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# Comments

## ALLELUIA, THE BUCK STOPS HERE: THE PARAMETERS OF INDIVIDUAL PROTECTED CONCERTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT†

*Section 7 of the National Labor Relations Act protects the right of employees to engage in concerted activity. Concerted activity is often considered as group activity such as union picketing or organizational drives. The scope of section 7 is much broader, however. Individual activity is included within the concept of concerted activity, although the extent to which individual action is protected is in dispute. In particular, whether an employee who exercises an independent statutory right is protected under section 7 is a common subject of debate. This comment argues that an employee who individually invokes an employment-related statutory right is unprotected under the Act because such action is not within the scope of the Act's legislative purpose.*

### INTRODUCTION

Fixing the permissible boundaries of individual activity in the workplace is a point of contention between employees and employers. Over the years the National Labor Relations Board (NLRB)<sup>1</sup> has

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† The author wishes to thank his parents for their invaluable help and support in the preparation of this article.

1. National Labor Relations Act § 3, 29 U.S.C. § 153 (1982). The NLRB has two main functions: (1) to conduct representation elections and certify the results and (2) to prevent employers or unions from engaging in unfair labor practices.

defined what it believes to be the parameters of individual activity through its decisions and orders. While these decisions have been applied uniformly in subsequent cases before the NLRB, their applicability in an appellate court depends upon the federal circuit in which an appeal of an NLRB decision takes place.

As a result of circuit courts individually affirming or rejecting NLRB decisions, the law regarding individual employee activity varies among circuits. When a conflict exists among the circuits on a point of law, the U.S. Supreme Court may resolve the conflict so that uniformity of the law will exist. Recently, the Supreme Court decided *NLRB v. City Disposal Systems Inc.*<sup>2</sup> which dealt with the right of an individual employee to enforce a provision in a collective bargaining agreement. This was an issue of great disagreement among the circuits. In its opinion, the Court took an expansive view of the bounds of individual employee activity by holding that an employee who individually asserts a right grounded in a collective bargaining agreement is protected from discharge.

The careful observer will realize that the Court's decision created an apparent inconsistency in individual employee rights as a result of an earlier decision this year by the NLRB. In *Meyers Industries*<sup>3</sup> the NLRB held that where a group of employees are not unionized and there is no collective bargaining agreement, an employee's assertion of a right that can only *be presumed* to be of interest to other employees is not protected from employer retribution. The effect of this inconsistency can be seen in the following hypothetical situation.

An employee is instructed by his employer to drive a particular truck. While leaving the parking lot, he discovers the truck's brakes are faulty. He parks the vehicle and informs the employer he will not drive an unsafe truck. The employer orders him to drive the truck or look for another job. The driver refuses, claiming that the collective bargaining agreement in force guarantees employees the right to refuse to handle equipment they believe is unsafe. As a result, the employer fires the employee.

In a similar situation, a nonunion employee without a collective bargaining agreement, refuses to drive a truck with faulty brakes. He complains to the employer and files a complaint with the Interstate Commerce Commission<sup>4</sup> and the Occupational Safety and Health Administration.<sup>5</sup> Both agencies cite the employer for various

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2. 52 U.S.L.W. 4360 (U.S. Mar. 20, 1984).

3. 115 L.R.R.M. (BNA) 1025 (Jan. 6, 1984).

4. 49 U.S.C. § 10301 (1982). The Interstate Commerce Commission is charged with creating and enforcing regulations regarding the free and safe flow of interstate commerce.

5. 29 U.S.C. § 661 (1982). The Occupational Safety and Health Administration is charged with creating and enforcing regulations regarding health and safety in the workplace. 29 U.S.C. § 651 (1982).

violations. Thereafter, the employer fires the employee.

Both employees then file an unfair labor practice charge with the NLRB<sup>6</sup> claiming they were discharged for engaging in concerted activities protected by section 7 of the National Labor Relations Act (the Act).<sup>7</sup> After an administrative hearing, the NLRB finds the unionized employee had engaged in a protected concerted activity while the nonunion employee had not. Accordingly, the NLRB orders that the unionized employee be reinstated with back pay but upholds the discharge of the nonunion employee.

The union employee acted properly by enforcing the collective bargaining agreement which the employer had agreed to follow. However, the nonunion employee acted just as properly by reporting the employer for violating legislation which represents a public interest in safe working conditions. Unlike the union employee who only enforced a contract right, this employee enforced a congressional mandate to employers requiring safe working conditions. One would think that such individual action is protected against employer retribution, but the NLRB, following the standards established by *City Disposal Systems* and *Meyers*, denied reinstatement of the employee. Why was this employee unprotected under the Act?

The answer is found in the type of activities protected under the Act. Generally, concerted activities are protected under the Act. However, what is "concerted activity" has generated extensive debate over the years, especially when individual activities are involved.

This Comment examines the different categories of concerted activity, the dispute over the extent to which an individual may engage in concerted activity, recent developments regarding the scope of individual concerted activity, and the current status of the law. The basic premise of this Comment is that an employee, union or nonunion, who individually invokes an employment-related statutory right does not thereby engage in protected concerted activity under the Act.

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6. 29 U.S.C. § 153 (1982).

7. 29 U.S.C. § 157 (1982). Section 7 provides: "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 . . . ."

## SECTION 7 AND CONCERTED ACTIVITIES

### *Scope of Section 7 Rights*

Section 7 represents part of the legislative effort to remedy the common law prohibitions on the right of employees to organize and bargain collectively with their employer over wages, hours, and working conditions. Many courts regarded group activity aimed toward improving wages and working conditions as unlawful criminal conspiracies. Later, such activity was regarded as a civil wrong subject to injunction. Many employers even successfully invoked the Sherman Antitrust Act<sup>8</sup> against groups of employees by claiming such group organization represented a conspiracy to restrain trade.<sup>9</sup>

Through the enactment of the Clayton Act,<sup>10</sup> the Norris-LaGuardia Act,<sup>11</sup> the Railway Labor Act,<sup>12</sup> and the National Labor Relations Act,<sup>13</sup> Congress attempted to remedy the prior judicial restraints on the ability of organized labor to organize by protecting the right of employees to engage in group activity.<sup>14</sup> Section 7 is one aspect of the National Labor Relations Act that protects the right of employees to engage in concerted activities.<sup>15</sup> This section covers two main areas. First, it provides employees the right to aid a labor organization or to have such represent them; and second, it gives employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The term "concerted activities" embraces activities of employees joined together to achieve common goals.<sup>16</sup> However, an *individual* may engage in activities that are concerted. To be protected by section 7, employees, union or nonunion, must act together for the purpose of mutual aid or protection and not necessarily on behalf of or through their unions.<sup>17</sup> Mutual activity focuses on improving working conditions<sup>18</sup> and includes activities such as employees presenting

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8. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

9. For a more thorough discussion of the history of labor law and concerted activity see R. GORMAN, *LABOR LAW* (1976).

10. Ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.).

11. Ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-10, 113-15 (1982)).

12. Ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-63 (1982)).

13. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-68 (1982)).

14. R. GORMAN, *supra* note 9.

15. 29 U.S.C. § 157 (1982).

16. *NLRB v. City Disposal Sys. Inc.*, 52 U.S.L.W. 4360, 4362 (U.S. Mar. 20, 1984).

17. *Indiana Gear Works v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967).

18. Gorman & Finkin, *The Individual and the Requirement of 'Concert' Under*

grievances to their employer to secure better working conditions.<sup>19</sup>

An employee's personal complaint is treated as individual activity rather than concerted activity and is unprotected under the Act.<sup>20</sup> A personal complaint is one in which the person's objective is to vent a personal grievance, or one which is motivated by malice. In a personal complaint situation, the individual's activity is unrelated to collective bargaining or mutual aid or protection of fellow employees.<sup>21</sup>

Employees who voice dissatisfaction about matters of common concern but who, in good faith, spread information which later proves to be inaccurate do not lose the Act's protection.<sup>22</sup> However, dissemination of deliberately and maliciously false information is not protected.<sup>23</sup> Unprotected activities include cases where an individual employee acts only to advance a personal interest,<sup>24</sup> favorable resolution of the employee's complaint will not improve other employees' working conditions,<sup>25</sup> and the actions involved are unlawful, violent, in breach of contract, or indefensibly disloyal.<sup>26</sup>

### *Categories of Concerted Activity*

Over the years the NLRB and the courts have attempted to delineate the type of actions which constitute concerted activity. Upon examining their decisions regarding employee activity, two categories of concerted activity become apparent: group activity and individual activity. In the area of individual activity four standards exist: the "Representation" standard, the *Mushroom*<sup>27</sup> standard, the *Interboro*<sup>28</sup> standard, and the *Alleluia*<sup>29</sup> standard. This section examines what activity falls within these different categories of concerted activity.

*the National Labor Relations Act*, 130 U. PA. L. REV. 287, 289 n.10 (1981) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-568 (1978)).

19. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969) (quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)).

20. *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979).

21. *Joanna Cotton Mills v. NLRB*, 176 F.2d 749, 753 (4th Cir. 1949).

22. *Owens-Corning Fiberglas v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1968).

23. *Id.*

24. *Gorman & Finkin*, *supra* note 18, at 293.

25. *Id.*

26. *THE DEVELOPING LABOR LAW* 136 (C. Morris ed. 1983).

27. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *see also infra* notes 35-43 and accompanying text.

28. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967); *see also infra* notes 49-57 and accompanying text.

29. *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1976); *see also infra* notes 58-66 and accompanying text.

## Group Activity

Actions by a group of employees are most commonly associated with concerted activity. Most peaceful activities engaged in by a group of employees exercising section 7 rights are regarded as concerted.<sup>30</sup> Group activity regarded as concerted includes collective bargaining, peaceful economic strikes, sympathy strikes, and dissident activity in opposition to union leadership.<sup>31</sup>

### Individual Concerted Activity

As noted, four standards define individual concerted activity: (1) the "Representation" standard, (2) the *Mushroom* standard, (3) the *Interboro* standard, and (4) the *Alleluia* standard. The first two standards enjoy judicial acceptance because they are regarded as a part of group activity or as a basis for group activity. The latter two standards are not so widely accepted since each involves a finding of implied, or constructive, concerted activity and thus both are viewed as unmerited extensions of coverage under the Act. An understanding of these four standards is essential to understanding the positions adopted as to each. Accordingly, a summary of each standard follows.

#### *"Representation" Standard*

Under the "Representation" standard, the employee acts as a representative of fellow employees; an individual claim or complaint must be made on behalf of other employees to be concerted activity. A claim made solely on behalf of oneself is not concerted activity and is thus unprotected.<sup>32</sup>

An employee acting as a representative need not be appointed a representative for the complaint to be protected. The spokesperson may be either a volunteer or a chosen representative.<sup>33</sup> Nor is a strong showing of organized group activity required. If a reasonable inference can be drawn from the facts and circumstances that the employees involved felt they had a grievance, then concerted activity exists.<sup>34</sup>

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30. THE DEVELOPING LABOR LAW, *supra* note 26, at 136.

31. *Id.*

32. ARO, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979).

33. Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355 (3d Cir. 1969).

34. NLRB v. Guernsey-Muskingum Elec. Coop. Inc., 285 F.2d 8, 12 (6th Cir. 1960). This case provides a good example of concerted activity under the "Representation" standard. A group of employees complained among themselves about their employer's failure to promote one of them to a foreman's position. The complaint to the employer by one of the employees about this matter was considered concerted activity under the Act.

*Mushroom Standard*

Individual activity will be concerted if the objective is to induce or prepare for group activity or if the activity relates to group activity in the interest of the employees. The Third Circuit Court of Appeals established this principle in *Mushroom Transportation Company v. NLRB*.<sup>35</sup> In *Owens-Corning Fiberglas v. NLRB*,<sup>36</sup> the employer refused to allow an employee to drive a fellow worker home after that worker received notice of his wife's death. One employee subsequently circulated a petition protesting the employer's action. The employer discharged the employee for circulating the petition. In its decision, the court relied on *Mushroom* and stated that individual activity intended to gain the support and aid of other employees to correct what they believed were inadequate working conditions was protected concerted activity.<sup>37</sup>

The *Mushroom* Standard is less limiting than the "Representation" standard. Under the "Representation" standard, there must be actual group activity represented by the individual's actions. Under *Mushroom*, on the other hand, there is no requirement of actual group activity. While an individual's preliminary discussions with other employees may not result in group activity, such individual action will qualify as concerted activity.<sup>38</sup>

Almost any concerted activity for mutual aid or protection must start with communication between individuals.<sup>39</sup> Denying protection simply because no actual group activity results would practically nullify the right of self organization and collective bargaining guaranteed in section 7.<sup>40</sup> However, conversation with no apparent intention, contemplation, or reference to group action falls outside the *Mushroom* standard.<sup>41</sup>

Mere talk must have group action as its objective in order to be

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35. 330 F.2d 683, 685 (3d Cir. 1964). In *Mushroom*, an individual employee advised fellow employees of their rights under the collective bargaining agreement. Additionally, it was rumored that he intended to report the company's violations to the Interstate Commerce Commission. Subsequently, the company alleged he was a trouble maker and discharged him; however, the employee claimed he was fired for engaging in concerted activities. In upholding the discharge, the court created the standard for individual concerted activity. The court found that none of the evidence showed the employee intended to induce or promote group activity.

36. 407 F.2d 1357 (4th Cir. 1968).

37. *Id.* at 1365.

38. 330 F.2d at 685.

39. *Id.*

40. *Id.*

41. *Id.*



protected. The court in *Mushroom* emphasized this point when it said that conversation between employees constitutes concerted activity when the speaker acts with the goal of inducing group activity or when the conversation has some relation to group action in the interest of employees.<sup>42</sup> *Mushroom* enjoys wide acceptance among the circuit courts since it is a logical extension of group activity which is most commonly associated with concerted activity.<sup>43</sup>

### *The Theory of Constructive Concerted Activity*

Two less accepted theories of individual concerted activity rest upon a concept developed by the NLRB known as "constructive concerted activity." A few circuits have accepted part of this idea<sup>44</sup> while others reject it completely.<sup>45</sup>

Professors Gorman and Finkin describe the theory as a concept based upon fictions and fabricated presumptions.<sup>46</sup> As they explain it, an individual's complaint is regarded as made on behalf of a group when resolution of the grievance inures to the benefit of the group. All employees benefit when an individual asserts a claim which is linked to a collective bargaining agreement. In addition, in the absence of a collective bargaining agreement, there is a presumption of a group benefit from individual claims based on any statute or public regulation.<sup>47</sup>

The two constructive concerted activity standards are the *Interboro* standard and the *Alleluia* standard. By means of these two standards, the NLRB has granted protected concerted status to the majority of individual complaints about working conditions.<sup>48</sup>

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42. *Id.*

43. See *Scooba Mfg. Co. v. NLRB*, 694 F.2d 82, 84 (5th Cir. 1982) (per curiam); *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) (quoting *Mushroom*); *Wheeling v. Pittsburgh Steel Corp.*, 618 F.2d 1009, 1017 (3d Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981); *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979); *NLRB v. Empire Gas, Inc.*, 566 F.2d 681, 684 (10th Cir. 1977); *NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977) (per curiam); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 720 (5th Cir. 1973); *Randolph Div., Eathan Allen, Inc. v. NLRB*, 513 F.2d 706, 708 (1st Cir. 1975); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1968); *Indiana Gear Works v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967).

44. See, e.g., *NLRB v. Ben Pekin Corp.*, 459 F.2d 205 (7th Cir. 1971); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).

45. See, e.g., *Kohls v. NLRB*, 629 F.2d 73 (D.C. Cir. 1980), *cert. denied*, 101 U.S. 1390 (1981); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980); *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079 (8th Cir. 1977); *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967).

46. Gorman & Finkin, *supra* note 18, at 309.

47. *Id.*

48. *Id.*

*Interboro* Standard

Under the *Interboro* standard, attempts by an individual to enforce a collective bargaining agreement provision may be deemed concerted even in the absence of interest by fellow employees.<sup>49</sup> In *NLRB v. Interboro Contractors, Inc.*<sup>50</sup> two employees individually complained about collective bargaining agreement violations to their employer who subsequently discharged them. The NLRB found the dismissal constituted an unfair labor practice and in so finding created the *Interboro* doctrine.<sup>51</sup>

The Second Circuit, in approving the concept, stated that the NLRB need not find the employee's complaint meritorious for the activity to be concerted; the employee must only act in good faith.<sup>52</sup>

The Seventh Circuit is the only other circuit to adopt and apply the *Interboro* standard.<sup>53</sup> In *NLRB v. Ben Pekin Corporation*,<sup>54</sup> an employee was to receive a \$75.00 wage increase. When he received only \$21.00, he asked the employer whether there had been a payoff between the union and the employer. The employer fired him for the statement. The NLRB held that, under *Interboro*, the discharge was an unfair labor practice.<sup>55</sup> On appeal, the Seventh Circuit adopted the *Interboro* doctrine, stating that an attempt by an individual employee to enforce the terms of a collective bargaining agreement, as that employee reasonably understood those terms to be, is a protected concerted activity.<sup>56</sup>

Concerted activity under *Interboro* constructively occurs when an individual bases his right or refusal to act upon a collective bargaining agreement provision. For example, an employee who refuses to drive a truck based upon a good faith belief it is unsafe is protected under *Interboro* if the collective bargaining agreement guarantees a right to refuse to handle unsafe equipment.<sup>57</sup>

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49. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967).

50. 388 F.2d 495 (2d Cir. 1967).

51. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966).

52. 388 F.2d at 500.

53. Courts rejecting *Interboro* include *Royal Development Co., Ltd. v. NLRB*, 703 F.2d 363, 374 (9th Cir. 1983); *Roadway Express, Inc. v. NLRB*, 700 F.2d 687, 693-94 (11th Cir. 1983); *Kohls v. NLRB*, 629 F.2d 173, 176-77 (D.C. Cir. 1980); *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973) (dictum); *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971).

54. 452 F.2d 205 (7th Cir. 1971).

55. *Ben Pekin, Inc.*, 181 N.L.R.B. 1025 (1970).

56. 452 F.2d at 206.

57. See, e.g., *NLRB v. City Disposal Sys. Inc.*, 52 U.S.L.W. 4360 (U.S. Mar. 20, 1984).

## *Alleluia* Standard (The “Benefit” Standard)<sup>58</sup>

Under the *Alleluia* standard, if any benefit inures to a group of employees from an individual’s actions, the NLRB will regard the person’s actions as concerted unless there is specific disapproval for the individual’s actions by other employees. The NLRB established this standard in *Alleluia Cushion Co.*<sup>59</sup>

In *Alleluia*, an employee filed a complaint with California’s Occupational Safety and Health Administration (OSHA) about unsafe working conditions at his employer’s two plants. The individual accompanied the OSHA inspector at the inspector’s request. After the inspection the employee was fired. The NLRB held that where an employee complains and seeks enforcement of a statutory regulation which relates to occupational safety designed for the benefit of all employees, it will find implied consent to such action and regard the activity as concerted unless fellow employees disavow such representation.<sup>60</sup> The NLRB reasoned that the absence of an outward manifestation of support by other employees does not mean they reject the individual’s interest in safety or his complaints about safety violations, emphasizing that “[s]afe working conditions are matters of great and continuing concern for all in the work force.”<sup>61</sup> Occupational safety is an important condition of employment; its importance is demonstrated by Congress’ enactment of the Occupational Safety and Health Act. Activity which invokes rights under this Act inures to the benefit of other employees because it achieves safe working conditions. The NLRB presumed that since all employees have an interest in safe working conditions, they impliedly consent to the person’s actions thereby making the activity concerted.<sup>62</sup>

The foundation for *Alleluia* was laid in *G.V.R., Inc.*<sup>63</sup> There, an employer required two employees to kick back their wages from payments on an Army contract. During an investigation of the employer’s failure to file proper payroll records, an Army Compliance Officer interviewed the employees individually and discovered the kickback scheme. The Labor Department subsequently initiated proceedings against the employer who soon afterwards fired both employees. The NLRB reasoned that an individual who protests the employer’s noncompliance with a federal statute engages in pro-

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58. Note, *Protection of Individual Action as ‘Concerted Activity’ Under The National Labor Relations Act*, 68 CORNELL L. REV. 376, 384 (1983) (due to *Alleluia*’s presumption of concerted activity for individual activity that benefits fellow employees, the authors refer to the *Alleluia* standard as the “Benefit” standard).

59. 221 N.L.R.B. 999 (1976).

60. *Id.* at 1000.

61. *Id.*

62. *Id.*

63. 201 N.L.R.B. 147 (1973).

ted concerted activity for the mutual aid and protection of similarly situated employees.<sup>64</sup>

Although there was group activity in *G.V.R., Inc.*, the NLRB's reasoning has been applied to individual employee activity. Since Congress' enactment of a federal statute constitutes a public interest in a particular area, the assertion of a statutory right may be presumed to be a matter of concern by all employees for whom it was enacted.<sup>65</sup> In subsequent decisions, the NLRB expanded *Alleluia* to encompass complaints under other federal employment laws and, eventually, to any complaints which benefited fellow employees.<sup>66</sup>

In sum, the above standards define that conduct which constitutes concerted activity protected under the Act. However, just because an employee's actions fall under one of these standards does not mean the Act is violated should the employer fire the individual for such activity. There is a requirement that the employer know the employee's activity was concerted.

### *The Requirement of Employer Knowledge*

For an employer's adverse action against an employee to be unlawful under the Act, there must be substantial evidence showing (1) the employee engaged in concerted activity for the purpose of mutual aid or protection; and (2) the employer knew of this at the time of the discharge.<sup>67</sup> Thus, an employer does not violate the Act for discharging an employee for engaging in an activity which the employer does not know the Act protects. This is so regardless of whether the employee activity was protected and concerted in the given instance.<sup>68</sup> While an employee may be discharged for several different legitimate reasons, an Act violation will be found upon the

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64. *Id.* at 147.

65. *Meyers Indus.*, 115 L.R.R.M. (BNA) 1025, 1034 (Jan. 6, 1984) (dissenting opinion).

66. *See, e.g.*, *Hotel and Restaurant Employees, Local 28*, 252 N.L.R.B. 1124 (1980) (filing a sex discrimination complaint is concerted activity); *General Teamsters Local Union No. 528*, 237 N.L.R.B. 258 (1978) (filing a racial discrimination complaint with the Equal Employment Opportunity Commission is concerted activity); *Pink Moody, Inc.*, 237 N.L.R.B. 1064 (1977) (refusing to handle unsafe equipment is concerted activity); *Air Surrey Corp.*, 229 N.L.R.B. 1064 (1977) (inquiring at employer's bank whether he has sufficient funds to make the next payroll is concerted activity); *Ambulance Service of New Bedford*, 229 N.L.R.B. 106 (1977) (filing a criminal complaint against an employer for continuously dishonored checks is concerted activity); *Dawson Cabinet Co.*, 228 N.L.R.B. 290 (1970) (filing sex discrimination complaint is concerted activity).

67. *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 717 (5th Cir. 1973).

68. *Air Surrey Corp. v. NLRB*, 601 F.2d 256, 257 (6th Cir. 1979).

showing that the dismissal was based, even in part, upon an unlawful motive. Restraining the exercise of section 7 rights by employees is an example of such an unlawful motive.<sup>69</sup>

The requirement that employers know the activity is concerted adds an interesting twist to the *Alleluia* decision, since there is implied consent by fellow employees under the *Alleluia* standard. Due to this presumption of implied consent, an employer is charged with the knowledge that an *Alleluia*-type activity is deemed concerted and bears the burden of proving otherwise.<sup>70</sup>

#### DISPUTE OVER STANDARDS OF INDIVIDUAL CONCERTED ACTIVITY

There are two general points of view regarding individual concerted activity: the strict and the liberal interpretations. Those strictly interpreting section 7 find only a limited basis for protecting individual activity while the liberal interpretation finds a much broader basis for protecting such activity. A discussion of each of these viewpoints follows.

##### *Strict Interpretation*

Courts which most narrowly construe section 7 define concerted activity to mean only group activity. Any action by an individual must be part of or look toward group activity.<sup>71</sup> Generally, this viewpoint rejects the theory that underlies *Interboro* and *Alleluia* as a legal fiction and recognizes only the "Representation" and *Mushroom* standards.<sup>72</sup>

Strict interpretation looks to the purpose of the employee's activity to determine if it is concerted or protected by section 7. If the purpose is for the mutual aid or protection of other employees and not merely personal, the activity will be regarded as concerted and protected,<sup>73</sup> since group activity seldom exists without someone initiating it.<sup>74</sup>

##### Strict View of *Interboro*

Courts which reject *Interboro* feel the doctrine represents an unwarranted expansion of the definition of concerted activity developed

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69. *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 27 (7th Cir. 1980).

70. *Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 126 n.7 (6th Cir. 1980). See also 115 L.R.R.M. at 1027.

71. *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 717 (5th Cir. 1973).

72. See, e.g., *ARO, Inc., v. NLRB*, 596 F.2d 713, 717 (6th Cir. 1979); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

73. *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 308 (4th Cir. 1980) (quoting *Joanna Cotton Mills v. NLRB*, 176 F.2d 749 (4th Cir. 1949)).

74. *Owens-Corning Fiberglas v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1968).

in *Mushroom*.<sup>75</sup> In *NLRB v. Northern Metal Company*,<sup>76</sup> the third circuit vehemently rejected *Interboro*. The court held that *Interboro* represented expansion of the Act's coverage in violation of the Act's clear wording, the doctrine created a legal fiction to support an unwarranted judicial conception, and such freedom to loosely interpret the Act was impermissible.<sup>77</sup> Basically, the only type of activity the court felt was concerted was group activity for the purpose of collective bargaining or mutual aid or protection.<sup>78</sup>

The Sixth Circuit also rejected the *Interboro* doctrine in *ARO, Inc. v. NLRB*.<sup>79</sup> The court regarded *Interboro* as an unwarranted expansion of the scope of section 7 protection.<sup>80</sup> To be concerted activity under the Act, the individual's action cannot be made merely on an individual's behalf. Rather, the activity must fall within the coverage of the *Mushroom* or "Representation" standard.<sup>81</sup>

Courts reject *Interboro* in the belief that such a broad standard of concerted activity hinders the institution of collective bargaining and destroys industrial peace.<sup>82</sup> In the courts' view, no real collective bargaining will occur if employers are forced to deal with individual or splinter groups.<sup>83</sup> They believe that attempted negotiations with individual employees makes a mockery of collective bargaining and generates divisive pressures between employees and employers.<sup>84</sup>

### Strict View of *Alleluia*

While the NLRB has consistently applied *Alleluia* to similar cases, every court of appeals which has examined this standard has

75. See, e.g., *NLRB v. Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973).

76. 440 F.2d 881, 884 (3d Cir. 1971). Here, a probationary employee complained to his employer that he was entitled to holiday pay under the collective bargaining agreement. The employer fired him for making this complaint. The NLRB ruled the employee's activity was concerted based on *Interboro*; however, on appeal the Third Circuit rejected *Interboro*.

77. *Id.*

78. *Id.*

79. 596 F.2d 713 (6th Cir. 1979). In *ARO*, an employer laid off three temporary employees due to cutbacks. One employee complained that keeping as a permanent employee one who was hired after the temporaries were hired violated the seniority provision of the collective bargaining agreement. After her complaints, the employer said he would never recall her. She filed an unfair labor practice charge and the NLRB found her activity concerted under *Interboro*.

80. *Id.* at 718.

81. *Id.*

82. See, e.g., *Id.*

83. *NLRB v. R.C. Can Co.*, 328 F.2d 974, 978-79 (5th Cir. 1964).

84. *Id.*

rejected it.<sup>85</sup> In cases where no collective bargaining agreement is involved, courts consistently apply either the *Mushroom* or the "Representation" standard; both require that an individual must act with the object of inducing group activity or that the act must relate to group action in the interest of employees.<sup>86</sup>

Like those that reject *Interboro*, courts that reject *Alleluia* view the theory of implied concerted activity as a legal fiction. To them, the theory represents an unwarranted expansion of the definition of concerted activity which has no statutory support.<sup>87</sup>

While the NLRB has held that where the subject matter of the individual's complaint is of common interest the activity inures to the benefit of other employees, courts have required something more. The employee must show he intended his activities to relate to or induce group activity.<sup>88</sup> If the employee's activity only demonstrates a personal grievance, even if the grievance is shared by other employees, the activity is not concerted.<sup>89</sup> By strict adherence to the facts in evidence courts have avoided *Alleluia*.<sup>90</sup>

*Alleluia* is regarded as an expansion of *Interboro* to a nonunion setting, but courts which have adopted *Interboro* have nevertheless rejected *Alleluia*. In *Ontario Knife Company v. NLRB*,<sup>91</sup> three nonunion employees complained about the excessive workload on their shift. After speaking with their foreman, one employee walked off the job. When she reported for work the next day, she was terminated. Although the NLRB found her activity concerted, based on *Alleluia*, the Second Circuit held her activity was not protected. The court stated that section 7 should be read according to its terms except in the context of a collective bargaining agreement, as in *Interboro*.<sup>92</sup> Where there is no collective bargaining agreement, individual activity can be protected only if used to induce group activity

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85. Gorman & Finkin, *supra* note 18, at 332.

86. *Id.*

87. *See, e.g.*, NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980).

88. Koch Supplies, Inc. v. NLRB, 646 F.2d 1257, 1259 (8th Cir. 1981).

89. Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 28 (7th Cir. 1980).

90. *See, e.g.*, Jim Causley Pontiac v. NLRB, 620 F.2d 122 (6th Cir. 1980). Here, an individual employee filed a complaint with Michigan's Occupational Safety and Health Administration (OSHA) regarding hazardous working conditions. A fellow employee allowed his name to be used in the complaint. The court held there was no need to rely on *Alleluia* to determine whether filing the complaint was a concerted activity in this case. The facts clearly indicated the activity was protected under section 7 because a fellow employee signed the complaint which thus constituted group activity under the Act. *See also* NLRB v. Dawson Cabinet Co., Inc., 566 F.2d 1079 (8th Cir. 1977). Here, a female employee was discharged for her refusal to work unless she was paid the same rate as male employees. Prior to this incident, she filed an equal pay complaint with the Labor Department's Wage and Hour Division. The court held there was no evidence the employee was fired for filing the pay complaint. The employee's refusal to perform the work was for her own personal interest, thus making her activity unconcerted.

91. 637 F.2d 840 (2d Cir. 1980).

92. *Id.* at 845.

under the *Mushroom* standard.<sup>93</sup>

In his dissent to the NLRB's decision in *G.V.R. Inc.*, Chairman Miller argued for a strict interpretation of the Act to avoid extending section 7 protection to *Alleluia* situations.<sup>94</sup> He said the violation of an employee's rights under another federal statute does not amount to a violation of rights stemming from the Act and noted that the law violated in *G.V.R. Inc.* was not the Act.<sup>95</sup>

In Miller's view the Act does not protect employees against illegal wage payments, kickbacks, unsafe working conditions, sex discrimination, or employer retribution against an employee for complaints to a government agency (other than the NLRB) about the employer's illegal practices.<sup>96</sup> An individual who files a complaint with another agency does not accrue rights under the Act.<sup>97</sup> Miller summed up this viewpoint when he said:

Thus, outraged though we may be about the illegal and immoral conduct of this Respondent, we are neither God nor the Attorney General, and we are not empowered to correct either all immorality nor all illegality arising under the total fabric of Federal law.<sup>98</sup>

Miller believed that where no violation of the Act is established, the NLRB must dismiss the complaint, no matter how harsh the result.<sup>99</sup> This is the view courts which reject *Alleluia* seem to adopt. The discharge of an employee for making a complaint regarding a statutory violation by the employer will not violate the Act unless the individual's activity conforms to either the *Mushroom* or the "Representation" standard of individual concerted activity.

Another aspect of *Alleluia* courts dislike is that the presumption of concerted activity shifts the burden of proof. The employer must rebut the presumption that an individual's complaint regarding a statutory regulation or working condition is a concerted activity with implied consent by fellow employees.<sup>100</sup> Courts have noted that the NLRB fails to suggest the manner in which an employer might obtain evidence to rebut this presumption that other employees endorse the activity.<sup>101</sup> This presumption becomes, in effect, irrefutable.<sup>102</sup>

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93. *Id.*

94. *G.V.R., Inc.*, 201 N.L.R.B. 147, 147 (Miller, Chairman, dissenting).

95. *Id.*

96. *Id.* at 148.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 310 (4th Cir. 1980).

101. *Id.* at 309.

102. *Id.*



Courts which reject *Alleluia* hold that the burden of proof properly rests with the NLRB to show the employee was engaged in protected concerted activity under either the *Mushroom* or the "Representation" standard.<sup>103</sup>

### Commentators' Opposition to *Alleluia* and *Interboro*

Some commentators argue the paramount purpose of the Act is to preserve the institution of collective bargaining and achieve industrial peace.<sup>104</sup> They believe the *Interboro* and *Alleluia* standards for protection of individual activity misconstrue section 7, go against the policies of the Act, and reestablish inequity in the labor-management relationship, thus facilitating industrial strife.<sup>105</sup> Adopting these two standards encourages individual employees to bypass grievance procedures and harass employers while constructively relying on a collective bargaining agreement or statutory regulation.<sup>106</sup>

Critics believe *Interboro* places individual bargaining on the same level of importance as collective bargaining.<sup>107</sup> They assert that this result violates the Act's policy of encouraging collective bargaining to reduce inequity in bargaining power between employers and employees.<sup>108</sup> Overall, these commentators feel *Interboro* and *Alleluia* ignore the requirements of section 7 and are too tenuous to accept under the basic policy of the Act.<sup>109</sup>

### *Liberal Interpretation*

#### Liberal View of *Interboro*

Supporters of *Interboro* believe an individual's invocation of a collective bargaining agreement is an extension of the collective activity that led to the agreement.<sup>110</sup> Judge Biggs, dissenting in *NLRB v. Northern Metal Co.*,<sup>111</sup> argued that when an individual attempts to enforce the provisions of a collective bargaining agreement, he asserts a collective right under a collective contract thereby benefitting all employees because enforcement of the contract promotes a collective right.<sup>112</sup>

Proponents of *Interboro* feel the doctrine is a necessary and rea-

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103. *Id.* at 310.

104. *E.g.*, note, *supra* note 58, at 389.

105. *Id.* at 390.

106. *Id.* at 391.

107. *E.g.*, *id.* at 391-92.

108. *E.g.*, *id.*

109. *E.g.*, *id.* at 391.

110. *E.g.*, *NLRB v. City Disposal Sys. Inc.*, 52 U.S.L.W. 4360, 4362 (U.S. Mar. 20, 1984).

111. 440 F.2d 881 (3d Cir. 1971).

112. *Id.* at 887 (Biggs, J., dissenting).

sonable construction of the Act. A strong supporter of *Interboro* is Judge Lay of the Eighth Circuit. In his dissent in *Illinois Ruan Transport Corporation v. NLRB*<sup>113</sup> he said, "[w]here an individual employee asserts a right found in a collective-bargaining agreement, it is reasonable to state he is extending the terms protecting union activity."<sup>114</sup> Lay reasoned that both sections 7 and 9(a)<sup>115</sup> of the Act give an employee the right to act alone when asserting a right consistent with a collective bargaining agreement. He also stated that in both sections, Congress recognized that an individual's rights are not totally subsumed by the group when the person asserts rights consistent with the interests of the group. To reason otherwise, according to Lay, would deny the purpose for which a union exists: to protect the rights of the individual employee.<sup>116</sup>

### Liberal View of *Alleluia*

Judge Lay also supports the *Alleluia* concept of concerted activity. He believes that even if no collective bargaining agreement exists, an employee may still engage in protected concerted activity under section 7 if the activity is for the mutual aid or protection of others.<sup>117</sup>

The enforcement of a statutory regulation meets this requirement of mutual aid or protection. The NLRB noted in *Alleluia* that often the only practical way to enforce statutory regulations is to encourage people to report violations.<sup>118</sup> To condone the discharge of an individual for reporting statutory violations would indicate to other employees the danger of seeking assistance from federal or state agencies to obtain statutorily guaranteed working conditions and would frustrate the purpose of such protective legislation.<sup>119</sup>

Judge Lay has observed that employees owe a duty to ensure that statutory protections are enforced.<sup>120</sup> He condemned the discharge of an employee who took an unsafe truck to the Interstate Commerce Commission for inspection.<sup>121</sup> Lay argued that performance of a law-

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113. 404 F.2d 274, 281 (8th Cir. 1968) (Lay, J., dissenting).

114. *Id.* at 285.

115. 29 U.S.C. § 159(a) (1982) allows an individual employee to present a grievance to his employer without the intervention of the bargaining agent.

116. 404 F.2d at 289 (Lay, J., dissenting).

117. *NRLB v. Dawson Cabinet Co.*, 566 F.2d 1079, at 1084-85 (8th Cir. 1977) (Lay, J., dissenting).

118. *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1976).

119. *Id.*

120. *Illinois Ruan Transport Co. v. NLRB*, 404 F.2d 274, 285 (8th Cir. 1968) (Lay, J., dissenting).

121. *Id.* at 283.

ful duty should not be condemned as unauthorized conduct, that a driver should never be required to drive an unsafe truck at his and the public's peril, that the lawful right of a regulatory agency to inspect unsafe working conditions should supercede a company rule against unauthorized use of equipment, and finally, that a company rule which seeks to override a statutory regulation is unreasonable as a matter of law.<sup>122</sup>

In subsequent cases, the NLRB expanded *Alleluia's* protection of individual activity to any complaint relating to working conditions of mutual concern to fellow employees.<sup>123</sup> Commentators have appropriately summed up the expansive basis of *Alleluia*:

*Alleluia Cushion* is not only based on the policy of advancing the purpose of federal and state safety law, but also on the premise that an individual's actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees.<sup>124</sup>

### Commentators' Support of *Interboro* and *Alleluia*

Commentators who favor *Interboro* and *Alleluia* argue that courts which reject the two doctrines read section 7 too narrowly. They assert that all work-related claims of individual employees should be protected as concerted activity.<sup>125</sup> To do otherwise, they reason, denies protection to the individual employee who asserts a collective right and violates the history and spirit of federal labor laws.<sup>126</sup>

Their argument is that, while the Act focuses on collective action, there is no indication in the language of the Act that the term "concerted activities" applies only to literal collective action or that Congress intended the term to limit the assertion of employee rights. Instead, the term appears to limit only the assertion of individual rights which are unrelated to collective efforts.<sup>127</sup> In the view of these commentators, the NLRB must recognize other employment legislation and construe the Act in a manner supportive of the entire statutory scheme. Thus, they conclude, presuming concerted activity in the individual assertion of a statutory right or in a collective bargaining agreement provision inures to the benefit of other employees and accommodates the Act to the legislative policy regarding working conditions.<sup>128</sup>

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122. *Id.*

123. *See supra* note 66.

124. Gorman & Finkin, *supra* note 18, at 306.

125. *Id.* at 309.

126. *E.g.*, Meyers Indus., 15 L.R.R.M. (BNA) 1025, 1031 (Jan. 6, 1984) (Zimmerman, Member, dissenting).

127. *Id.* at 1033.

128. *Id.* at 1034.

## RECENT DEVELOPMENTS

### *Supreme Court Approval of Interboro*

The Supreme Court recently approved the *Interboro* Doctrine in *NLRB v. City Disposal Systems Inc.*,<sup>129</sup> where a union truckdriver refused to drive with faulty brakes. The Court concluded that an individual's assertion of a right grounded in a collective bargaining agreement was concerted activity and protected under section 7.<sup>130</sup> The individual's statement or act must be based on a reasonable and honest belief that he was asked to perform a task not required under the collective bargaining agreement. The statement, or act, itself must be reasonably directed to the enforcement of a collective bargaining agreement right.<sup>131</sup> Concerted activity then exists because the employee's actions constitute an integral part of the process by which the agreement is enforced, even if the individual is wrong in the belief that the collective bargaining agreement right was violated. So long as the contract is honestly and reasonably invoked, and the complaint is reasonably clear to the person to whom it is made, the individual's statement or act will constitute concerted activity.<sup>132</sup>

The Supreme Court noted that the disagreement among circuits over the *Interboro* doctrine<sup>133</sup> centers on the relationship that must exist between an individual's action and group activity under section 7.<sup>134</sup> It held the NLRB's view of this relationship was reasonable because the grant of section 7 protection to an individual employee by means of *Interboro* preserves the integrity of the collective bargaining process. An employee, by invoking a right in a collective bargaining agreement, makes that right a reality. The employee's action revitalizes both the promises in the instant agreement as well as the collective bargaining process itself, intended by Congress to achieve

129. 52 U.S.L.W. 4360 (U.S. Mar. 20, 1984). In this case, a garbage truck driver refused to drive a truck with faulty brakes. The collective bargaining agreement which covered the employee guaranteed employees the right to refuse to handle equipment they in good faith believed was unsafe. After being fired for refusing to drive the truck, the employee filed an unfair labor practice charge with the NLRB. The NLRB ruled the employee's refusal was concerted activity based on *Interboro*; however, the Court of Appeals for the Sixth Circuit reversed the NLRB's decision on the basis of *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979).

130. *Id.* at 4362.

131. *Id.* at 4364.

132. *Id.* at 4365.

133. Compare text accompanying notes 75-84 *supra*, with text accompanying notes 110-116 *supra*.

134. 52 U.S.L.W. at 4362.

industrial peace.<sup>135</sup>

The right of employers to control the work environment was not affected by the Court's approval of *Interboro*. An employer who refuses to tolerate certain methods by which employees invoke their rights under the agreement is free to negotiate a contract provision which limits the availability of such methods. For example, the employer might insist on a no-strike clause. An employee who violates such a provision will be unprotected even though the activity may be concerted.<sup>136</sup>

### *NLRB's Rejection of Alleluia*

While the Supreme Court's approval of *Interboro* was a major victory for proponents of a liberal interpretation of section 7, the NLRB handed this group a major defeat in *Meyers Industries, Inc.*<sup>137</sup> The facts in *Meyers* were similar to those in *City Disposal Systems*, except that the case arose in a nonunion setting.

In *Meyers*, an administrative law judge held that, based on *Alleluia*, the employee's actions were concerted. The NLRB disagreed. In its decision, the NLRB overruled *Alleluia* and its progeny, saying the *Alleluia* standard of concerted activity failed to reflect the principles inherent in section 7. For the NLRB, the standard of *concerted activity* would once again be the objective standard which existed before *Alleluia*.<sup>138</sup>

The NLRB said the language of section 7 showed the Act viewed concerted action in terms of collective activity such as self organization, forming, joining, or assisting labor organizations, and collective bargaining through representatives.<sup>139</sup>

The NLRB criticized the *Alleluia* standard of concerted activity as too subjective. Under *Alleluia*, the NLRB would question whether the *purpose* of the activity was one which it wanted to protect. If so, the NLRB would then find the activity concerted. From this subjective viewpoint, it mattered not whether the action was in the form of group activity or individual activity.<sup>140</sup>

Prior to *Alleluia*, the NLRB considered as concerted activity only

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135. *Id.* at 4363.

136. *Id.* at 4364.

137. 115 L.R.R.M. (BNA) 1025 (Jan. 6, 1984). Here, an employee was required to drive a truck with faulty brakes and steering. Due to a brake malfunction, the employee had an accident. He informed the Tennessee Department of Transportation about the accident. An inspector examined the truck and cited the employer for numerous Department of Transportation violations. The employer later fired the employee for reporting the accident to the Department of Transportation.

138. *Id.* at 1028-29. (When the NLRB uses the term "objective" standard in its *Meyers* decision, it means activity that falls within either the "Representation" or the *Mushroom* standards).

139. *Id.* at 1026.

140. *Id.* at 1021.

the actions of individuals united as a group in pursuit of a common goal. In *Meyers*, the NLRB assailed the negative effect *Alleluia* had had on the old standard of concerted activity. Under *Alleluia* the required demonstration of group will in the workplace was no longer essential for a finding of concerted activity. The existence of other employment legislation and its invocation by an individual employee became sufficient to find the activity concerted.<sup>141</sup>

Under *Alleluia*, the NLRB made its own determination of whether the issue was one which should concern employees as a group rather than looking for observable evidence of actual group action. The decisions which followed *Alleluia* dropped the requirement of legislative coverage of the activity.<sup>142</sup> The NLRB instead decided what was a matter of mutual concern or protection when there was little or no legislation on the matter.<sup>143</sup> Finally, under *Alleluia*, the burden of proof regarding whether an activity was concerted shifted from the NLRB General Counsel to the employer.<sup>144</sup>

The NLRB in *Meyers* held that the Act mandates that the old objective standard be used to determine if activity is concerted. The NLRB emphasized that while a particular form of individual activity may warrant group support, this does not, of itself, create a sufficient basis to deem the activity concerted.<sup>145</sup> For activity to be concerted, the employee must be engaged in action with, or under, the authority of other employees. The action cannot be engaged in solely by oneself or on one's own behalf.<sup>146</sup>

To show a violation of the Act after *Meyers*, the individual must show that the employer actually knew the individual's activity was concerted, that the activity was protected by the Act, and that the employer's adverse action was motivated by the individual's protected conduct.<sup>147</sup> Accordingly, an employer does not violate the Act if he mistakenly imposes discipline in a good faith belief that the employee engaged in misconduct. Thus, if the terms of the Act are not violated, under the *Meyers* standard an employer may discharge an employee for any reason or justification that is not prohibited by contract or statute.<sup>148</sup>

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141. *Id.* at 1027.

142. *See supra* note 66.

143. 115 L.R.R.M. (BNA) at 1027.

144. *Id.* at 1028.

145. *Id.*

146. *Id.* at 1029.

147. *Id.*

148. *Id.* at 1029 n.21.

Under the *Meyers* standard it does not matter that several employees may individually complain to the employer about the same matter. The NLRB noted in *Meyers* that individual employee concern, even if openly manifested by several employees on an individual basis, is not a sufficient basis for finding concert of action. Some indication of group activity is necessary for the action to be deemed concerted.<sup>149</sup>

While the NLRB specifically overruled *Alleluia*, it was careful to maintain *Interboro*.<sup>150</sup> The NLRB factually distinguished *Interboro* on the basis that there was an attempted implementation of a collective bargaining agreement in that situation. However, in a nonunion situation such as *Meyers* there is no contract to enforce, so the activity cannot be concerted when an individual complains.<sup>151</sup>

In concluding, the NLRB emphasized that section 7 was designed to legitimate and protect group activity as engaged in by employees for their own mutual aid or protection. The NLRB acknowledged that its holding was onerous to the employee in *Meyers* in view of the circumstances surrounding the case. However, the NLRB stated that it was neither God nor the Department of Transportation:

Outraged though we may be by a respondent who — at the expense of its driver and others traveling on the nation's highways — was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost, we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.<sup>152</sup>

#### THE CURRENT STATE OF THE LAW

In light of the recent *City Disposal Systems* and *Meyers* decisions, the law regarding individual employee activity seems to be in a state of flux. It would appear that the Supreme Court is expanding the scope of permissible activity for union employees while the NLRB is restricting the scope of nonunion employee activity. The Court seems to give more rights to union employees while the NLRB is taking away rights it had previously guaranteed employees.

#### *Apparent Inequity Between Union and Nonunion Employee Rights*

*City Disposal Systems* and *Meyers* involved individual activity. But while in *City Disposal Systems*, the Supreme Court expanded the scope of section 7 with its approval of *Interboro*, in *Meyers* the

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149. *Id.* at 1030.

150. Although the NLRB decided *Meyers* before the Supreme Court decided *City Disposal Systems*, the Court's decision has no effect on the validity of the *Meyers* decision. The Court stated that the *Meyers* case was of no relevance in *City Disposal Systems* because the NLRB distinguished the case from *Interboro*. See *NLRB v. City Disposal Sys. Inc.*, 52 U.S.L.W. 4360, 4362 n.6 (U.S. Mar. 20, 1984).

151. 115 L.R.R.M. (BNA) at 1028.

152. *Id.* at 1031.

NLRB limited section 7 by shutting the door on almost all individual activity in a nonunion environment. The two decisions create inequity between the rights of unionized and nonunionized employees, especially when work safety is involved, in that unionized employees have greater protection under the Act.

A union member may rely on safety provisions in the collective bargaining agreement to improve working conditions. In contrast, a nonunion employee who files a complaint with a regulatory agency to improve working conditions is without assurance that the action will be protected under the Act. This inequity appears even greater when it is realized that more than half of the workers covered by the Act are nonunion employees.<sup>153</sup>

Due to the apparent inequity between union and nonunion employee rights after *City Disposal Systems* and *Meyers*, the question of what constitutes concerted activity to improve working conditions remains unanswered. Is it the right to go to a regulatory agency or merely the invocation of a collective bargaining agreement? To determine the answer, it is necessary to examine the rationale underlying *Interboro* and *Alleluia* as well as the history and purpose of the Act.

#### *Rationale For Interboro*

There are two bases underlying *Interboro*. First, the assertion of collective bargaining agreement rights is an extension of the concerted activity that originally produced the agreement. Second, asserting these rights affects all employees in the bargaining unit.<sup>154</sup> The Supreme Court held *Interboro* was consistent with the the Act's purpose of encouraging collective bargaining and other practices fundamental to the peaceful adjustment of industrial disputes over wages, hours, and other working conditions.<sup>155</sup>

The key difference between *Interboro* and *Alleluia* lies in the basis of the individual's complaint: does the employee rely on a collective bargaining agreement or on a public statute? Implementation of a collective bargaining contract is concerted activity.<sup>156</sup> Invocation of a statutory right (which may cover the same subject as the contract provision) is not. In *Smith v. Evening News Association*<sup>157</sup> the Su-

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153. Gorman & Finkin, *supra* note 18, at 287 n.5.

154. NLRB v. City Disposal Sys. Inc., 52 U.S.L.W. 4360 (U.S. Mar. 20, 1984).

155. *Id.* at 4363.

156. Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 309 (4th Cir. 1980).

157. 371 U.S. 195 (1962).



preme Court said:

The right of individual employees concerning rates of pay and conditions of employment are a major focus of negotiation and administration of collective bargaining contracts. Individual claims which lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of collective bargaining contracts on which they are based.<sup>158</sup>

Thus it is that such individual claims, lying at the heart of the grievance and arbitration machinery, are defined as concerted acts.

### *Rationale For Alleluia*

Under *Alleluia*, an employee's assertion of an employment-related statutory right was presumed to be activity protected by the Act. An individual employee who filed an employment-related complaint with a federal or state agency was viewed as engaging in activity which furthered fellow employee's rights under the relevant statute.<sup>159</sup> To presume without evidence that fellow employees did not endorse an individual's effort to enforce a statutory regulation for their benefit was seen as contrary to the policy underlying the employment legislation relied on by the individual. Therefore, unless fellow employees did object to such action, there was a presumption of concerted activity. Since laws which protect the well-being of employees had been legislatively declared to be in the overall public interest, concerted activity and employee consent was seen to emanate from the individual's assertion of statutory rights.<sup>160</sup>

Those favoring *Alleluia* argue that the presumption of concerted activity in asserting a statutory right is consistent with the legislative history of section 7, supports the policies of the Act, and fulfills the NLRB's responsibility to accommodate the Act to other employment legislation.<sup>161</sup> They agree that the main purpose of the Act is to encourage the normal flow of commerce by avoiding or minimizing industrial strife.<sup>162</sup> Evidence of such intent is found in section 1(b) of the Labor Management Relations Act<sup>163</sup> which asserts that the purpose of the Act may be achieved if employers, employees, and labor

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158. *Id.* at 200.

159. Meyers Indus., 115 L.R.R.M. (BNA) 1025, 1032 (Jan. 6, 1984) (Zimmerman, Member, dissenting); *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1976).

160. 221 N.L.R.B. at 1000.

161. *E.g.*, 115 L.R.R.M. (BNA) at 1032 (Zimmerman, Member, dissenting). Although the NLRB overruled *Alleluia*, proponents for the standard continue to assert its validity. Because changes in the Presidency of the United States often bring about changes in the NLRB's perception of the appropriate labor policy, *Alleluia*-type situations will come before the NLRB again. Whether the NLRB readopts *Alleluia* or continues to reject it will depend on the political party in office and the labor policy of the President.

162. *Id.*

163. Labor Management Relations Act § 1(b), 29 U.S.C. § 141(b) (1982).

organizations recognize the legal rights of one another in their relationships, and refrain from activities which jeopardize the public health, safety, or interest.

Proponents point out the presumption of concerted activity is supported by the NLRB's policies and its duty to accommodate other employment legislation. The Act considers employee concern for matters affecting the public health, safety, or interest — matters not limited to the Act, but embodied in numerous other employment-related legislation.<sup>164</sup> The NLRB in *Alleluia* noted that the Supreme Court told it to recognize the purposes and policies of other employment legislation and to construe the Act in a manner supportive of the overall statutory scheme.<sup>165</sup> The Court emphasized this point in *Southern Steamship Co. v. NLRB*<sup>166</sup> when it said:

The NLRB has not been commissioned to effectuate the policies of the National Labor Relations Act so single mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.<sup>167</sup>

Thus, *Alleluia* proponents reason that the presumption of concerted activity accommodates the Act's overall legislative policy regarding the workplace and working conditions.

#### *Emporium Capwell: Supreme Court's View of the Legislative History and Purpose of The Act*

The Supreme Court weakened the thrust of *Southern Steamship* in *Emporium Capwell Co. v. Western Addition Community Organization*.<sup>168</sup> In *Emporium*, a group of minority employees filed a grievance through their union alleging racial discrimination. Then, claiming the grievance procedure was inadequate, they demanded to meet with the company president. Upon the president's refusal to meet with them, they picketed the employer's store in violation of the no-strike clause in the collective bargaining agreement. They were fired after repeated warnings to stop both picketing and encouraging a consumer boycott.

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164. 115 L.R.R.M. at 1304 (Zimmerman, Member, dissenting).

165. 221 N.L.R.B. at 1000 (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

166. 316 U.S. 31 (1942).

167. *Id.* at 47.

168. 420 U.S. 50 (1975).

The Court noted that it must construe the Act in light of the broad national policy of nondiscrimination in employment.<sup>169</sup> It held, however, that even if an employee discharge violated the Civil Rights Act,<sup>170</sup> it did not necessarily follow that the discharge also violated the Act.<sup>171</sup>

The Court followed a strict interpretation of section 7. Since the activity here subverted the collective bargaining process, the Court implied that the purpose of the Act is to promote industrial stability through collective bargaining. Whether or not the employees' substantive right to be free from racial discrimination is found under Title VII<sup>172</sup> or finds an independent basis in the Act, they cannot pursue such rights at the expense of the orderly collective bargaining process contemplated by the Act.<sup>173</sup> The Court stated that under the Act, concerted activities are protected not for their own sake, but as an instrument of a national labor policy to minimize industrial strife through collective bargaining.<sup>174</sup>

The Court noted in *City Disposal Systems* that activities which lead to the practice of collective bargaining are protected under the Act. The Court found that Congress intended to create equality in bargaining power between the employee and employer throughout the entire process of labor organization, collective bargaining, and the enforcement of collective bargaining agreements.<sup>175</sup>

Congress never intended to increase disharmony between employee and employer by protecting individual activity such as reporting an employer for statutory violations. The Act's goal is to bring the parties together for the purpose of collective bargaining and the preservation of industrial peace.

The Court found in *Emporium* that invoking a statutory right protected under other employment legislation does not mean that the same activity is entitled to protection under the Act.<sup>176</sup> Conduct which does not meet the present criteria for concerted activity may form the basis for a lawful discharge.<sup>177</sup> Therefore, if an individual wishes to invoke a statutory right and be protected under the Act, the activity must conform either to the "Representation" or the *Mushroom* standard.<sup>178</sup>

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169. *Id.* at 66.

170. 42 U.S.C. § 2000(e)(1)-(e)(17) (1982).

171. *Id.* at 71.

172. 42 U.S.C. § 2000(e)(3) (1982).

173. *Id.* at 69.

174. *Id.* at 62.

175. *NLRB v. City Disposal Sys. Inc.*, 52 U.S.L.W. 4360, 4363 (U.S. Mar. 20, 1984).

176. 420 U.S. at 71.

177. *Id.*

178. *See supra* text accompanying notes 32-43.

While under the Act an individual employee who invokes a statutory right may be discharged, most employment-related statutes provide for recourse against an employer who fires an employee for invoking a statutory right under such statute.<sup>179</sup> The statute usually provides that the employee may be reinstated with back pay.<sup>180</sup> Often, the process of reinstatement after invoking a statute will take longer and involve more risks with some regulatory agencies than would be the case with the NLRB, because the NLRB may issue an administrative order while some agencies are not empowered to do so.<sup>181</sup>

Proponents of *Alleluia* are quick to note that not *all* employment-related statutes protect an employee against employer retaliation. An individual is not protected against an employer's wrath when asserting rights under wage and hour laws, workmen's compensation laws, and many state employment laws. While *Alleluia* supporters admit the preservation of collective bargaining and industrial peace is the paramount policy of the Act, they claim that, under *Meyers*, the NLRB ignores the mutual aid or protection clause of section 7 when it denies concerted activity status to an individual's complaint under a work-related statute.<sup>182</sup>

The NLRB, however, does not ignore this clause. Under *Meyers*, group activity for the mutual aid or protection of fellow employees is deemed to be concerted and thus protected.<sup>183</sup> This viewpoint is supported by the Supreme Court in *Eastex, Inc. v. NLRB*.<sup>184</sup> In *Eastex*, an employer refused to allow the bargaining representative to distribute a union newsletter encouraging political action by the employees. The employer felt any activity not dealing with the employee-employer relationship was unprotected under the section 7 mutual aid or protection clause. The Court held the mutual aid or protection clause protects employees from employer retaliation when

179. See, e.g., Civil Rights Act of 1964, Title VII § 704(a), 42 U.S.C. § 2000(e)(3) (1982); Fair Labor Standards Act §§ 15(a)(3), 16(b), 29 U.S.C. §§ 215(a)(1), 216(b) (1982); Discrimination Against Employees Exercising Rights Underneath The William-Steiger Occupational Safety and Health Act of 1970, 29 C.F.R. §§ 1977.1-1977.23 (1982).

180. See, e.g., statute sections cited *supra* note 179.

181. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 71 (1975). For example, the Equal Employment Opportunity Commission cannot issue an administrative order requiring an employer to reinstate an employee that he fired for filing a Title VII charge. Instead it must bring suit against the employer in federal court to try to require the employer to reinstate the employee.

182. 115 L.R.R.M. at 1032 (Zimmerman, Member, dissenting).

183. 115 L.R.R.M. at 1029.

184. 437 U.S. 556 (1978).

they attempt to improve working conditions by resort to administrative, judicial, or legislative forums.<sup>185</sup> Not protecting such concerted activity would violate another purpose of the Act: the right of employees to act together to improve working conditions.<sup>186</sup>

*Alleluia* proponents will find no basis of support in *Eastex* for protecting individual activity since the Court did not refer to *individual* activity in its opinion. The *Eastex* language demonstrates that there must be group activity because the Court refers to employees only in a plural sense. The requirement of group activity was reinforced by the Court when it said the NLRB is responsible for establishing the boundaries of the mutual aid or protection clause by means of the cases coming before it.<sup>187</sup> The NLRB reversed its original position in *Alleluia* and established this boundary in *Meyers* when it held that to be concerted, activity for mutual aid or protection must be group activity or activity which attempts to induce group activity.<sup>188</sup>

### CONCLUSION

Congress never intended to increase disharmony between employee and employer by protecting under the Act individual activity such as reporting an employer for statutory violations. The goal of the Act is to bring the parties together to resolve problems. If an individual wishes to invoke a statutory right and be protected under the Act, the activity must conform either to the "Representation" or the *Mushroom* standard.

While the individual who asserts an employment-related statutory right is without Act protection, denial of such protection preserves the institution of collective bargaining. To afford protection for an individual's assertion of a statutory right would be drastic in the case of unionized employees represented by a bargaining agent. If individuals were allowed to invoke statutory rights whenever they were displeased with their work situation, they would undermine the collective bargaining agreement and the role of the bargaining representative. Advocates of minority viewpoints could subvert the collective bargaining and grievance process by trying to get a regulatory agency to enforce their wishes. Even Judge Lay, in *Northern Metal*, conceded that if individual activity were protected, employees would be encouraged to bypass the regular grievance procedure.<sup>189</sup> Subverting the grievance process would increase fractionization among

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185. *Id.* at 565-66.

186. *Id.* at 567 (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)).

187. *Id.* at 568.

188. 115 L.R.R.M. at 1029.

189. *NLRB v. Northern Metal Co.*, 440 F.2d 881, 888 (3d Cir. 1971) (Lay, J., dissenting).

membership of the bargaining unit and force the employer to bargain with several different factions. Consequently, industrial strife would increase the burdens or obstructions of commerce, and the employer's ability to manage the employees and control the work environment would be hindered.

The Act's purpose is not to guarantee employees the right to act as they please; rather, its objective is to guarantee them the right of collective bargaining in order to preserve industrial peace.<sup>190</sup> An employer must have some right to maintain control over the workforce to keep commerce flowing. Nothing in the language or legislative history of the Act demonstrates a Congressional intent to intrude upon the day-to-day operation of an employer's business.<sup>191</sup> An employer has the right to hire or fire any employee at will unless limited by contract or statute.<sup>192</sup> Thus, if an employer never attempts to restrain or coerce employees in the exercise of their rights under the Act, an employer may fire an employee whose actions he resents.<sup>193</sup>

While this is a harsh result, industrial peace must be preserved. Granted, problems exist with the present state of the law. Not protecting the individual invocation of a statutory right creates a disincentive to invoke these rights. The effect defeats the purpose of employment-related legislation and is a disservice to the public interest.

A further side effect is that the employee is forced to make sophisticated legal judgments before attempting to invoke a statutory right. To be protected, the employee must try to engage in group activity, or best of all, get all the employees to complain together in writing. This represents a difficult obstacle for an individual. Consequently, an employee may hesitate to assert a statutory right if he cannot easily interest a group of fellow employees to act with him.

While the enforcement of statutory rights is a desirable end, the present language of the Act does not give the judiciary or the NLRB the basis to protect such individual activity. Since individuals who enforce statutory regulations promote the public interest, Congress and the state legislatures should amend either the Act or the other respective employment legislation to protect such activity.

PATRICK J. DUFFY

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190. *Joanna Cotton Mills v. NLRB*, 176 F.2d 749, 752 (4th Cir. 1949).

191. *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979).

192. *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

193. *Id.*

