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EMPLOYERS ARE NOT FRIENDS WITH FACEBOOK: HOW THE NLRB IS PROTECTING EMPLOYEES' SOCIAL MEDIA ACTIVITY

INTRODUCTION

Among the multitude of technological changes over the past few years was the explosion of social media.¹ Social media platforms like Facebook and Twitter have grown so popular that they substantially influence everyday life.² As of June 2012, Facebook had more than 995 million monthly active users with over 550 million logging in every day,³ and Twitter had approximately 500 million registered users, whose exponential growth sees 100 million users logging in each day.⁴ From the blockbuster success of *The Social Network*⁵ to Facebook and Twitter's contributions to the Arab Spring revolutions,⁶ social media has already noticeably affected society and continues to do so.⁷ Likewise, the workplace is not immune from the influence of social media.

In November 2010, in what labor officials and lawyers view as a "ground-breaking case,"⁸ the National Labor Relations Board (NLRB) claimed that under the National Labor Relations Act (NLRA or Act) it is "protected activity" for an employee to criticize a supervisor on Facebook.⁹ The NLRA protects employees' right to discuss "terms and conditions of their employment with co-workers and others."¹⁰ This case started what has

1. See Robert B. Fitzpatrick, *Social Media and Privacy in the Workplace*, in 2 ALL-ABA COURSEBOOK: CURRENT DEVELOPMENTS IN EMPLOYMENT LAW: THE OBAMA YEARS AT MID-TERM 2123, 2130 (2011).

2. See *id.*

3. *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Sept. 27, 2012).

4. See Shea Bennett, *Just How Big is Twitter in 2012?*, ALL TWITTER (Feb. 23, 2012, 6:00 AM), http://www.mediabistro.com/alltwitter/twitter-statistics-2012_b18914; see Lauren Dugan, *Unofficial Reports Suggest Twitter Surpassed 500M Registered Users in June*, ALL TWITTER (July 31, 2012, 10:00 AM), http://www.mediabistro.com/alltwitter/twitter-500-million-registered-users_b26104.

5. *The Social Network* is a movie about the creation of Facebook that received three Oscars. See Fitzpatrick, *supra* note 1, at 2130.

6. See, e.g., Mike Giglio, *Tunisia Protests: The Facebook Revolution*, THE DAILY BEAST (Jan. 15, 2011, 6:29 AM), <http://www.thedailybeast.com/articles/2011/01/15/tunisa-protests-the-facebook-revolution.html>; Luke Allnut, *Tunisia: Can We Please Stop Talking About 'Twitter Revolutions'?*, TANGLED WEB BLOG, http://www.rferl.org/content/tunisia_can_we_please_stop_talking_about_twitter_revolutions/2277052.html (last visited Dec. 20, 2011); Ari Melber, *Can Egypt's Internet Movement be Exported?*, THE NATION (Feb. 18, 2011), <http://www.thenation.com/print/article/158717/can-egypts-internet-movement-be-exported>.

7. See Giglio, *supra* note 6; Allnut, *supra* note 6.

8. See Steven Greenhouse, *Company Accused of Firing over Facebook Post*, N.Y. TIMES, Nov. 8, 2010, <http://www.nytimes.com/2010/11/09/business/09facebook.html>.

9. See *id.*

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

become, and will likely continue to be, a pattern of charges filed by the NLRB against employers that discipline employees for discussing employment issues via social media.¹¹

The “Facebook Firing” case—as the media has coined it¹²—and the social media cases that have followed¹³ will likely have a profound impact on the corporate world. As social media use remains prevalent and widespread, employees will undoubtedly continue to use social media platforms to express their feelings about supervisors, co-workers, and other aspects of their jobs. In an effort to protect their reputation and organizational culture, corporations will likely terminate many employees for posting certain comments on social media websites. The Facebook Firing case has shown that such employer action may have significant consequences.¹⁴ But the NLRB’s inconsistent pattern of choosing to pursue certain cases that followed the Facebook Firing case while refusing others has created uncertainty as to when social media postings will be protected and when they will not.¹⁵

In the near future, if not currently, all employers will need social media policies for their employees,¹⁶ but they must be careful when enforcing those policies.¹⁷ On one hand, employers do not want to face the costs of

-comments.

11. See *When Can Employers Fire You for Facebook, Twitter?*, TECH AND TREND (Sept. 6, 2011), <http://www.ibtimes.com/articles/220171/20110926/facebook-twitter-national-labor-relations-board.htm>; see also *Think You Can’t Fire over a Facebook Post? Think Again*, NOTATIONS ON NON-PROFITS (July 30, 2011), <http://www.notationsnonprofits.com/recent-law/think-you-cant-fire-over-a-facebook-post-think-again/>.

12. See Melanie Trotman, *Facebook Firing Case is Settled*, WALL ST. J., Feb. 7, 2011, <http://online.wsj.com/article/SB10001424052748704422204576130631738779412.html>.

13. See, e.g., *Bay SYS Technologies, LLC*, 357 N.L.R.B. 28 (2011) (detailing a social media case brought by the NLRB following the Facebook Firing case); *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges, Sept. 2 2011); *Karl Knauz Motors, Inc.*, No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28, 2011); N.L.R.B., MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) [hereinafter MEMORANDUM OM 11-74] (on file with author).

14. See *Greenhouse*, *supra* note 8; see also Trotman, *supra* note 12 (discussing employer in the Facebook Firing case settling privately with the employee on undisclosed terms, but forced to rewrite its employee rules).

15. Compare *Karl Knauz Motors*, 2011 WL 4499437 (pursuing charges based on the NLRB’s contention that certain postings, both with and without comments from others, were “concerted”), with NLRB. Gen. Couns. Adv. Mem., Case No. 17-CA-25030 (July 19, 2011) [hereinafter *Wal-Mart Advice Memorandum*] (advising the dismissal of charges because a post was not “concerted,” despite the fact that the post garnered many comments and support from others and seemed to be inducing group action).

16. See, e.g., David Gevertz & Gina Greenwood, *Crafting an Effective Social Media Policy for Healthcare Employers*, 22 No. 6 HEALTH L. 28, 30–32 (2010) (describing how to draft effective social media policies in the healthcare industry to prevent risks of employee inappropriateness on social networking sites). See generally Kellen A. Hade, *Not All Lawyers are Antisocial: Social Media Regulation and the First Amendment*, 2011 J. PROF. L. 133 (2011) (exploring social media policies for attorneys).

17. See Nancy J. King, *Labor Law for Managers of Non-Union in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827 (2003).

carefully monitoring their employees' social media use, and even worse, the spiraling litigation costs that will result from wrongfully disciplining employees.¹⁸ On the other hand, employers want the discretion to make employment decisions when employees disparage their co-workers or harm the employers' reputation through social media.¹⁹

This note argues that the NLRB misapplies old law to a new and distinct context by broadly defining employees' social media use as "protected concerted activity" under Section 7 of the NLRA. Without clear precedent from the NLRB on when social media activity is protected, employers will face a dilemma when an employee complains via social media: terminate the employee and live with the potential repercussions of high litigation costs, or do nothing and hope it does not affect public relations, productivity, or organizational culture. However, it is inevitable that, in an effort to protect their reputation and corporate culture, some employers will terminate employees for social media postings. These corporations unfortunately have an unknown fate. In light of this problem, Congress should take a proactive approach and amend the Act. Waiting for tribunals to establish precedent on this issue will take years or even decades, and the last thing employers and employees need in this economic climate is uncertainty.²⁰ An amendment to this part of the Act has not been passed in over sixty years, and there is no better time than now. The framework of the employer-employee relationship has been drastically transformed since the 1930s and 1940s, when the Act was more properly applied to the employment landscape.²¹ It is time for the Act to conform to the current employment landscape and societal realities.

Part I discusses the Facebook Firing case and how the nature of the Internet makes protecting employees' social media activity different from protecting face-to-face or pre-Internet activity. Part II looks into a few

18. *See id.*

19. *See* PETER J. PIZZI, WHERE CYBER AND EMPLOYMENT LAW INTERSECT, RISKS FOR MANAGEMENT ABOUND (West 2011), available at 2011 WL 3020563.

20. The United States Court of Appeals for the District of Columbia Circuit recently held that President Obama's recess appointments of three NLRB members was unconstitutional. Robert Barnes & Steven Mufson, *Court Says Obama Exceeded Authority in Making Appointments*, WASH. POST, Jan. 25, 2013, http://www.washingtonpost.com/politics/court-says-obama-exceeded-authority-in-making-appointments/2013/01/25/b7e1b692-6713-11e2-9e1b-07db1d2ccd5b_story.html. Therefore, the decisions in which those NLRB members participated can potentially be challenged. *Id.* This may cast doubt over recent NLRB decisions, including some social media cases, and could "present a quandary for employers about how to comply with the law." *Id.* However, the effect of the D.C. Circuit's holding is unknown because as the NLRB Chairman stated, the holding only applies to that one case. *Id.* The NLRB will likely continue prosecuting social media cases and the NLRB Chairman indicated that the NLRB will "continue business as usual." *Id.* The case may also reach the Supreme Court, which would further delay resolution of this issue. *Id.* Thus, the D.C. Circuit's opinion advances the premise of this note that there is and will be great uncertainty surrounding social media cases, and the NLRB will likely continue to pursue such cases against employers.

21. *See, e.g., infra* Part I.C.

social media cases that followed the Facebook Firing case and how they fail to draw a clear line between social media activity that is protected and activity that is not protected. Part III examines past NLRB precedent to project how broadly the NLRB will define activity as “protected concerted activity” in the coming years, and to what extent employee misconduct warrants discipline without the employer fearing future litigation costs. Lastly, Part IV recommends a solution to the negative consequences that these social media cases have on employers. That solution is to amend the NLRA. The NLRA is long overdue for modifications and the current economic climate and transformation of the employer-employee relationship make the time ripe for congressional proactivity.

I. HOW EMPLOYEES’ SOCIAL MEDIA ACTIVITY HAS A GREATER EFFECT ON CORPORATIONS THAN FACE-TO-FACE ACTIVITY

A. THE NATIONAL LABOR RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD

The NLRA was established to protect America’s labor force, as a reaction to minimal restrictions on employers and growing labor unrest.²² Congress passed the NLRA in 1935, guaranteeing employees certain rights, including the right to organize and bargain collectively.²³ In order to enforce the rights guaranteed by the NLRA, Section 3 of the NLRA established the NLRB and its powers.²⁴ The NLRB has two branches: judicial and prosecutorial.²⁵ The judicial branch, referred to in this note as the Board, is a group of five individuals based in Washington, D.C. who act in a judicial capacity.²⁶ They are appointed by the President to a five-year term and are affirmed by the Senate.²⁷ The other branch is the General Counsel, which is the prosecutorial side of the NLRB.²⁸

The NLRB has offices across the country and is responsible for investigating and prosecuting parties that engage in unfair labor practices.²⁹

22. Description of National Labor Relations Act, IBEW LOCAL 1613, <http://home.earthlink.net/~local1613/nlra.html> (last visited Nov. 26, 2011).

23. See, e.g., National Labor Relations Act, 29 U.S.C. §§ 151–169 (1935), available at <http://www.nlr.gov/national-labor-relations-act>. “The provisions of the NLRA were later expanded under the Taft-Hartley Labor Act of 1957 and the Landrum-Griffin Act of 1959.” *National Labor Relations Act (1935)*, OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=false&doc=67> (last visited Dec. 20, 2011).

24. 29 U.S.C. § 153.

25. See *National Labor Relations Board*, INC.COM, <http://www.inc.com/encyclopedia/national-labor-relation-board-nlr.html> (last visited Dec. 20, 2011).

26. *Id.*

27. See *What We Do – Decide Cases*, NLRB, <https://www.nlr.gov/what-we-do/decide-cases> (last visited Dec. 20, 2011).

28. See *National Labor Relations Board*, *supra* note 25.

29. *Id.*

This process begins when an employee, union, or employer files a “charge” (a claim) with a Regional Office of the NLRB.³⁰ Then, after an investigation, the NLRB decides whether to issue a complaint or dismiss the charge.³¹ If the NLRB pursues the case, the case is brought before an administrative law judge (ALJ), a neutral public official who decides whether the accused party committed an unfair labor practice.³² The ALJ’s decision can be appealed to the Board.³³ Board decisions can be appealed to an appropriate United States Court of Appeals, which can in turn be appealed to the United States Supreme Court.³⁴ The NLRB and the Board were designed to be a neutral “referee,” favoring neither the employer nor the employee.³⁵

The purpose of the NLRB is to protect the rights of employees as specified in the NLRA.³⁶ These rights are set forth in Section 7 of the NLRA, which states:

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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).³⁷

If employees’ rights have been violated, the NLRB can file an unfair labor practice charge against the employer³⁸ pursuant to Section 8 of the NLRA.³⁹ Specifically, Section 8(a)(1) protects employees’ Section 7 rights

30. See Meghan Brooke Phillips, *Using the Employee Free Choice Act as Duct Tape: How Both Active and Passive Deregulation of Labor Law Make the EFCA an Improper Mechanism for Remediating Working Class Americans’ Problems*, 111 W. VA. L. REV. 219, 238 (2008) (citation omitted).

31. See *id.*

32. See *id.*

33. See, e.g., *id.* (describing the process of charges filed with the NLRB); *What We Do – Decide Cases*, *supra* note 27.

34. See *What We Do – Decide Cases*, *supra* note 27.

35. See *id.*; see also *National Labor Relations Board*, *supra* note 25.

36. OUR DOCUMENTS, <http://www.ourdocuments.gov/doc.php?flash=false&doc=67> (last visited Dec. 20, 2011).

37. National Labor Relations Act § 7, 29 U.S.C. § 157 (1935), available at <http://www.nlr.gov/national-labor-relations-act>.

38. If an employee believes his or her rights have been violated by an employer or labor organization, he or she can file a charge with the NLRB. See *What We Do – Investigate Charges*, NLRB, <https://www.nlr.gov/what-we-do/investigate-charges> (last visited Dec. 20, 2011). Then the NLRB will investigate the charge and determine whether it is valid and should be pursued. See *National Labor Relations Board*, *supra* note 25. Before the NLRB issues a complaint, many charges are withdrawn or settled. *Id.* If a complaint is filed, typically there is a full hearing before an NLRB Administrative Law Judge, which is subject to review by the Board. See *What We Do – Decide Cases*, *supra* note 27.

39. See National Labor Relations Act, 29 U.S.C. §§ 151–169.

by stating that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”⁴⁰ In social media cases, the NLRB typically brings charges against the employer for violating Section 8(a)(1), which protects union and nonunion employees.⁴¹

B. THE FACEBOOK FIRING CASE: STARTING A TREND

The Facebook Firing case was the first case in which the NLRB determined that employees’ criticisms of their supervisors or employers on social networking sites are protected activities under the NLRA.⁴² The NLRB filed a complaint against American Medical Response of Connecticut for violating what it claimed was protected activity when an employee was terminated for criticizing her supervisor on the employee’s Facebook page.⁴³ The employee used vulgarities in mocking her supervisor on Facebook and referred to him as a “psychiatric patient.”⁴⁴ This Facebook post received comments by her co-workers who demonstrated their support.⁴⁵ The employee was later terminated.⁴⁶

The NLRB believed the post was “protected concerted activity” under Section 7 of the NLRA, and by terminating the employee for engaging in such activity, the employer violated Section 8(a)(1).⁴⁷ The NLRB argued that the post was “concerted” because other co-workers commented on the post and showed support,⁴⁸ and that this was “protected” because it criticized a supervisor with respect to “wages, hours and working conditions.”⁴⁹ The NLRB and American Medical Response of Connecticut eventually settled the claim.⁵⁰ Commenting on the case, the director of the NLRB’s Hartford office said, “You’re allowed to talk about your supervisor with your co-workers. You’re allowed to communicate the concerns and criticisms you have. The only difference in this case is she did it on Facebook and did it on her own time using her own computer.”⁵¹ However, there is a vast difference between face-to-face communication and communication via social networking.

40. See *id.* § 158(a).

41. See, e.g., *id.* §§ 151–169; Bay SYS Technologies, LLC, 357 N.L.R.B. 28 (2011); Hispanics United of Buffalo, Inc., No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges, Sept. 2 2011); Karl Knauz Motors, Inc., No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28, 2011); MEMORANDUM OM 11-74, *supra* note 13.

42. See Greenhouse, *supra* note 8; Trottman, *supra* note 12; Fitzpatrick, *supra* note 1.

43. See Greenhouse, *supra* note 8; Trottman, *supra* note 12.

44. See Greenhouse, *supra* note 8; Trottman, *supra* note 12.

45. See Greenhouse, *supra* note 8; Trottman, *supra* note 12.

46. See Greenhouse, *supra* note 8; Trottman, *supra* note 12.

47. See Greenhouse, *supra* note 8; Trottman, *supra* note 12.

48. National Labor Relations Act, 29 U.S.C. § 157 (1935); Greenhouse, *supra* note 8.

49. 29 U.S.C. § 157; Greenhouse, *supra* note 8.

50. Trottman, *supra* note 12.

51. Greenhouse, *supra* note 8.

C. THE DIFFERENCE BETWEEN PROTECTING SOCIAL MEDIA ACTIVITY AND FACE-TO-FACE ACTIVITY

Social media use in the employment context is particularly significant because of the way the Internet's distinctive characteristics changed the nature of the workplace.⁵² The Internet opens "a gateway to the outside world—beyond the walls of the corporation—that has had, and will continue to have, far-reaching effects."⁵³ Social media makes it easier for employees to bring their workplace issues home with them and discuss such issues with their co-workers,⁵⁴ friends, or even complete strangers. Prior to social media, discussing employment problems with co-workers was possible through e-mail, the telephone, or old-fashioned face-to-face communication. As social media becomes more popular, it appears that more employees use social media as their major vehicle for communication.⁵⁵ However, unlike the other forms of communication, social media profiles are easily discovered and more publically accessible.⁵⁶ Furthermore, employers are making greater efforts to monitor public posts made on social media websites.⁵⁷ This is only part of the problem. In addition to the employer, other "friends" including peers, competitors, the media, and the general public can view what employees post if the employee does not restrict his or her privacy settings⁵⁸ such that even seemingly private social media conversations can end up reaching the public.⁵⁹ The other participant in the conversation, or another user that can

52. PATRICIA WALLACE, *THE INTERNET IN THE WORKPLACE: HOW NEW TECHNOLOGY IS TRANSFORMING WORK 1* (Cambridge Univ. Press 2004).

53. *Id.* at 2.

54. *Id.*

55. See Elizabeth Lupfer, *Communicate with Employees Through Social Media*, *THE SOCIAL WORKPLACE* (Aug. 24, 2009), <http://www.thesocialworkplace.com/2009/08/24/communicate-with-employees-through-social-media/>.

56. Sometimes an employee's Facebook or Twitter page can be found with a simple Google search of the person's name. See Om Malik, *Facebook Opens up to Public Search*, GIGAOM (Sep. 5, 2007, 12:07 AM), <http://gigaom.com/2007/09/05/facebook-open-to-public-search/>.

57. See, e.g., Joshua Brustein, *Keeping a Closer Eye on Employees' Social Networking*, N.Y. TIMES BITS BLOG (Mar. 26, 2010, 6:51 PM), <http://bits.blogs.nytimes.com/2010/03/26/keeping-a-closer-eye-on-workers-social-networking/> (discussing Social Sentry, a company that "draws . . . publicly posted information on Facebook and Twitter" when monitoring social media posts for employers); Dionne Searcey, *Employers Watching Workers Online Spurs Privacy Debate*, WALL ST. J., April 23, 2009, <http://online.wsj.com/article/SB124045009224646091.html> (detailing where an employer enters private chatroom and fires employees for the ensuing discussion).

58. See Shea Bennett, *10 Must-Learn Lessons for Twitter Newbies*, ALL TWITTER (Aug. 6, 2012, 8:00 AM), http://www.mediabistro.com/alltwitter/10-lessons-twitter-newbies_b10079.

59. "That's the problem with social media. Once you start feeding it posts and images, users can send them swirling just about anywhere. You might think you're just talking to your friends, but you don't really control the conversation, which can take on a breadth and significance you hadn't intended." Max Fisher, *Why is Israel Tweeting Airstrikes?*, WASH. POST, Nov. 16, 2012, http://www.washingtonpost.com/opinions/israels-campaign-of-airstrikes-and-tweets/2012/11/16/48b17eae-2f75-11e2-9f50-0308e1e75445_story.html (discussing how the Israeli Defense Force's tweets and Facebook posts have been re-posted and shared thousands of times).

view the “private” conversation, can re-post it to his or her friends, who can in turn re-post it to their friends, and so on.⁶⁰ The large scale usage of the Internet and social media amplifies the possible damage to a corporation when employees comment about the workplace.⁶¹ This makes a familiar problem for a corporation—an employee disparaging his or her employer—exponentially more harmful for the corporation because of the broad range of entities that can view the postings.

The information posted on social media forums not only reaches a broad range of people but could also be permanent, which creates a new problem for employers.⁶² For example, complaints on Facebook about a supervisor may be forever traceable.⁶³ In contrast, when the NLRA was passed in 1935, fewer people heard employee complaints to co-workers about their supervisor, and such statements were probably not recorded at all. This unavoidable characteristic of the Internet⁶⁴ further broadens corporations’ exposure when employees take to social media to discuss employment problems.

The sense of anonymity and guise that people feel when using the Internet—justified or unjustified—may cause employees to feel more comfortable using social media to air grievances.⁶⁵ As opposed to speaking to a co-worker at the place of employment, where a supervisor might be listening, an employee sitting at home behind a computer may be more likely to express his or her concerns.⁶⁶ Consequently, social media can cause employees to discuss employment problems more frequently and publically than ever before.

60. *Id.*

61. See, e.g., *Internet Usage Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited Dec. 20, 2011) (illustrating global internet usage statistics); Mark Zuckerberg, *One Billion People on Facebook*, FACEBOOK (Oct. 4, 2012), <http://newsroom.fb.com/News/One-Billion-People-on-Facebook-1c9.aspx>.

62. See Daniel K. Gelb, *Privacy Invasions Last Forever*, N.Y. TIMES (Nov. 14, 2011, 12:53 PM), <http://www.nytimes.com/roomfordebate/2010/09/30/cyberbullying-and-a-students-suicide/privacy-invasions-now-last-forever> (discussing the effects of cyber bullying, including the permanence of information on the Internet); see also Sarah Hawk, *The Internet is Forever*, SITEPOINT (May 17, 2012), <http://www.sitepoint.com/the-internet-is-forever/> (explaining that people have asked the blogger to delete their posts because the postings remain on the Internet and could have devastating consequences in the future).

63. See Hawk, *supra* note 62.

64. See Gelb, *supra* note 62; Hawk, *supra* note 62.

65. See, e.g., *Facebook’s Randi Zuckerberg: Anonymity Online ‘Has To Go Away,’* HUFFINGTON POST (July 27, 2011, 1:23 PM), http://www.huffingtonpost.com/2011/07/27/randi-zuckerberg-anonymity-online_n_910892.html (calling for anonymity on the Internet to go away so people can be held more accountable on social media forums such as Facebook). People often would like to be anonymous on the Internet for various reasons; however, the “cloak of online anonymity can easily be lifted.” John D. Sutter, *The Coming-out Stories of Anonymous Bloggers*, CNN TECH (Aug. 21, 2009), http://articles.cnn.com/2009-08-21/tech/outing.anonymous.bloggers_1_bloggers-online-anonymity-persona?s=PM.

66. See Nancy J. King, *Labor Law for Managers of Non-Union in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 828–29 (2003) (explaining that the Internet gives employees new ways to air their concerns).

These fundamental aspects of the Internet and social media illustrate a few important themes. First, the type of activity that the NLRA was designed to protect in 1935—employees discussing employment issues—has dramatically evolved into a more frequent and permanent phenomenon that reaches an exponentially larger audience.⁶⁷ Second, as long as social media continues to dominate American culture, the problems associated with social media use and employment will grow if they are not adequately addressed.

II. THE NLRB’S APPLICATION OF OLD LAW TO SOCIAL MEDIA ACTIVITY HAS CREATED UNCERTAINTY FOR EMPLOYERS AND EMPLOYEES AS TO WHEN SOCIAL MEDIA ACTIVITY IS PROTECTED

A. THE NLRB BROADLY INTERPRETS “PROTECTED CONCERTED ACTIVITY” AND FINDS EMPLOYEE CONDUCT ON SOCIAL MEDIA PROTECTED UNDER THE NLRA

As technology has developed, people have found different ways to communicate with each other.⁶⁸ Social media platforms like Facebook and Twitter are the newest, most popular methods of communication.⁶⁹ In the Facebook Firing case, the NLRB determined that certain communications on Facebook are “protected concerted activity.”⁷⁰ Since that case, there have been several similar cases involving employers disciplining or terminating employees based on social media activity.⁷¹ These cases broadly define “protected concerted activity” and have inconsistent outcomes, causing two major problems: (1) uncertainty for employers and employees as to when social media activity is protected; and (2) adverse consequences for employers who attempt to protect their corporation’s reputation or organizational culture.

The NLRB has taken the position that Facebook posts that are commented on by co-workers can be deemed a form of “concerted” activity.⁷² And the NLRB Division of Judges—the ALJs—agree with

67. See, e.g., *Internet Usage Statistics*, *supra* note 61 (illustrating the vast amount of internet users); Zuckerberg, *supra* note 61; Gelb, *supra* note 62.

68. See WALLACE, *supra* note 52.

69. See, e.g., *Key Facts*, *supra* note 3; Bennett, *supra* note 4; see also Dugan, *supra* note 4.

70. See *Settlement Reached in Case Involving Discharge for Facebook Comments*, *supra* note 10.

71. See, e.g., Bay SYS Technologies, LLC, 357 N.L.R.B. 28 (2011) (discussing how an employer terminated his employee for commenting on co-workers’ Facebook pages about the employer making late payments); Hispanics United of Buffalo, Inc., No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges, Sept. 2 2011); Karl Knauz Motors, Inc., No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28, 2011); see also MEMORANDUM OM 11-74, *supra* note 13.

72. *Hispanics United of Buffalo*, 2011 WL 3894520, at *7–9.

them.⁷³ In *Hispanics United*, five employees of a nonprofit social services provider were terminated for posting comments on Facebook.⁷⁴ The terminations arose out of a domestic violence advocate's conversation with a co-worker about how she believed some employees of the nonprofit corporation were underperforming.⁷⁵ The co-worker posted on Facebook what the advocate told her and within a few hours, four employees had responded with their feelings about their own job performances.⁷⁶ For example, one employee said, "What the Hell, we don't have a life as is, What else can we do???"⁷⁷ Another said, "Tell her to come do mt[my] f***** job n c if I don't do enough, this is just dum."⁷⁸ The advocate saw the posts and commented that the original post was a lie.⁷⁹ She later complained about the incident to the Executive Director.⁸⁰ The Executive Director terminated all five employees because their comments constituted "bullying and harassment" of the advocate.⁸¹ The ALJ disagreed, concluding that the nonprofit corporation interfered with the employees' Section 7 rights in violation of Section 8(a)(1) of the NLRA and ordered the nonprofit corporation to reinstate the employees and make them whole for their lost earnings and benefits, with interest.⁸²

The ALJ applied Board precedent and held that the employees' activity was concerted.⁸³ The ALJ cited the *Meyers* line of cases, which explains that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."⁸⁴ The ALJ stated that "the activities of a single employee in enlisting support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity."⁸⁵ Further, the ALJ held that "individual action is concerted so long as it is

73. *Id.*; see MEMORANDUM OM 11-74, *supra* note 13.

74. *Id.* at *6-7. It should be noted that the Board recently affirmed the ALJ's decision in this case. *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 1, 1 (2012). Specifically, the Board "decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order." *Id.*

75. *Id.* at *4, 6-7.

76. *Id.* at *4-5.

77. *Id.* at *5.

78. *Id.* (spelling error from "mt" to "my" was made in the decision, and the curse word "f*****" was censored in this note due to its inappropriateness, although spelled out fully in the decision).

79. *Id.* at *6.

80. *Id.*

81. *Id.*

82. *Id.* at *9.

83. *Id.* at *7-9.

84. *Id.* at *7 (internal quotation marks omitted) (citing *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493 (1984), *rev'd sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *on remand Meyers Indus. (Meyers II)*, 281 U.S. 882 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988)).

85. *Id.*

engaged in with the object of initiating or inducing group action.”⁸⁶ Since the charging employee’s original Facebook post was an appeal to her co-workers for assistance, the activity was “concerted” under Section 7 of the NLRA.⁸⁷ The employees’ postings were protected because they were complaining about working conditions—comments by a co-worker about their job performance.⁸⁸

Lastly, the ALJ applied the *Atlantic Steel* test⁸⁹ to determine whether the employees forfeited their protection under the NLRA for engaging in misconduct (here, cursing) during the course of their protected activity.⁹⁰ The factors considered under the *Atlantic Steel* test are: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”⁹¹ Based on a broad interpretation of the *Atlantic Steel* test, the ALJ—ignoring the curse words and sarcastic undertones of the Facebook posts—determined that the posts did not constitute misconduct to the requisite level that would lose the protection of the NLRA.⁹²

The *Hispanics United* case indicates that ALJs and the Board will squeeze social media cases into Board law that is several decades old.⁹³ Its broad reading of “concerted activity” will affect how corporations must deal with their employees’ social media activities.⁹⁴ An employer that is familiar with *Hispanics United* might discipline or terminate an employee for commenting on Facebook about job conditions if the comment did not garner any responses. However, with the NLRB, the ALJs, and the Board applying the *Meyers* line of cases to social media contexts, an individual comment on Facebook “engaged with the object of . . . inducing group action” would be considered “concerted activity.”⁹⁵ This is a problem because despite the statements made by Lafe Solomon, the Acting General Counsel of the NLRB who asserted that posting on Facebook is equivalent to conversing at a “water cooler,”⁹⁶ social media communication has glaring differences from the traditional workplace communication.⁹⁷ The popularity

86. *Id.* (citing *Mushroom Trans. Co.*, 330 F.2d 683 (3d. Cir. 1964); *Whittaker Corp.*, 289 N.L.R.B. 933 (1988)).

87. See MEMORANDUM OM 11-74, *supra* note 13.

88. *Hispanics United of Buffalo*, 2011 WL 3894520, at *8.

89. *Id.* at *8 (citing *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979)).

90. *Id.*

91. *Id.*

92. *Id.*

93. See generally *id.*

94. *Id.* at *6.

95. *Id.* at *5.; see also, *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 1, 16 (2012) (applying *Meyers* to the social media context).

96. Edward G. Phillips, *A Primer for Nonemployment Lawyers Advising Clients on the NLRB’s Treatment of Social Media Cases*, TENN. B.J. 30, 31 (2011).

97. Brustein, *supra* note 57.

of social media and the anonymous guise of the Internet make employees' comments on social media platforms more likely to garner responses from others than they would if the statements were made privately or at the water cooler.⁹⁸ Therefore, the NLRB will deem activity "concerted" more frequently than it has before, further exposing employers to litigation costs arising from defending themselves against charges brought by the NLRB.

Furthermore, the broad access to social media platforms creates a public image and reputation problem for corporations that "water cooler talk" simply does not.⁹⁹ In *Bay SYS Technologies*, a local newspaper published Facebook posts made by one employee on other employees' Facebook pages about their employer making late payments to employees.¹⁰⁰ The Board concluded that the complaints on co-workers' Facebook pages were protected concerted activity.¹⁰¹ After the newspaper published the Facebook posts, the employer's Chief Executive Officer (CEO) learned about the posts and emailed the employees, criticizing them for their actions.¹⁰² Several days later, the employer terminated the employee who made the Facebook posts.¹⁰³ The Board held that the employer committed an unfair labor practice by "interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act."¹⁰⁴ The Board ordered the employer to cease and desist¹⁰⁵ from discouraging the employees from engaging in protected activity.¹⁰⁶

This case illustrates the public exposure employers could have from employee complaints via social media. Although it was possible before the Internet and social media for employees to make public complaints, employee gripes on social media platforms are inherently public due to the expansive reach and popularity of Facebook and Twitter. For example, media outlets, such as the local newspaper in *Bay SYS Technologies*, can

98. *Facebook's Randi Zuckerberg: Anonymity Online 'Has to Go Away,' supra* note 65.

99. Brustein, *supra* note 57.

100. *Bay SYS Technologies, LLC*, 357 N.L.R.B. 28, 2 (2011).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105.

The remedies provided for under the NLRA are not as lucrative as the damages available under some individual rights statutes and theories. The remedial provision in the NLRA states that if the Board finds an unfair labor practice was committed, it "shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effect the policies of the Act."

William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 277 n.89 (2002) (citing 29 U.S.C. § 160(c)).

106. *Bay SYS Technologies*, 357 N.L.R.B. at 3.

gain access to Facebook and other social media forums.¹⁰⁷ Therefore, social media creates a higher likelihood that complaints about a corporation or workplace discussions will “go viral” and reach an even broader audience, exposing the employer to bad press and public relations.¹⁰⁸

B. THE BOARD TAKES A STEP BACK AND FINDS THAT SOME SOCIAL MEDIA POSTINGS ARE UNPROTECTED

Although the NLRB has shown a willingness and proclivity to pursue social media cases against employers, the Board has given employers some optimism that employees will not have free range when taking their employment complaints to Facebook and other social media platforms.¹⁰⁹ However, with such optimism comes uncertainty.¹¹⁰ In *Karl Knauz Motors*, a BMW car dealership held an event to launch a new product and was serving hotdogs, cookies, and chips at the event.¹¹¹ At a meeting before the event, some salespeople stated that they felt the food choice was inappropriate for the type of brand they were trying to portray to their customers.¹¹² Also, some salespeople said that the BMW dealership should be “doing more” for the event.¹¹³ The charging party, a salesman for the BMW dealership, later testified that he and his co-workers were concerned that the low quality of food would reflect poorly on the product, customers would be less satisfied, and the salespeople would receive lower commissions.¹¹⁴ The charging party took pictures of the event and mocked it on Facebook with a few comments.¹¹⁵ A few days later, a different salesman at the Land Rover dealership next to the BMW dealership, both owned by the employer in the case, allowed a thirteen-year-old boy to sit in the driver’s seat, which led to the boy driving the car over his father’s foot and into a pond.¹¹⁶ From the BMW dealership, where he could see the incident, the charging party took pictures of the car in the pond and posted them on Facebook.¹¹⁷ Several co-workers commented on these pictures as well.¹¹⁸ Later, the charging party was terminated.¹¹⁹

107. *See id.* at 2.

108. *See, e.g., Internet Usage Statistics, supra* note 61; *Key Facts, supra* note 3; BETTER BLOGGING FOR BLOGGERS, <http://www.betterbloggingforbloggers.com/2010/05/how-to-make-blog-post-go-viral-in.html> (last visited Dec. 20, 2011).

109. *See Karl Knauz Motors, Inc., No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28, 2011).*

110. *See id.*

111. *Id.* at *2.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at *3.

116. *Id.*

117. *Id.* at *3–4.

118. *Id.*

119. *Id.* at *5.

The ALJ held that the posts about the BMW event were “concerted” activity because co-workers had previously discussed the issue at a meeting.¹²⁰ They were “protected” because the event potentially affected the salesman’s commission (“a condition of employment”).¹²¹ Although the employee posted the photos and comments himself, without other salespeople’s comments or input, the ALJ found that his posts were “clearly concerted” because “he was vocalizing the sentiments of his co-workers and continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting.”¹²² However, the ALJ held that the postings about the car accident were not concerted or protected because they were not on behalf of other co-workers or regarding the salesman’s employment conditions.¹²³ Thus, the ALJ held that the termination was lawful because it was only based on the postings about the car, rather than the protected postings about the BMW event.¹²⁴

A year later, the Board ruled on this case and affirmed the ALJ’s decision.¹²⁵ The Board held that the discharge was lawful because it was based solely on the employee’s posts concerning the car accident, which were not protected.¹²⁶ But the Board also found it “unnecessary to pass on whether the [salesman’s] Facebook posts concerning a marketing event at the Respondent’s BMW dealership were protected.”¹²⁷ This decision may further complicate the legal landscape surrounding social media postings. It is unlikely that the Board will dissuade the NLRB from pursuing such claims against employers, but the Board has refused to add precedent on this issue, creating greater uncertainty about whether posts such as the salesman’s in *Karl Knauz Motors* will garner protection.

Additionally, *Karl Knauz Motors* demonstrates that ALJs (and maybe the Board) are willing to draw the line somewhere between what is concerted activity and what is not, but where that line falls in the social media context is unclear.¹²⁸ Like many of the other social media cases, the ALJ applied *Meyers* and its progeny to the facts of the case to determine whether the activity was concerted.¹²⁹ Yet, it may not be clear to an employer whether social media postings by employees “seek to initiate or to induce or to prepare for group action” (protected), or whether they are

120. *Id.* at *8.

121. *Id.* (discussing the issue indicated “concerted” activity, and the fact that because it could affect commission indicated that it was “protected” activity since it has to do with wages, a term and condition of employment).

122. MEMORANDUM OM 11-74, *supra* note 13.

123. *Karl Knauz Motors*, 2011 WL 4499437, at *9.

124. *Id.*

125. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. 1, 1 (2012).

126. *Id.* at 1 n.1.

127. *Id.* at 1.

128. *Karl Knauz Motors*, 2011 WL 4499437, at *9.

129. *See id.*

“solely by and on behalf of the employee himself” (not protected).¹³⁰ It appears that comments by co-workers indicate concerted action, but the photos and comments about the car accident in *Karl Knauz Motors* were not concerted, despite co-workers posting comments on the pictures.¹³¹ Therefore, the standard in these social media cases is clear, but its application is not.

The NLRB has dismissed some cases because it determined that certain “individual griping” is not concerted activity, thus drawing a line—however unclear—between social media postings that are concerted and that are not concerted.¹³² In one case, a Wal-Mart employee was disciplined for complaining about Wal-Mart management on Facebook.¹³³ The posts said, “Wuck Falmart! I swear if this tyranny doesn’t end in this store they are about to get a wakeup call because lots are about to quit!”¹³⁴ The post elicited a few “hang in there” type responses from co-workers, whom accounted for a majority of the employee’s “Facebook friends.”¹³⁵ The NLRB dismissed the charge because the post was an “individual gripe” and the co-workers’ comments suggested that the original post was a “plea for emotional support.”¹³⁶ However, it is understandable for an employer in this situation to believe that the NLRB may consider a post constitutes “concerted activity” if it states that “lots [of employees are] about to quit.”¹³⁷ Such a statement seems to be inducing group action. Somehow a “plea for emotional support”¹³⁸ is different from “enlisting support of fellow employees in mutual aid and protection.”¹³⁹ The NLRB again attempted to draw a line—using the *Meyers* standard—where social media conduct is not concerted.¹⁴⁰

130. Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1716–17 (1989).

131. See *Karl Knauz Motors*, 2011 WL 4499437, at *9.

132. In one case, a restaurant and bar had a corporate policy that waitresses do not share tips with bartenders and two bartenders spoke about how the policy was unfair. See *JT’s Porch Saloon*, No. 13-CA-46689, 2011 WL 2960964 (N.L.R.B.G.C., July 7, 2011). Months later, one of the bartenders was terminated for complaining on Facebook about the policy and bashing the employer’s customers as “rednecks.” *Id.* at *1–2. The bartender was terminated and there was no violation of the NLRA because the bartender was not attempting to induce group action, was not conversing with another co-worker, and the post did not arise from the conversation with the co-bartender months before. *Id.* at *2–3. In another case, an employee made “insensitive comments about the employer’s clientele,” which was not concerted because it was not to a co-worker. See *Martin House*, No. 34-CA-12950, 2011 WL 3223853 (N.L.R.B.G.C. July 19, 2011).

133. See Wal-Mart Advice Memorandum, *supra* note 15.

134. See *id.* at 1.

135. See *id.* at 2.

136. See *id.* at 3.

137. *Id.* at 1.

138. *Id.*

139. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520, at *7 (N.L.R.B. Div. of Judges, Sept. 2 2011).

140. See Wal-Mart Advice Memorandum, *supra* note 15, at 3.

The problem with the NLRB's handling of these cases is twofold: (1) the application of *Meyers* to social media postings gives employees and employers little guidance on when social media activity is concerted;¹⁴¹ and (2) broadly defining "protected concerted activity" is inappropriate in a social media context where the impact that employee complaints have on corporations is significantly greater than in face-to-face contexts.¹⁴² Therefore, corporations' exposure in social media litigation is increased exponentially due to the large, seemingly anonymous, and permanent nature of the Internet and social media.¹⁴³ Nonetheless, the NLRB has broadly defined "protected concerted activity" and applied it to the social media context.¹⁴⁴ This broad application of *Meyers* to these cases, along with the few cases where social media posts were solely "individual activity," fails to assist employees or their employers in determining when activity is "concerted."¹⁴⁵ Corporations also will want to know when an employee's social media activity is so reprehensible that the conduct will not be protected by the Act. This will allow corporations to make employment decisions as they feel appropriate in their business judgment, without fear of defending themselves against the NLRB.

III. THE BOARD WILL CONTINUE TO BROADLY MISAPPLY OLD LAW TO THE SOCIAL MEDIA CONTEXT WHEN EMPLOYEES POST COMMENTS THAT ARE DISLOYAL, DEFAMATORY, OR DISPARAGE THE EMPLOYER OR ITS EMPLOYEES

Along with the uncertainty surrounding whether social media postings are concerted, the NLRB has not given any indication when social media postings will rise to a level of misconduct so reprehensible so as to lose protection under the NLRA. The NLRB has indicated through its charges filed against employers that it will rarely conclude that an employee who would have otherwise engaged in protected concerted activity will lose that

141. Compare *Karl Knauz Motors, Inc.*, No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28, 2011) (pertaining to an NLRB pursued claim where an employee was discharged for posting comments criticizing his employer on Facebook), with *Wal-Mart Advice Memorandum*, *supra* note 15. (dismissing an employee's charge against an employer who terminated the employee after he criticized his employer on Facebook).

142. See, e.g., *Internet Usage Statistics*, *supra* note 61; *Key Facts*, *supra* note 3.

143. See *Internet Usage Statistics*, *supra* note 61.

144. See, e.g., *Bay SYS Technologies, LLC*, 357 N.L.R.B. 28 (2011); *Hispanics United of Buffalo, Inc.*, 2011 WL 3894520; *Karl Knauz Motors, Inc.*, 2011 WL 4499437; MEMORANDUM OM 11-74, *supra* note 13.

145. Compare *Karl Knauz Motors*, 2011 WL 4499437 (finding an employee's posts on Facebook as "concerted"), with *Wal-Mart Advice Memorandum*, *supra* note 15 (dismissing a claim because the employee's Facebook post was solely individual action).

protection due to misconduct.¹⁴⁶ Even arguably distasteful and disparaging statements about supervisors or the corporation will maintain protection.¹⁴⁷ But how far can employees' statements go without forfeiting protection? When can an employer terminate an employee for hurting the corporation's public image on the Internet, or disturbing employer-employee relationships and organizational culture?

**A. EMPLOYER ALLEGATIONS OF EMPLOYEE MISCONDUCT OR
DEFAMATION IN SOCIAL MEDIA POSTINGS WILL RARELY LOSE
PROTECTION OF THE NLRA**

1. The *Atlantic Steel* Test

The NLRB has not made it clear when it will be safe for corporations to make employment decisions without facing potential liability under the NLRA.¹⁴⁸ Despite its reluctance to forfeit an employee's protection under the NLRA, the NLRB has shown that it will apply *Atlantic Steel* to determine whether social media postings will lose that protection.¹⁴⁹ In one case, a sports bar and restaurant discharged two employees for a conversation about the employer's tax withholding practices when one of the employees said the employer was "such an asshole."¹⁵⁰ It was apparent that the employees' comments were "concerted" under the *Meyers* cases since they were made by co-workers sharing "group complaints" and that they were "protected" because income tax withholdings are "terms and conditions of employment."¹⁵¹ However, an employer would most likely expect these statements to lose protection due to their distasteful, disloyal, or defamatory nature.¹⁵² The bar owner conveyed this expectation by having its attorney send a letter to one of the charging parties stating that "legal action would be initiated against her unless she retracted her 'defamatory' statements regarding the Employer and its principals published to the general public on Facebook."¹⁵³

The NLRB found that the employee's statements did not lose protection under the *Atlantic Steel* test. The factors considered under the *Atlantic Steel* test are "(1) the place of the discussion; (2) the subject matter of the

146. See, e.g., *Bay SYS Technologies*, 357 N.L.R.B. 28; *Hispanics United of Buffalo*, 2011 WL 3894520; *Karl Knauz Motors*, 2011 WL 4499437; MEMORANDUM OM 11-74, *supra* note 13; see NLRB, <http://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments> (last visited Dec. 20, 2011); Trotman, *supra* note 12.

147. See MEMORANDUM OM 11-74, *supra* note 13.

148. See *id.*

149. See, e.g., *Hispanics United of Buffalo*, 2011 WL 3894520; MEMORANDUM OM 11-74, *supra* note 13.

150. MEMORANDUM OM 11-74, *supra* note 13, at 10.

151. *Id.*

152. *Id.* at 9.

153. *Id.* at 10.

discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."¹⁵⁴ The statements did not lose protection because the comments were made outside of the workplace while the employee was off-duty, they did not disrupt operations or undermine supervisory authority, and the nature of the postings were "much less offensive than other behavior found protected by the Board."¹⁵⁵ Additionally, the NLRB stated that to prove the employee defamed the employer, which would cause the statements to lose their protected status, the statements must not only be false, but maliciously false.¹⁵⁶ Furthermore, not only did the NLRB find that the employer's allegations of defamation were unfounded, but the threat to sue violated Section 8(a)(1) of the Act.¹⁵⁷ In this case, the employer may have been better off if it had actually sued for defamation—"The Board has historically distinguished the threat of a lawsuit from the actual filing of a lawsuit and has rejected employers' attempts to extend the First Amendment protection accorded to lawsuits to threats to sue where those threats, as here, were not incidental to the actual filing of a suit."¹⁵⁸ This case demonstrates that when an employee's social media postings appear to disparage the corporation or supervisors of that corporation, those statements may still be protected and that threatening to sue is not a good idea if the threat is not incidental to actually filing the suit.¹⁵⁹

Thus far in social media cases, the NLRB has been reluctant to apply *Atlantic Steel* in a manner that forfeits employees' rights under the NLRA.¹⁶⁰ An employee loses the protection of the NLRA if the activity is "maliciously false" or "opprobrious" under the *Atlanta Steel* test.¹⁶¹ This test heavily favors employees, as is exhibited by the NLRB's position that the Act protects an employee's statements calling a supervisor a "scumbag"¹⁶² or an employer's owner "an asshole"¹⁶³ on social media platforms.¹⁶⁴ Thus, it appears as though inflammatory language on social media postings will not lose protection.¹⁶⁵ Social media postings critical of

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

155. MEMORANDUM OM 11-74, *supra* note 13, at 9.

156. *Id.*

157. *Id.* at 11.

158. *Id.*

159. *Id.*

160. MEMORANDUM OM 11-74, *supra* note 13, at 10–11; *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges, Sept. 2 2011).

161. Phillips, *supra* note 96, at 31 (citations omitted) (internal quotation marks omitted); MEMORANDUM OM 11-74, *supra* note 13, at 11.

162. Phillips, *supra* note 96, at 31 (citations omitted).

163. *Id.* (citations omitted) (internal quotation marks omitted).

164. *Id.*

165. An employee was fired for calling the owner of the company that employed him an "F'ing mother F'ing," an "F'ing crook," and "an asshole," and that he was stupid, nobody liked him, and everyone talked about him behind his back. *Plaza Auto Ctr. Inc. and Nick Aguirre*, 355 N.L.R.B.

an employer already cause increased damage to those employers based on the inherent characteristics of the Internet—mainly the public access, seeming anonymity, and permanence.¹⁶⁶ Protecting inflammatory postings will only further expose and damage corporations' reputations and organizational morale. Inflammatory language will more likely catch peoples' eyes on social media, or "go viral," and give the corporation bad publicity.¹⁶⁷ Inflammatory comments about the employer or a supervisor will also more likely cause schisms at the workplace between the employee and management, particularly if the comments are made about a particular manager or supervisor.

2. The Defamation Defense

Employers will often file a defamation lawsuit against the disciplined employee as a back-up plan in case the Board finds that the disciplined employee's statements were protected under the NLRA.¹⁶⁸ Employers may attempt to do so as a power tactic to scare the employee from attempting to defend itself against a defamation claim and cause them to withdraw their charge with the NLRB.¹⁶⁹ Or, the employer may genuinely believe it is being defamed.¹⁷⁰ Employers will be unpleasantly surprised when the NLRB decides to apply the heightened "defamation defense" standard to social media cases, as it does to other NLRA labor dispute cases.¹⁷¹

In NLRA labor disputes, courts apply a heightened standard that requires a defamation plaintiff (the corporation-employer in this context) to show that a defendant's statements were "a deliberate or reckless untruth" and that the statements caused actual harm.¹⁷² This differs from the usual state law defamation standard that only requires the plaintiff to show that "the defendant was negligent in making his or her untruthful statements to a third party and does not require demonstrable proof that the statements led to actual harm."¹⁷³ In *Linn v. United Plant Guard Workers, Local 114*, the Supreme Court of the United States further stated that in labor disputes,

85, 85–86 (2010). The NLRB held that such language was not sufficient to lose protection. *Id.*; see also Phillips, *supra* note 96, at 31.

166. See, e.g., Brustein, *supra* note 57; Gelb, *supra* note 62 (discussing the effects of cyber bullying, including the permanence of information on the internet).

167. See Bay SYS Technologies, LLC, 357 N.L.R.B. 28 (2011).

168. See Kati L. Griffith, *The NLRA Defamation Defense: Doomed Dinosaur or Diamond in the Rough?*, 59 AM. U. L. REV. 1, 4–5 (2009) (stating that employer defamation suits against employee or worker organizations are on the rise).

169. *Id.* at 5.

170. *Id.* at 4.

171. *Id.* at 5.

172. *Id.* at 12 (citing *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63–65 (1966)). See *Veeder-Root Co.*, 237 N.L.R.B. 1175 (1978) (finding that employee literature did not lose the protection of the NLRA because it was false, misleading or inaccurate, since the statements were not deliberately or maliciously false).

173. See Griffith, *supra* note 168, at 12–13.

“[T]he most repulsive speech enjoys immunity [from defamation liability] provided it falls short of a deliberate or reckless untruth.”¹⁷⁴ But even deliberate or reckless falsities are not actionable defamation claims “unless the defamation plaintiff can also prove that these untruths led to actual damages.”¹⁷⁵ Due to the Supremacy Clause, this federal NLRA standard preempts state defamation laws, thus requiring employer defamation claims to meet this heightened standard.¹⁷⁶ The Supreme Court’s rationale for this standard is that allowing states to regulate allegedly defamatory statements during a labor dispute would “dampen the ardor of labor debate and truncate the free discussion envisioned by the [NLRA].”¹⁷⁷ “The Court also sought to decrease the likelihood that defamation suits, which sometimes lead to ‘excessive damages,’ would be ‘used as weapons of economic coercion.’”¹⁷⁸

The Board will likely adopt this standard for defamation claims that arise out of social media postings. Facing this mountainous standard, employers will be unlikely to succeed on a defamation claim and, therefore, should think twice (or three times) before terminating or disciplining an employee for what it believes are defamatory social media postings.

B. DISLOYAL AND DISPARAGING COMMENTS ABOUT AN EMPLOYER WILL ALSO RARELY LOSE PROTECTION OF THE NLRA

The Board will likely adopt the *Jefferson Standard* approach when handling social media cases where an employee allegedly disparages the employer. *Jefferson Standard* attempted to distinguish terminations that were unfair labor practices from those that were “for cause.”¹⁷⁹ If the termination is for “insubordination, disobedience or disloyalty,” the employer has adequate cause for discharge.¹⁸⁰ The employee will not be protected if his or her comments amount to an “attack” on the corporation or “the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.”¹⁸¹ There are several factors that the Board and courts have traditionally relied upon to remove speech from NLRA protection:

How closely connected employee comments are to actual labor disputes;
the timing of the organizational comments (i.e., the more “critical” a time
for the employer with regards to their relationship with the marketplace,

174. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63 (1966).

175. Griffith, *supra* note 168, at 13 (citing *Linn*, 383 U.S. at 63–65).

176. *See id.* at 7–8.

177. *Id.* at 11 (quoting *Linn*, 383 U.S. at 64).

178. *Id.*

179. *NLRB v. Local Union No. 1229, Int’l Broth. of Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 472 (1953) (quoting 29 U.S.C. § 160(c)).

180. *Id.* at 474.

181. *Id.* at 471.

the more likely the speech will be deemed disloyal); the general tone (overly harsh, critical, attacking, etc.); the employee's general motive; and the intended audience (the employer's clients or customers, the general public, or other employees).¹⁸²

Although the Board will likely apply this standard to social media cases,¹⁸³ the problem again lies in the uncertainty of its application. As one commentator put it, “[B]ased on the body of case law decided in the years since *Jefferson Standard*, it is difficult to ascertain what, exactly, amounts to the type of disloyalty that will subject employees’ otherwise protected organizational speech to discipline.”¹⁸⁴ And that ambiguous body of law does not yet include social media cases. In social media, disparaging comments will have amplified consequences for employers due to the large scale, sense of anonymity, and permanent nature of the Internet and social media platforms.¹⁸⁵ Due to the Board’s history of taking an ad hoc, fact-specific approach to determining whether employees’ statements reach the level of disparagement,¹⁸⁶ it is likely that it will continue to do so in the social media context. This illustrates the obvious problem of uncertainty for both employees and employers as to when social media postings will lose or maintain protection. It is the employers’ and employees’ best guess as to how the Board will apply *Jefferson Standard* to the facts surrounding a disciplinary action.

IV. AMENDING THE NLRA WILL MAKE THE NLRB MORE EQUIPPED TO HANDLE SOCIAL MEDIA CASES AND MITIGATE THE UNCERTAINTY THAT CURRENTLY EXISTS FOR EMPLOYERS AND EMPLOYEES

There are several problems with the NLRA and its inability to keep up with the economic and societal realities of today.¹⁸⁷ One of those realities is that activity on the Internet is invariably different from non-Internet communication.¹⁸⁸ Yet, the NLRB continues to apply old law to new contexts that it was not created to deal with.¹⁸⁹ In applying Section 7

182. Andrew F. Hettinga, *Expanding NLRA Protection of Employee Organizational Blogs: Non-Discriminatory Access and the Forum-Based Disloyalty Exception*, 82 CHI. KENT L. REV. 997, 1021 (2007).

183. See generally *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006) (finding that employee lost protection for disparaging his employer on the Internet).

184. Hettinga, *supra* note 182, at 1016.

185. See *id.* at 998–999; Gelb, *supra* note 62 (stating that “information can remain searchable and retrievable, potentially forever”).

186. See Hettinga, *supra* note 182 at 1015–18.

187. See Phillips, *supra* note 30, at 221–23.

188. See WALLACE, *supra* note 52, at 3–4.

189. See, e.g., *Bay SYS Technologies, LLC*, 357 N.L.R.B. 28 (2011); *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges, Sept. 2 2011); *Karl Knauz Motors, Inc.*, No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28,

protection to social media postings, the NLRB has failed to consider the drastic effects such protection could have on an employer, who can be publically criticized—often harshly—without discretion to remedy the situation.¹⁹⁰ Instead, based on the scant guidance that the NLRB, the ALJs, and the Board have given through the social media cases,¹⁹¹ employees will not know what postings will be protected by the NLRA, and employers will not know when they can discipline employees without fearing litigation costs. Therefore, measures must be taken to (1) account for the harsh results these cases may have on employers, and (2) mitigate some of the uncertainty for both employers and employees.

**A. CODIFY THE LAW REGARDING PROTECTED CONCERTED
ACTIVITY AND SPECIFY WHEN EMPLOYEES WILL LOSE
PROTECTION OF THE NLRA**

Congress and state legislatures will often codify the common law that develops in a particular area where courts have grappled with a legal issue.¹⁹² To mitigate the uncertainty of what constitutes protected concerted activity in social media, Congress should amend the NLRA and codify the type of Internet activity and communication that will constitute concerted activity. The old adage of allowing laws to apply in all contexts irrespective of technological change may have some legitimacy when technology changes so rapidly that the law simply cannot keep up with it.¹⁹³ Or, applying old law may work if the old technology is similar enough to the new technology.¹⁹⁴ However, since it appears that the Internet is here to stay and is vastly different from its predecessor technologies, establishing labor laws that conform to today's era of Internet communication is vital. Congress has successfully passed statutes to deal specifically with Internet activity in other areas,¹⁹⁵ thus, there is no reason why labor-management issues should be any different.

Congress should look at the types of social media cases (and other Internet cases) and pass a statute specifying when postings are concerted. Congress can define “concerted” activity along with explanatory comments that give examples of Internet and pre-Internet activity that is both

2011); *Settlement Reached in Case Involving Discharge for Facebook Comments*, *supra* note 10; Trotman, *supra* note 12.

190. *See supra* note 189.

191. *See supra* note 189.

192. *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 350 (2010).

193. Rebecca J. Rosen, *The Thorny Combination of Old Laws and New Tech*, THE ATLANTIC, Nov. 10, 2011, <http://www.theatlantic.com/technology/archive/2011/11/the-thorny-combination-of-old-laws-and-new-tech/248111/#>.

194. *Id.*

195. Congress passed laws for sexual predation on the Internet. *See* NET SAFE KIDS, http://www.nap.edu/netsafekids/pp_li_il.html (last visited Dec. 20, 2011).

“concerted” and not “concerted.” Granted, unexpected disputes will arise that do not seamlessly fit into the definition or the comments and the Board will be left to determine how to categorize such unexpected activity. But, employment disputes tend to repeat themselves, as they did in *Hispanics United*, the Facebook Firing case, *Karl Knauz Motors*, and *Bay SYS Technologies*,¹⁹⁶ and Congress can eliminate uncertainty in a majority of these disputes by codifying where the law will stand in these foreseeable situations. As a result, employees will know when they can air their feelings on social media, blogs, or in an e-mail without fear of adverse action being taken against them. Similarly, employers will know when they can discipline an employee for potentially harmful comments made via social media.

Further, Congress should codify when employees may lose protection under the NLRA. Given the characteristics of the Internet—public access, sense of anonymity, permanence—Congress may decide to create limited carve-outs from NLRA protection for otherwise protected speech when it is made through social media (or, for that matter, any publically-accessible Internet posts). For instance, a post may lose protection if it is likely to have a significantly more harmful effect on employers than the same non-Internet speech would have had. Or, Congress may set a level of egregiousness (high or low) where social media posts lose NLRA protection. Congress may alternatively set a standard that a social media post will lose protection if a reasonable employee should know that the comments are likely to cause substantial harm to his or her employer. These proposed legislative changes take into account the realities of the Internet and social media era that we live in.

Additionally, the NLRA “was initially conceived of as the free market solution to market failures in individual bargaining” and was created to deal with the “‘inequality of bargaining power’ between generally weaker-positioned employees and generally stronger-positioned employers, and protecting commerce by guaranteeing employees the right to ‘organize and bargain collectively.’”¹⁹⁷ Since even the employees who complain via social media, like in the Facebook Firing case or *Hispanics United*, are not likely exercising their right to organize or collectively bargain, there is less reason to protect those posts when they greatly harm employers.¹⁹⁸ Therefore,

196. See, e.g., *Bay SYS Technologies, LLC*, 357 N.L.R.B. 28 (2011); *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, 2011 WL 3894520 (N.L.R.B. Div. of Judges, Sept 2, 2011); *Karl Knauz Motors, Inc.*, No. 13-CA-46452, 2011 WL 4499437 (N.L.R.B. Div. of Judges, Sept. 28, 2011); *Settlement Reached in Case Involving Discharge for Facebook Comments*, *supra* note 10; Trotman, *supra* note 12.

197. Phillips, *supra* note 30, at 226 (quoting Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 58 (2007)) (also quoting National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449–50 (1935)).

198. See, e.g., *Hispanics United of Buffalo*, 2011 WL 3894520; *Settlement Reached in Case Involving Discharge for Facebook Comments*, *supra* note 10; Trotman, *supra* note 12.

Congress should enact some measures to alleviate the harm to employers caused by employees' social media gripes, while at the same time protecting the principles of the NLRA that guard employees' right to organize. However, even if Congress simply codifies *Jefferson Standard* or *Atlantic Steel*, it would do a great service to employers and employees by mitigating uncertainty regarding future social media cases.¹⁹⁹

B. TRIPARTITE NATIONAL BODY WITH REGIONAL BOARDS AND REDUCED SCOPE OF JUDICIAL REVIEW

A tripartite national body with regional boards would be a structure where each region had its own board with three members—one representing employers, one representing workers, and one neutral.²⁰⁰ This structure will ensure that “each party will have its case presented and understood before a sympathetic board member who understands that party’s day-to-day concerns.”²⁰¹ Such a structure would mimic the War Labor Board and Canadian Board²⁰²—it would replace the ALJs and the Regional Board’s adjudications could similarly be appealed to the National Board as it currently exists.²⁰³ This tripartite system would “increase the likelihood that the practical problems and concerns of both parties are addressed in addition to legal issues.”²⁰⁴ The Regional Board’s decision is also more likely to be accepted by the losing party since it will have had an adjudicator that is aligned with its interests hear the case.²⁰⁵ Further, having a regionalized Board will facilitate the parties to “bring about voluntary resolution of the dispute, or if necessary, bring the Board decisions closer to the parties.”²⁰⁶

Moreover, the scope of judicial review of National Board decisions should be reduced.²⁰⁷ “Board decisions would be reversed or remanded only if the Board denied the complainant due process, exceeded its jurisdiction, or violated the NLRA.”²⁰⁸ This will avoid the administrative delays experienced under the current Board and would also serve to limit frivolous appeals,²⁰⁹ enabling Board precedent on new issues, such as social media cases, to be developed more speedily. The tripartite system would also give newfound confidence in precedent in this area, because the cases will have

199. See, e.g., *NLRB v. Local Union No. 1229, Int’l Broth. of Elec. Workers*, 346 U.S. 464, 472 (1953); *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979).

200. See Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKELEY J. EMP. & LAB. L. 30, 46–47 (1997).

201. *Id.* at 47.

202. See *id.* at 46–47.

203. See *id.* at 50–51.

204. *Id.* at 51.

205. See *id.* at 48.

206. *Id.* at 51.

207. See *id.* at 52.

208. *Id.*

209. See *id.*

been decided by experts in the field that represent the interests and concerns of both employees and employers.²¹⁰ Rather than applying old law to the new and distinct social media context, the Regional Boards can develop case law to fit the economic and societal realities, while still maintaining the original purpose of the Act.

A tripartite Regional Board will help solve both problems of uncertainty and backlash against employers. Even if Congress refuses to codify the Board common law into the NLRA, Board precedent in this new area of the law will develop rapidly under this tripartite structure with reduced judicial review and fewer appeals.²¹¹ The Regional Board will be close to the parties, have great expertise in the field, and have one member essentially representing the interests of each party, eliciting greater trust in the common law developed surrounding the issue.²¹² Therefore, parties will be comfortable in relying on the established precedent in social media cases—employers will know when social media activity can be reprimanded and employees will know when they can air their grievances via social media.

C. EXPAND BOARD REMEDIES

Congress should also expand the Board's remedial powers in an effort to avoid potential negative implications on union organizing. Currently, the Board's remedial powers—proscribed in Section 10 of the NLRA—are relatively limited.²¹³ The Board's typical remedy is a cease-and-desist order,²¹⁴ which is essentially a slap on the wrist. The Board also has the power to order a “make whole” remedy, which could require an employer to reinstate and award back pay to an unlawfully-discharged employee.²¹⁵

Although it is unlikely that many of the social media cases have involved or will involve employees attempting to organize, it is possible that social media will be used to facilitate union organizing.²¹⁶ And that should not be thwarted. The recommended changes in this note are designed to solve the problem of applying old Board precedent to a new setting involving social media communication. Those changes align with—and should not hamper—the intent of the Act to protect employees who organize to take lawful group action. The NLRA has an expressed interest

210. *See id.*

211. *See id.*

212. *See id.* at 50–51.

213. *See, e.g.,* Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 431 (1992); Phillips, *supra* note 30, at 238.

214. *See* Craver, *supra* note 213, at 431–33; *see also* Phillips, *supra* note 30, at 266–68.

215. *See* Craver, *supra* note 213, at 432.

216. *E.g.,* *Bargaining Update by Update*, THE DAILY DOT (Oct. 11, 2011), <http://www.dailydot.com/news/labor-unions-twitter-facebook-negotiations-uaw/>; *see* Marissa Oberlander, *An Unlikely Union: Social Media and Labor Relations*, MEDILL REPORTS (Jan. 12, 2012), <http://news.medill.northwestern.edu/chicago/news.aspx?id=176075>.

in protecting labor organizing.²¹⁷ Thus, when the Regional Board or National Board recognizes a social media case where such organization is *clearly* taking place, the NLRB should issue a mandatory injunction to prevent the employer from impeding the employees' collective action. Despite Section 10(j) of the Act, which grants the Board the power to issue an injunction, the NLRB "rarely seeks preliminary relief against employer unfair labor practices under Section 10(j)."²¹⁸ That problem would be solved if, in such situations, the NLRB is statutorily obliged to seek an immediate injunction to have the employer immediately reinstate the discharged employee.

Furthermore, the Board should have harsher remedies at its disposal, such as fines, sanctions, and double back-pay awards for unlawfully discharged employees. This will protect employees' Section 7 rights when they are *actually* being violated, and at the same time protect employers from litigations expenses when their employees are not *actually* exercising their organizational rights protected by the NLRA.

CONCLUSION

This note has attempted to demonstrate that the NLRB's characterization of social media activity as "protected concerted activity" under the NLRA has created uncertainty for employers and employees, and does not consider the potentially grave consequences that broadly protecting this activity could have on employers. The differences between social media and face-to-face or pre-Internet communication—mainly public access to social media sites, guise of anonymity on the Internet, and the permanent nature of Internet postings—are the reasons why an application of old law to new contexts has undesirable results. The most viable solution to this problem is to amend the NLRA, which is antiquated and unequipped to deal with current societal and economic realities, to codify with explanatory comments when activity is "concerted" and when otherwise protected activity loses protection in the pre-Internet and Internet contexts, to create a tripartite system with a national board and regional boards, and to expand Board remedies to protect conduct that truly violates employees' Section 7 rights under the Act.

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217. See National Labor Relations Act, 29 U.S.C. § 151 (1935), available at <http://www.nlr.gov/national-labor-relations-act> (last visited 12/20/11).

218. Craver, *supra* note 213, at 431.

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