonably determined that it concerns the fact that HUB is not doing enough.

3. *Procedural Requirement*

Cole-Rivera's Facebook post satisfies the procedural requirement because it was made in a way that affirmatively solicited the participation of another employee for the purpose of mutual aid or protection. This requirement must be met because the employee's concern does not involve a collective bargaining agreement or union activity, but rather related an ongoing dispute over job performance.

The post satisfies both components of the procedural requirement. First, Cole-Rivera mentioned both another employee and employees in general in the Facebook post.[89] Additionally, the post was made so that all employees could better assist individuals that need the services of HUB.[90]

The differences in outcome in this situation show why timing is important for the foundation requirement. The foundation requirement ensures that the employer is not blind-sided by employees. Especially in the realm of social media, the foundation requirement is necessary so that peace can be maintained in the workplace and the employer—even if he or she does not do so—at least has the opportunity to address the issue before workplace issues are aired publicly.

C. American Medical Response of Connecticut, Inc.: *The Objective Test and the Board Reach Different Outcomes*

The three-part objective test and the Board, by virtue of the General Counsel, reach different conclusions in *American Medical Response of Connecticut* because the Board based its decision on subjective factors. Conversely, under the objective test, the employee's social media post failed the objective test primarily because of the substantive requirement. In *American Medical Response of Connecticut*, the General Counsel examined the activity of Dawnmarie Souza to determine if her termination for a Facebook post was concerted activity.[91] American Medical Response (American) fired Souza after she made crude Facebook posts about her

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[88] *Id.*
[89] *See id.*
[90] *See id.* ("[E]mployees . . . did not provide timely and adequate assistance to clients.").
[91] *See* American Medical Advice Memorandum, *supra* note 7, at 3.

supervisor.[92] In holding that her actions were concerted,[93] the General Counsel stated that because Souza was discussing supervisory actions with workers in her Facebook post, the activity was protected.[94] The General Counsel focused on *subsequent* Facebook posts and said that the intent of the text was clearly related to the supervisor's actions.[95] The primary reason why the objective test does not consider Souza's Facebook post concerted activity is because there is no indication of the anchor activity in the Facebook post, therefore failing the substantive requirement. Additionally, the post failed the procedural requirement. For a complete analysis, Souza's Facebook post will be examined under each part of the objective test.

1. *Foundation Requirement*

Souza's Facebook post passes the foundation requirement because she clearly communicated her desire to have her supervisor present during an initial meeting before she made the Facebook post.[96] Souza communicated this concern to her supervisor to no avail.[97] The fact that the supervisor knew that Souza wanted a union representative before she posted on Facebook is sufficient evidence to satisfy the foundation requirement.

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[92] *Id.* at 4.

[93] A finding of "protected" status, although outside the scope of this comment, was an absurd result in itself. *See* Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB, 81 F.3d 209, 214 (D.C. Cir. 1996) ("The fact that an activity is concerted does not necessarily mean that an employee can engage in the activity with impunity."); NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 266 (9th Cir. 1995) (noting a distinction between protected concerted activity and unprotected concerted activity). It was found that Souza's Facebook post, notwithstanding calling her employer derogatory terms, was not done with impunity. *See* American Medical Advice Memorandum, *supra* note 7, at 9–10.

[94] American Medical Advice Memorandum, *supra* note 7, at 9.

[95] *See id.* Even if that were the case, judging by what the General Counsel read, it is a stretch to say the conversation was about the actions of a supervisor. The General Counsel noted the conversation as follows:

> An AMR supervisor then responded, "What happened?," and a current AMR employee posted, "What now?" Souza answered, "Frank being a dick." A former AMR employee next wrote "I'm so glad I left there," and the current AMR employee stated, "Ohhh, he's back, huh?" Souza replied, "Yep he's a scumbag as usual." The thread ended with the current AMR employee telling Souza to "[c]hin up!"

Id. at 3–4 (alteration in original). The only reference here is to her supervisor as male genitalia and as a scumbag. This is not what the drafters of the NLRA intended "concerted activity" to mean.

[96] *See id.* at 3.

[97] *Id.*

2. *Substantive Requirement*

Souza's Facebook post does not pass the substantive requirement because there is no objective evidence that mentions the anchor event. The contents of the Facebook posts were as follows: "[l]ooks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be supervisor."[98] The subject of this post contains no reasonable relation to what satisfied the foundation requirement—the supervisor's refusal to let her have union representation while drafting an incident report. Since it cannot be reasonably discerned from the Facebook post that Souza is referring to union activity or a collective bargaining agreement, it could be said that it relates to an ongoing dispute regarding the actions of her supervisor. However, this argument fails because no facts exist in the record to show that Souza had any issue beyond the denied union representation—which would mean any incident mentioned in the Facebook post that does not relate to the anchored event would fail the foundation requirement. Since there is no objective evidence that Souza's Facebook post referred to the anchor event, the post fails the substantive requirement.

3. *Procedural Requirement*

Since Souza's action concerned union activity, this requirement does not need to be satisfied.[99] However, if the substantive requirement in Souza's case had been met, this test would have to be satisfied.[100] Souza posted the message on her *own* Facebook wall,[101] which is prima facie evidence that there was no affirmative solicitation of others. Additionally, there is no indication from the language of the post that Souza was seeking to induce group activity. The post also resembles a personal gripe more so than a statement made for mutual benefit or protection. Since Souza's post related to a personal, isolated incident and did no more than express her frustration with her supervisor, it does not satisfy the procedural requirement.

Because the contents of Souza's Facebook post contain no reasonable reference to her being denied union representation when filing her incident report, it cannot be concerted activity under the objective framework. This analysis is preferred over the General Counsel's subjective approach because of the inferential—and judicially rejected[102]—"spawning theory" that the General Counsel used to hold that the Facebook post referred to

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[98] *Id.*
[99] *See supra* Part II.C.
[100] *Id.*
[101] *See* American Medical Advice Memorandum, *supra* note 7, at 3.
[102] *See supra* note 40 and accompanying text.

Souza's earlier meeting.[103] Such a subjective analysis is inconsistent and offers little guidance to employers, employees and their counsel, as the result of the case will depend on whom is deciding the case.[104]

D. Karl Knauz Motors: *The Objective Test and the Board Reach Different Outcomes*

In *Karl Knauz Motors*, the three-part objective test and the Board come to the different conclusions because the Board—by virtue of the Administrative Law Judge—ignores the procedural requirement when holding that Karl Knauz Motor employee Robert Becker's Facebook post was concerted activity. Becker was terminated after he posted criticisms about the food choices that were to be provided at an annual Ultimate Driving Event.[105] In holding that the activity was concerted, the Administrative Law Judge (ALJ) stated that the Facebook post related to an issue that could have had an effect on the compensation of all employees.[106] Based on the three-part objective test, however, Becker's Facebook post was not concerted activity primarily because it failed the procedural requirement.

1. *Foundation Requirement*

The foundation requirement is met because, before Becker posted on Facebook, there was an ongoing dispute of which the employer was aware. The Facebook post was made on June 14, 2010.[107] The discussions of the food options occurred, according to Becker, around June 7 or 8, one or two days before the actual Ultimate Driving Event.[108] The discussions revolved around some of the employees' discontent with the quality of the food options for the event.[109] The dates are relevant for the foundation

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[103] *See* American Medial Advice Memorandum, *supra* note 7, at 6, 9–10.
[104] *See supra* Part III.A.
[105] Karl Knauz Motors, Inc., No. 13-CA-46452, 2011 WL 4499437, at *2 (Sept. 28, 2012).
[106] *Id.* at *8.
[107] *Id.* at *4.
[108] *Id.* at *2.
[109] *Id.* Some employees "rolled their eyes in amazement" when they heard about the food options. *Id.* (internal quotations marks omitted). The employer replied with "[t]his is not a food event." *Id.* The ALJ held the activities as concerted based on the following analysis:

> While it is not as obvious a situation as if he had objected to the Respondent reducing their wages or other benefits, there may have been some customers who were turned off by the food offerings at the event and either did not purchase a car because of

requirement because the concern was communicated to the employer before the Facebook post was made. The foundation requirement is satisfied here because, before the social media occurred, there is a clearly communicated concern to the employer.

2. *Substantive Requirement*

Becker's Facebook post satisfies the substantive requirement because, objectively, it reasonably relates to the anchor event. The Facebook post read as follows:

> I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years . . . the new 5 series. A car that will generate tens in 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 over cooked wiener and a stale bunn . . . .[110]

The post contains objective indications regarding the anchor event; it mentions the anchor event directly.[111] The substantive requirement was met because by objective standards, it is understood that the Facebook post relates to the anchor event—the dispute of the type of food at the Ultimate Driving Event.

3. *Procedural Requirement*

In contrast to what the ALJ held, Becker's Facebook post does not satisfy the procedural requirement because the post was neither made in a way that affirmatively solicited the participation of another employee, nor for the purpose of mutual aid or protection. This part of the test must be satisfied because the substantive requirement reveals that the issue was not about union activity or a collective bargaining agreement, but rather an ongoing dispute about food options.

> it, or gave the salesperson a lowering rating in the Customer Satisfaction Rating because of it; *not likely*, but possible.

Id. at *8 (emphasis added). The ALJ admits that this scenario, which heaps inference upon inference, is not likely. *See id.* Interestingly enough, there was no mention of food in any of the advertisements to the potential customers. *Id.* at *3. This supports the employer's assertion that the choice of refreshments at the Event did not matter, since customers were likely not drawn to the event by food.

[110] *Id.* at *3.

[111] Karl Knauz Motors, Inc., No. 13-CA-46452, 2011 WL 4499437, at *3 (Sept. 28, 2012).

Becker's post fails this requirement because it contains no indication that other employees should be involved, nor does it mention another employee by name.[112] Additionally, the statement was posted on the personal Facebook profile of the employee with the complaint, not that of another employee. Furthermore, there is no indication that Becker posted on his Facebook page seeking mutual aid or protection. To the contrary, Becker's post appears to be a personal gripe or criticism of the situation. For those reasons, this social media post does not satisfy the procedural requirement.

The ALJ used multiple layers of inferences to determine that the Facebook post was a product of mutual aid or protection of compensation.[113] In addition, the ALJ ignored the affirmative solicitation requirement by relying entirely on mutual aid or protection rather than looking for an attempt by Becker to join employees together in a common cause.[114] Because Becker's post neither contained evidence of a plea for mutual aid or protection, nor was made in a way that affirmatively solicited the participation of another employee, it does not satisfy the procedural requirement and is not concerted activity under the objective test.

The ALJ held that the post was concerted activity because of its subjective interpretation of the facts. This example highlights the need of an objective framework because the inference-upon-inference analysis could change based on the decisionmaker. The objective framework will lead to a consistent outcome no matter who is deciding the case. As the above discussion demonstrates, if a social media post is examined through a subjective lens, the results are unpredictable and unhelpful as guidance to those facing similar issues. The Board must use the objective framework to reach consistent decisions in the realm of social media.

V. CONCLUSION

The NLRB will continue to struggle to decide whether a Facebook post should deserve section 7 protection. In making those determinations, the Board must balance the interest of protecting an employee's right to engage in concerted activities with the employer's right to discipline insubordinate workers. The suggested objective framework discussed herein will allow Facebook posts to be considered concerted activity if they satisfy the foundation requirement, the substantive requirement and the procedural requirement. Since such framework will lead to consistent decisions, both

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[112] *Id.*
[113] *Id.* at *8.
[114] *Cf. id.*

small and large businesses can safely rely on this framework when making employment decisions and establishing their social media policies.

Until that happens, however, employers should pause before taking any adverse action against employees for their social media activity. Despite the current inconsistent evaluation of "Facebook firings," employers must consider several factors when deciding if disciplinary actions are lawful: first, whether the employee's post relates to workplace conditions or the terms of his or her employment; second, whether co-workers are responding to or even aware of the posted complaint; and finally, whether the post was following up or responding to something that happened to a group at work. If any of these factors are present, employers should seek experienced legal counsel before taking any action that could invoke section 7 protection.

Additionally, employees should be aware that not all of their social media activity is concerted activity. Though the Board's decisions are generally inconsistent when it comes to labeling such activity as concerted, many such instances do not qualify for protection under the NLRA. Employees must take the Board's unpredictable rulings into consideration before venting frustrations on social media and exercise caution when publicly expressing discontent. Employees should also be aware of their specific employer's social media policies, as not all policies that are posted throughout the workplace or distributed during orientation improperly limit an employee's section 7 rights.

Employers have an interest in protecting their reputation. Disparaging social media postings are adverse to that interest. The Board will continue to analyze complicated scenarios where employees share their workplace issues on a worldwide forum. Until the dust settles and concerted activity status is evaluated based on objective factors, however, employers and employees alike should pause before taking action.