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You Can't Say That on Facebook: The NLRA's Opprobriousness Standard and Social Media

Elizabeth Allen*

INTRODUCTION

In January 2013, British music retailer HMV made headlines not only for its financial woes but also for its lay-offs, publicized by a terminated employee on HMV's Twitter account.¹ "[T]weeting live from HR where we're all being fired!" was Poppy Rose Cleere, the company's Social Media Planner, who reached out to Twitter in her frustration over the layoffs.² A company in a bad situation suddenly found itself in an even worse one, as it lost its ability to control its public image. HMV's still-employed Marketing Director reportedly asked, "How do I shut down Twitter?"³

The HMV incident is illustrative of the complicated relationship employers have with social media. On the one hand, social media is a powerful tool companies want to utilize.⁴ It is inexpensive, far-reaching, and effectively permanent. But these same attributes make social media dangerous. Because it is inexpensive, individuals can

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1. Emma Rowley, *HMV Staffer Claims Responsibility for Tweeting Mass Sacking*, TELEGRAPH, Jan. 31, 2013, available at <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9839855/HMV-staffer-claims-responsibility-for-tweeting-mass-sacking.html>.

2. *Id.*

3. *Id.*

4. Illustratively, Cleere was the "social media planner" for HMV. *Id.* See Jennifer Preston, *If Twitter is a Work Necessity*, N.Y. TIMES, May 29, 2012, available at <http://www.nytimes.com/2012/03/01/education/digital-skills-can-be-quickly-acquired.html?pagewanted=all> (discussing a variety of programs and opportunities that educate on how to use social media to find employment and excel at work).

access the same platforms as deep-pocketed companies.⁵ Because social media is far-reaching, tweets like Cleere's can be heard instantaneously around the world.⁶ And because information shared on the internet is immediately out of the control of the original poster, it is effectively permanent.⁷ Only twenty minutes passed before HMV was able to delete Cleere's tweets, but that was sufficient time for their content to be viewed and shared by others.⁸

The HMV incident is likewise illustrative of what is at stake for companies when social media is used against their interests. Although Cleere was tweeting on her company's Twitter-feed, employers fear similar reputational damage from employees' personal social media accounts.⁹ In response to these fears, companies have increasingly adopted and affirmed policies delineating their expectations for employees' personal usage of social media.¹⁰ Employers have also disciplined employees whose social media posts have negatively portrayed the company.¹¹

5. In 2010, an estimated 25 billion tweets were sent via Twitter, 360 billion exchanges were made on Facebook, and 730 billion videos were watched on YouTube. Nick Bilton, *2010 Online, by the Numbers*, N.Y. TIMES, Jan. 14, 2011, available at <http://bits.blogs.nytimes.com/2011/01/14/2010-online-the-numbers>. Total global internet users totaled 1.97 billion. *Id.*

6. Social media speeds up the rates at which information can be exchanged across vast distances. *See, e.g.*, Jennifer Preston, *Social Media Gives Wall Street Protests a Global Reach*, N.Y. TIMES, Oct. 15, 2011, available at <http://mediadecoder.blogs.nytimes.com/2011/10/15/social-media-gives-wall-street-protests-a-global-reach> (detailing the impressive increases in social media usage that coincided with the Occupy Wall Street movement).

7. Even after deleting a post, a copy of it may still exist elsewhere. *See* Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES, July 21, 2010, available at <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all> (discussing how shared information creates an internet reputation that can be difficult to escape).

8. Jon Hyman, *The Revolution WILL be Televised . . . Shore Up Your Social Media Before a Termination*, OHIO EMP'R L. BLOG (Feb. 6, 2013), <http://www.ohioemployerlawblog.com/2013/02/the-revolution-will-be-televised-shore.html>.

9. *See, e.g.*, Margaret Sullivan, *After an Outburst on Twitter, the Times Reinforces Its Social Media Guidelines*, N.Y. TIMES, Oct. 17, 2012, available at <http://publiceditor.blogs.nytimes.com/2012/10/17/after-an-outburst-on-twitter-the-times-reinforces-its-social-media-guidelines>.

10. *See id.*; *see also* PROSKAUER ROSE, SOCIAL MEDIA IN THE WORKPLACE AROUND THE WORLD 2.0 2 (2012), http://www.proskauer.com/files/uploads/Documents/2012_ILG_Social_Network_Survey_Results_Social_Media_2.0.pdf [hereinafter PROSKAUER REP.]. From 2011 to 2012, employers with dedicated social media policies increased from 55 percent to 69 percent. *Id.* The majority of new policies impact both in- and out-of-work social media usage. *Id.* Approximately one-third of employers provide training on appropriate use of social media, and roughly half of employers have dealt with an employee's misuse of social media. *Id.*

11. Terminations for social media postings have become so common, there is now a

At stake here are privacy rights,¹² generational differences,¹³ and a society coming to terms with the indelible Internet.¹⁴ In April 2011, a new stakeholder in the social media dialogue joined the fight when Lafe E. Solomon, Acting General Counsel of the National Labor Relations Board (NLRB),¹⁵ directed a memorandum to regional NLRB offices.¹⁶ The Solomon Memorandum ordered NLRB regional offices to report to the Division of Advice¹⁷ before taking action on any “[case] involving employer rules prohibiting, or discipline of

popular blog, *The Facebook Fired*, dedicated to telling the stories of notorious social media terminations. FACEBOOK FIRED, <http://www.thefacebookfired.com> (last visited Jan. 25, 2013). Likewise, celebrities have been fired for offensive tweets and status updates. *See, e.g.*, Mark Memmott, *Comedian Gilbert Gottfried Jokes about Japan, Loses Aflac Job*, NAT'L PUB. RADIO (Mar. 15, 2011), <http://www.npr.org/blogs/thetwo-way/2011/03/15/134568422/comedian-gilbert-gottfried-bombs-with-jokes-about-japan-loses-aflac-job> (Aflac fired Gilbert Gottfried as the voice of their spokes-duck for tweeting insensitive comments about a Japanese earthquake.). Athletes have also lost their jobs as a result of social media posts. *See, e.g.*, Mary Pilon, *Twitter Comment Costs Greek Athlete Spot in Olympics*, N.Y. TIMES, July 25, 2012, available at <http://www.nytimes.com/2012/07/26/sports/olympics/twitter-comment-costs-greek-athlete-spot-in-olympics.html> (discussing an athlete's removal from the Olympic squad because of an offensive tweet). While firing a celebrity or an athlete for a social media comment may be arguably justified due to the notable's influence, social media has likewise led to the termination of people in more common jobs, such as teaching. *See, e.g.*, Jonathan Zimmerman, *When Teachers Talk Out of School*, N.Y. TIMES, June 3, 2011, available at <http://www.nytimes.com/2011/06/04/opinion/04zimmerman.html> (discussing teacher who was fired for comments on Facebook about her students).

12. *See* Alan Greenblatt, *How Much Can Potential Employers Ask About You*, NAT'L PUB. RADIO (May 22, 2010), <http://www.npr.org/2012/05/21/153201730/how-much-can-potential-employers-ask-about-you>.

13. CISCO, CISCO CONNECTED WORLD TECH. REP., GEN Y: NEW DAWN FOR WORK, PLAY, IDENTITY 16 (2012), <http://www.cisco.com/en/US/solutions/ns341/ns525/ns537/ns705/ns1120/2012-CCWTR-Chapter1-Global-Results.pdf> (reporting 40 percent of Gen Y survey participants indicated their employer prohibited social media use on company devices, but 71 percent ignored the ban).

14. Rosen, *supra* note 7.

15. The National Labor Relations Board is a large governmental agency with a number of working parts. For purposes of this Note, “NLRB” will be used to discuss the agency as a whole; “the Board” to discuss the adjudicative panel that decides cases; and the “General Counsel” to discuss the department led by the General Counsel of the NLRB. *See generally Who We Are*, NAT'L LAB. REL. BD., <http://nlrb.gov/who-we-are> (last visited Dec. 25, 2013).

16. Memorandum from Lafe E. Solomon, Acting General Counsel, National Labor Relations Board, to All Regional Directors, Officers in Charge, and Resident Officers, National Labor Relations Board (Apr. 12, 2011), available at <http://www.laborrelationsupdate.com/GC%20Memorandum%2011-11.pdf> [hereinafter Solomon Memo.].

17. The Division of Advice is charged with providing the NLRB Regional Offices with advice in cases that present novel or significant issues. *See Investigate Charges*, NAT'L LAB. REL. BD., <http://www.nlrb.gov/what-we-do/investigate-charges> (last visited Jan. 24, 2013).

employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter.”¹⁸

Seeking to “be of assistance to practitioners and human resource professionals,”¹⁹ Solomon published three more memoranda²⁰ in late 2011 and early 2012, discussing cases that had been sent to the Division of Advice, and advising on what constituted a violation of employees’ statutory rights under the National Labor Relations Act (NLRA).²¹

Solomon’s memoranda were just the beginning of the NLRB’s intervention²² on behalf of employees.²³ Since 2011, numerous

18. Solomon Memo., *supra* note 16, at 1–2.

19. Memorandum from Anne Purcell, Associate General Counsel, National Labor Relations Board, to All Regional Directors, Officers in Charge, and Resident Officers, National Labor Relations Board (Aug. 18, 2011), *available at* www.nlr.gov/news-outreach/news-story/actinggeneral-counsel-releases-report-employer-social-media-policies.

20. *Id.*; Memorandum from Anne Purcell, Associate General Counsel, National Labor Relations Board, to All Regional Directors, Officers in Charge, and Resident Officers, National Labor Relations Board (Jan. 24, 2012), *available at* www.nlr.gov/news-outreach/news-story/actinggeneral-counsel-releases-report-employer-social-media-policies [hereinafter Second Memo.]; Memorandum from Anne Purcell, Associate General Counsel, National Labor Relations Board, to All Regional Directors, Officers in Charge, and Resident Officers, National Labor Relations Board (May 30, 2012), *available at* www.nlr.gov/news-outreach/news-story/actinggeneral-counsel-releases-report-employer-social-media-policies [hereinafter Third Memo.]. See Ashley Post, *NLRB Sees Increase in Social Media-Related Cases*, INSIDECOUNSEL (Mar. 20, 2013), <http://www.insidecounsel.com/2013/03/20/nlr-sees-increase-in-social-media-related-cases> (discussing the circumstances leading to the publication of the memoranda).

21. 29 U.S.C. §§ 151–169 (2012). See also Theodore J. St. Antoine, *The Wagner Act: Labor Law’s Signal Event*, 64 MICH. B.J. 121, 121 (1985).

22. The NLRB’s outreach to address social media concerns has affected the non-unionized workplace. See Steven Greenhouse, *Even If It Enrages Your Boss, Social Net Speech is Protected*, N.Y. TIMES, Jan. 21, 2013, *available at* <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html?pagewanted=all>. Greenhouse reports:

Some corporate officials say the N.L.R.B. is intervening in the social media scene in an effort to remain relevant as private-sector unions dwindle in size and power.

“The [B]oard is using new legal theories to expand its power in the workplace,” said Randel K. Johnson, senior vice president for labor policy at the United States Chamber of Commerce. “It’s causing concern and confusion.”

But [B]oard officials say they are merely adapting the provisions of the National Labor Relations Act, enacted in 1935, to the 21st century workplace.

Id. The “concern and confusion” has led to a flurry of online and print publications addressing the cases decided to date, providing guidelines for practitioners, and advocating changes to the NLRB’s analyses. See, e.g., Jon Hyman, *The NLRB’s Holiday Gift: a Facebook Firing Decision*, OHIO EMP’R L. BLOG (Dec. 20, 2012), <http://www.ohioemployerlawblog.com/2012/>

employees have filed cases with the NLRB, arguing their terminations for social media posts violated the NLRA.²⁴ Cases of fired employees have now been heard by Administrative Law Judges (ALJs) and the Board; more, they are winding their way to the federal courts.²⁵ The statutory right at issue is the right of employees—unionized or nonunionized²⁶—to engage in protected concerted activity.²⁷ These cases consider whether a social media post can constitute protected concerted activity²⁸ and, if so, whether the post loses its protection due to opprobriousness.²⁹

This Note examines the NLRA's opprobriousness standard³⁰ as applied to social media cases. A standard for analyzing

12/the-nlrbs-holiday-gift-facebook-firing.html#UyDho4XiOlc (discussing a recently decided case and highlighting “two key points for employers”) and Colin M. Leonard & Tyler T. Hendry, *From Peoria to Peru: NLRB Doctrine in a Social Media World*, 63 SYRACUSE L. REV. 199, 224–25 (2013) (addressing shortcomings of the analyses by the NLRB, General Counsel, and ALJs, and suggesting alternative considerations).

23. For purposes of this Note, the term “employee” will be used to refer to a person who is an “employee” as defined by the NLRA, 29 U.S.C. § 152 (2012). In the same vein, the term “employer” also encompasses the NLRA’s definition. *Id.*

24. In general, the controversies in these cases dispute either an employer’s rule regarding social media, such as one found in an employee handbook, or the discipline of an employee for social media posts. *See, e.g.*, Karl Knauz Motors, Inc., 358 N.L.R.B. 164, 1 (2012) (ruling on both the employer’s “Courtesy” rule in its employee handbook and an employee’s termination for posts on Facebook).

25. *See* Greenhouse, *supra* note 22 (stating the defendants planned to appeal *Hispanics United of Buffalo*, 359 N.L.R.B. 1 (2012)).

26. The NLRA protects concerted activity of both unionized and nonunionized employees. Press Release, National Labor Relations Board, NLRB Launches Webpage Describing Protected Concerted Activity (June 18, 2012), available at <http://www.nlr.gov/news-outreach/news-story/nlr-launches-webpage-describing-protected-concerted-activity>. In a press release announcing the launch of a new website to educate employees about their right to engage in concerted activity, this right was called “one of the best kept secrets of the [NLRA].” *Id.*

27. 29 U.S.C. § 151 (2012).

28. *See* Office of the General Counsel, NLRB, Wal-Mart, Case 17-CA-25030 (July 19, 2011) (Facebook posts complaining about manager were not protected concerted activity); Leonard & Hendry, *supra* note 22, at 210.

29. *See* Leonard & Hendry, *supra* note 22, at 217; Office of the General Counsel, NLRB, Detroit Medical Center, Case 7-CA-06682 (Jan. 10, 2012) [hereinafter *Detroit Medical Center Advice Memo*.] (advising that an employee’s Facebook posts constituted concerted activity but lost their protection due to their opprobrious nature).

30. Conduct that is otherwise protected concerted activity may lose its protection because it is opprobrious. *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979) (“[E]ven an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the [NLRA].”).

opprobriousness in social media cases was discussed in Solomon's Second Memorandum³¹ and was utilized in the General Counsel's advice memoranda and in decisions by ALJs;³² but it has not yet been applied in any Board decision.³³ This Note argues this standard provides a strong framework for analyzing when employees' otherwise protected concerted activity on social media should lose its protection because the speech is impermissibly opprobrious, and argues that with certain modifications, this standard should be adopted by the NLRB and subsequently by courts.

Part I of this Note examines the history of social media as related to the work environment. Part II describes the legal doctrine of opprobriousness under the NLRA. Part III presents the standard for analyzing opprobriousness, and provides summaries of the relevant cases and memoranda. Part IV analyzes the effectiveness of the opprobriousness standard and proposes the standard be adopted with certain modifications.

31. Second Memo., *supra* note 20, at 24 (“[A] modified *Atlantic Steel* analysis that considers not only disruption to workplace discipline, but that also borrows from *Jefferson Standard* to analyze the alleged disparagement of the employer's products and services, would more closely follow the spirit of the Board's jurisprudence regarding the protection afforded to employee speech [on social media sites].”).

32. *See infra* Part III.

33. In *Karl Knauz*, the Board considered the termination of an employee who had posted to Facebook about his employer on two separate occasions. 358 N.L.R.B. No. 164 (2012). Finding the employee's posts about an accident at another employer-owned business were not protected concerted activity, the Board held that the employee's termination was proper and did not reach the second set of Facebook posts. *Id.* at 1. However, the ALJ who decided the case below had found the second set of Facebook posts were not so opprobrious as to lose their protection. *Id.* at 17. In two other cases, the analysis did not trigger *Atlantic Steel* because of the pleadings. *See* *Hispanics United of Buffalo*, 359 N.L.R.B. No. 37 n.12 (2012); *see also* *New York Party Shuttle, LLC*, No. 02-CA-073340, 2012 WL 4174865 n.7 (Div. of Judges May 2, 2013), *adopted as modified by* 359 N.L.R.B. No. 112 (2013). In *Bettie Page Clothing*, 359 N.L.R.B. No. 96 (2013), the Board did not discuss opprobriousness. The validity of many recent Board decisions, including these four, has been called into question because of a recent ruling by the DC Circuit. *See* *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861 (2013); Adam Liptak, *Justices to Hear Case on Obama's Recess Appointments*, N.Y. TIMES, June 24, 2013, *available at* http://www.nytimes.com/2013/06/25/us/justices-agree-to-hear-case-on-presidents-recess-appointments.html?_r=0.

I. SOCIAL MEDIA AT WORK

Social media has become part of work in a number of ways. Employees use social media to find employment,³⁴ and employers use social media to find employees.³⁵ Companies also use social media to promote their businesses³⁶ and communicate with customers.³⁷ Through employee policies, employers can encourage or discourage employees to engage in social media.³⁸

There are many reasons why employers might want to control their employees' social media use.³⁹ Many employers cite concerns

34. For example, jobseekers may use LinkedIn, a social networking site developed for professionals. *Linked in Reaches 200 Million Members Worldwide*, LINKEDIN, <http://press.linkedin.com/News-Releases/165/LinkedIn-reaches-200-million-members-worldwide> (last visited Dec. 18, 2013). Jobseekers may also use the Internet and social media in particular to attract employers by building a personal brand around their experience and abilities. See Farhad Manjoo, *Social Networking Your Way to a New Job*, N.Y. TIMES, Aug. 25, 2010, available at <http://www.nytimes.com/2010/08/26/education/26SOCIAL.html?pagewanted=all> (discussing jobseeker's use of social media).

35. See Julie Weed, *Finding New Employees, via Social Networks*, N.Y. TIMES, May 30, 2009, available at <http://www.nytimes.com/2009/05/31/jobs/31recruit.html>. Employers also utilize social media sites to investigate potential hires. The notion that employers check social media before hiring has gone from being shocking to a practice so routine and regular that there are now companies that provide this service for others. See Alan Finder, *For Some, Online Persona Undermines a Resume*, N.Y. TIMES, June 11, 2006, available at <http://www.nytimes.com/2006/06/11/us/11recruit.html?pagewanted=all>. See also Jennifer Preston, *Social Media History Becomes a New Job Hurdle*, N.Y. TIMES, July 20, 2011, available at <http://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html?pagewanted=all>. The employer practice of asking jobseekers for social media passwords has sparked legislative action. See, e.g., MD. CODE ANN. LAB. & EMPL. § 3-712 (West 2012) (banning employers from requiring disclosure of Facebook passwords). As of January 1, 2013, six states have likewise passed legislation that prevents employers from requiring employee disclosure of Facebook passwords. See Greenhouse, *supra* note 22.

36. See *supra* note 4 and accompanying text.

37. See Ben Bergman, *Tweeting Food Truck Draws L.A.'s Hungry Crowds*, NAT'L PUB. RADIO (Mar. 23, 2009), <http://www.npr.org/templates/story/story.php?storyId=101881984> (using Twitter to inform customers of the daily location of the moving business); see also 'Ev' and 'Biz' See *Bright Future for Twitter*, NAT'L PUB. RADIO (Mar. 11, 2009), <http://www.npr.org/templates/transcript/transcript.php?storyId=101727464> (where founders of Twitter discuss how Twitter is used, for example, to follow the changing state regulations of Idaho, to find new business ventures, and to get fans to a club where a band is playing).

38. See PROSKAUER REP., *supra* note 10, at 2.

39. *Id.* Employers' attitudes have become more positive toward social media, both for business and non-business use. In 2012, 40 percent of employers considered it an advantage to allow employees to use social media. This is a significant increase from 2011, when only 30 percent of employers considered it an advantage to allow employees to use social media for business and non-business use. At the same time, however, there has been a significant increase

about efficiency and effectiveness at work, arguing if their employees are on Facebook, they are not working.⁴⁰ Employers also worry that employees' use of social media might violate federal securities laws,⁴¹ or result in harassment⁴² or bullying.⁴³ Moreover, employers are concerned about their company's public image, which might be negatively influenced by their employees' online footprints unless the company regulates its employees' social media activities.⁴⁴ These concerns are not limited to employers: employees are likewise concerned about what their employers might think of their social media activity.⁴⁵

in the number of employers who monitor usage of social media sites, rising from 27 percent in 2011 to 36 percent in 2012. *Id.*

40. See ETHICS RES. CTR., NAT'L BUS. ETHICS SURVEY OF SOC. NETWORKERS 20–23 (2013), available at <http://www.ethics.org/nbes>; see also PROSKAUER REP., *supra* note 10, at 11 (reporting that more than half of people aged twenty-five to thirty-four use social media at work, more than any other age category).

41. Investment banks that have banned social media cite federal regulations requiring them to retain communication for three years. See Michael Kaplan, *Banned on Wall St.: Facebook, Twitter and Gmail*, N.Y. TIMES, Nov. 22, 2012, available at <http://dealbook.nytimes.com/2012/11/22/banned-on-wall-street-facebook-twitter-and-gmail> and Records to be Preserved by Certain Exchange Members, Brokers and Dealers, 17 C.F.R. § 240.17a-4 (2012).

42. See Hilary Stout, *Less 'He Said, She Said' in Sex Harassment Cases*, N.Y. TIMES, Nov. 5, 2011, available at <http://www.nytimes.com/2011/11/06/jobs/in-sex-harassment-cases-less-he-said-she-said.html> (discussing how technology has changed workplace harassment).

43. In *Hispanics United of Buffalo*, employees were terminated for a conversation about another employee on Facebook that their supervisor considered bullying and harassment in violation of the company's workplace policy. 359 N.L.R.B. 37, 1–2 (2012). Workplace bullying is a serious problem at many companies, with as many as 37 percent of employees saying they have been bullied at work. Tara Parker-Pope, *When the Bully Sits in the Next Cubicle*, N.Y. TIMES, Mar. 25, 2008, available at <http://www.nytimes.com/2008/03/25/health/25well.html>.

44. See Uttoran Sen, *50 Ways Social Media Can Destroy Your Business*, KISSMETRICS (Dec. 22, 2013), <http://blog.kissmetrics.com/social-media-can-destroy/>. Sen provides the example of McDonald's failed Twitter campaign known as #McDStories. *Id.* Within two hours of the launch, 73,000 tweets were posted with the hashtag, many with negative comments. *Social Media PR Disasters: #McDStories*, BRANDEBLOG (Feb. 20, 2012, 1:31 PM), http://brandemixblog.blogspot.com/2012/02/social-media-pr-disasters-mcdstories_20.html. McDonald's pulled the Twitter promotion because of the negative comments. *Id.* Comments came from both customers and employees. *Id.* However, while the negative comments received publicity, they accounted for only a small portion of the total tweets. *Id.* Moreover, McDonald's Annual Report shows there was little if any negative impact from the promotion: the first quarter of 2012, when the Twitter episode occurred, showed an increase in revenues from the first quarter of 2011. See MCDONALD'S 2012 ANNUAL REP. (2012), available at <http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/Investor%202013/2012%20Annual%20Report%20Final.pdf>.

45. According to a recent survey, 79 percent of employees consider their employer's reaction prior to making a work-related post on a social media site. ETHICS RES. CTR., *supra*

Employers have taken a variety of steps to control employees' social media use. Some employers have developed policies prohibiting the use of personal accounts during the work day.⁴⁶ Employers hope these policies will enable them to better protect the reputation of the business⁴⁷ and to minimize negative interactions amongst employees.⁴⁸ Some employers have gone so far as to block certain websites on company equipment.⁴⁹ Employers have also sought to prohibit employees from posting messages about the company, and have encouraged employees to consider professional image and the company's interest before posting.⁵⁰ For violating companies' social media policies, many employees have been fired.⁵¹ In response, employees have challenged the legality of their terminations for social media activities on a number of grounds, including privacy⁵² and freedom of speech.⁵³ Employees have also

note 40, at 23. Moreover, 64 percent of employees state that they consider how their employer would react to a personal posting on a social media site. *Id.*

46. See PROSKAUER REP., *supra* note 10, at 19. Although not the subject of this Note, the NLRB has also analyzed many companies' social media policies. See, e.g., Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 1 (2012) ("The Board also adopted the judge's finding that a 'Courtesy' rule in the employee handbook violated [NLRA § 8(a)(1)] because employees would reasonably believe that it prohibited statements of protest or criticism of the employer, including those protected by the [NLRA].").

47. See, e.g., Office of the General Counsel, NLRB, Stant USA Corp., Case 26-CA-24098 (Oct. 13, 2011). Stant USA's social media policy prohibited "name calling, unfounded statements, or behavior that will reflect negatively on Stant's reputation," and advised employees to "[b]e aware that your actions captured via images, posts, or comments can reflect upon Stant." *Id.* at 2.

48. See, e.g., *id.* Stant USA's social media policy required employees to "[h]onor privacy rights of other associates by seeking their permission before writing about them or displaying information that may be considered to be a breach of their privacy and confidentiality." *Id.*

49. Over one-quarter of all employers block employee access. PROSKAUER REP., *supra* note 10, at 2.

50. See, e.g., Third Memo., *supra* note 20, at 12 (quoting a social media policy stating that "[e]mployees should avoid harming the image and integrity of the company"); see also *supra* notes 47 and 48 and accompanying text.

51. See *supra* note 11 and accompanying text.

52. See *Roberts v. Careflite*, No. 02-12-00105-CV, 2012 WL 4662962, at *3 (2012) (finding that because the viewing of a Facebook post would not be considered highly intrusive by a reasonable person, the event that led to the firing could not be considered an invasion of privacy).

53. See *Bland v. Roberts*, 730 F.3d 368, 384-86 (4th Cir. 2013) (holding that "liking" a Facebook status is protected as speech under the First Amendment); see also *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283, at *6 (E.D. Ark. 2011) (holding that a

turned to the NLRB, arguing their social media posts are protected by the NLRA.⁵⁴

II. THE NLRA'S OPPROBRIOSNESS STANDARD

The NLRA is a fundamental piece of New Deal legislation⁵⁵ passed at a time of high hostility to employee organization.⁵⁶ Signed into law by President Franklin Delano Roosevelt, the NLRA has, for more than seventy-five years, been a cornerstone of American labor law.⁵⁷ The NLRA established the NLRB,⁵⁸ a quasi-judicial administrative agency tasked with eliminating the restraint on commerce caused by employers who deny employees the right to bargain collectively.⁵⁹

Two sections of the NLRA apply in cases that challenge social media terminations. The first is § 7,⁶⁰ which gives employees the right to engage in “concerted activities”⁶¹ for “mutual aid or

post on Facebook about recently terminated employees could constitute constitutionally-protected free speech).

54. See, e.g., Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012) (“This is the first case in which the Board has ruled on an unlawful discharge allegation involving Facebook posts.”).

55. See James Gross, *The NLRB: Then and Now*, 26 ABA J. LAB. & EMP. L. 213, 213–14 (Winter 2010).

56. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 33, 52 n.79, 151–52, 199–201 (1991) (citing examples of judicial hostility to employee organization).

57. See Gross, *supra* note 55, at 213.

58. 29 U.S.C. § 151 (2012).

59. See Gross, *supra* note 55, at 214–15; see also 29 U.S.C. §§ 153–56 (2012) (describing the organization of the NLRB).

60. 29 U.S.C. § 157 (2012).

61. *Id.* Whether conduct is concerted is analyzed under the *Meyers* cases. See *Meyers Indus., Inc.* (Meyers I), 268 N.L.R.B. 493, 496–97 (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., Inc.* (Meyers II), 281 N.L.R.B. 882 (1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). As announced in *Meyers I*, “In general, to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers I*, 268 N.L.R.B. at 497. *Meyers II* added to the analysis, clarifying that concerted activity includes “those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers II*, 281 N.L.R.B. at 887.

protection.”⁶² The second is § 8,⁶³ which makes it an “unfair labor practice”⁶⁴ to “restrain or coerce”⁶⁵ employees in the exercise of their § 7 rights.⁶⁶ Employees who believe their rights under the NLRA have been violated are encouraged to file a complaint with their regional NLRB office.⁶⁷ Non-unionized employees can likewise file complaints with the NLRB.⁶⁸

If conduct is found to be concerted activity undertaken for mutual protection,⁶⁹ the question remains whether it is protected by the

62. 29 U.S.C. § 157. Conduct is engaged in for purposes of “mutual aid or protection” when the employees “seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

63. 29 U.S.C. § 158 (2012).

64. *Id.*

65. *Id.*

66. *Id.*

67. The NLRA delineates a procedure for filing a complaint against an employer. *The Unfair Labor Practice Process Chart*, NAT'L LAB. REL. BD., <https://www.nlr.gov/resources/nlr-process/unfair-labor-practice-process-chart> (last visited Jan. 24, 2009). The NLRB's Regional Director investigates the complaint to determine whether formal action is merited. Temporary injunctive relief may be sought from the district court. *Id.* If the case involves unlawful boycotting or certain forms of picketing, the Regional Director must seek a temporary injunction. If formal action is merited, the case may reach an ALJ. The ALJ's decision becomes the decision of the Board, unless a timely exception is filed. *Id.* A timely exception leads to the dismissal of the case, a remedial order directed at the employer, or a return to the ALJ if there are objections. In the case of a dismissal, the employee may appeal to the federal court system for review; in the case of a remedial order, the employer may appeal to the federal court system for review, and the employee may apply to the federal court system to have his order enforced. *Id.*

68. It is a common misconception that the NLRB's jurisdiction is limited to the unionized workforce. *See supra* text accompanying note 26. The NLRB has taken strides to inform workers of their rights under the NLRA. *See NAT'L LAB. REL. BD., EMP. RIGHTS UNDER THE NAT'L LAB. REL. ACT*, available at <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-3788/employeeerightsposter-8-5x11.pdf>. Additionally, in 2011, the NLRB promulgated a rule requiring employers to post notice of employees' rights under the NLRA. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006 (Aug. 30, 2011) (codified at 29 C.F.R. pt. 104). Federal courts, however, have granted injunctions, holding that the NLRB lacks the authority to promulgate such a rule. *Chamber of Commerce of the U.S. v. NLRB*, 721 F.3d 152, 154 (4th Cir. 2013); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 963–64 (D.C. Cir. 2013).

69. When social media posts constitute concerted activity for mutual aid or protection is subject to debate. *See, e.g., Leonard & Hendry, supra* note 22, at 208–09. However, for purposes of this Note, the discussion is limited to the conditions under which otherwise protected concerted activity loses its protection due to opprobriousness.

NLRA.⁷⁰ The NLRA does not restrict all employers' rights in favor of employees.⁷¹ In certain cases, employees' conduct may be so violent, disloyal, unlawful, or in breach of contract as to be classified as "opprobrious" and therefore unprotected by the NLRA.⁷²

Concerted activity will seldom lose its protection because it is opprobrious.⁷³ As recognized by the Seventh Circuit:

[A] distinction is to be drawn between cases where employees engaged in concerted activities [that] exceed the bounds of lawful conduct in "a moment of animal exuberance" or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service, and that it is only in the latter type of cases that the courts find that the protection of the right of employees to full freedom in self-organizational activities should be subordinated to the vindication of the interests of society as a whole.⁷⁴

Therefore, if the conduct is concerted, the NLRA might protect conduct otherwise considered unlawful, and reserves the opprobriousness standard for only the most flagrant cases.⁷⁵ Employees are allowed, for example, to use sarcasm when engaging in concerted activity.⁷⁶ Likewise, the language used can be

70. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962) (holding that walking out of a factory in protest of its freezing temperature was a protected concerted activity and that it was not "indefensible"). However, where terminated employees engaged in protected concerted activity and a second activity that is not statutorily protected, courts utilize the *Wright Line* analysis to determine whether the employer violated the NLRA. *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983).

71. See *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 45 (1937) ("The [NLRA] does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.").

72. See *Wash. Aluminum Co.*, 370 U.S. at 17; *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

73. See *NLRB v. Ill. Tool Works*, 153 F.2d 811, 815-16 (7th Cir. 1946) (citations omitted) (finding an employee who may have committed libel against his employer had not engaged in conduct so opprobrious as to lose NLRA protection).

74. *Id.*

75. See, e.g., *id.*

76. See, e.g., *Pontiac Osteopathic Hosp.*, 284 N.L.R.B. 442, 452 (1986) ("[T]he fact that the [employees] used the literary techniques of satire and irony to make their point, as opposed to a more neutral factual recitation of their dissatisfaction, does not deprive the communication

unpleasant,⁷⁷ it can include curses,⁷⁸ and supervisors can be called hurtful names.⁷⁹

However, under certain circumstances, offensive language can violate the opprobriousness standard's high bar. In *Atlantic Steel*,⁸⁰ an employee called his supervisor an obscene name⁸¹ and was discharged.⁸² In determining that the discharge did not violate the NLRA, the Board announced a new standard for employee communications that include obscenities.⁸³ Under *Atlantic Steel*, four factors must be weighed: "(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."⁸⁴ The *Atlantic Steel* standard attempts to balance the employer's interest in an orderly work environment with the employee's right to engage in concerted activity.⁸⁵

that they produced of any protection under Section 7 of the [NLRA] to which it might otherwise be entitled.").

77. See, e.g., *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 249 (1997) (flippant language was not impermissibly opprobrious).

78. See, e.g., *Alcoa, Inc.*, 352 N.L.R.B. 1222, 1226 (2008) ("egotistical f—er" was not impermissibly opprobrious). Where profane employee speech is quoted in this Note, the language is provided as reported in the case or memoranda.

79. See, e.g., *Groves Truck & Trailer*, 281 N.L.R.B. 1194, 1195 (1986) (calling the company's CEO a "cheap son of a bitch" was not impermissibly opprobrious).

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

81. Witnesses' accounts differed. *Id.* at 814. The employee may have called the foreman a "lying son of a bitch" or a "m—f—liar." *Id.* Alternatively, he may have stated that the foreman had told a "m—f—lie." *Id.*

82. *Id.*

83. *Id.* at 817.

84. *Id.*

85. See Office of the General Counsel, NLRB, *Wolters Kluwer*, Case 18-CA-64873 (Nov. 28, 2011) [hereinafter *Wolters Kluwer Advice Memo.*] ("*Atlantic Steel* is generally used to analyze communications between employees and supervisors, and specifically focuses on whether those communications would disrupt or undermine shop discipline."). A recent Second Circuit case, *NLRB v. Starbucks*, limited the applicability of *Atlantic Steel*. 679 F.3d 70 (2d Cir. 2012). In *Starbucks*, the Second Circuit held that *Atlantic Steel* did not apply for cases in "public venues where customers are present." *Id.* at 79.

III. ADAPTING *ATLANTIC STEEL* FOR A SOCIAL MEDIA ANALYSIS

Although *Atlantic Steel* has not been adapted for use in social media cases by the Board,⁸⁶ the NLRB's General Counsel and some ALJs have utilized *Atlantic Steel* in such a context.⁸⁷ However, their analyses are inconsistent and result in confusion.⁸⁸

The NLRB's General Counsel suggested a modified test in the Second Memorandum that utilized the factors from *Atlantic Steel* and incorporated an analysis from a second case, *Jefferson Standard*.⁸⁹ While "*Atlantic Steel* is generally used to analyze communications between employees and supervisors, and specifically focuses on whether the communications would disrupt or undermine shop discipline,"⁹⁰ *Jefferson Standard* is used for "employee communications that are intended to appeal directly to third parties, with an eye toward whether those communications reference a labor dispute and are so disparaging of the employer or its product as to lose the protection of the [NLRA]."⁹¹ Recognizing that neither *Atlantic Steel* nor *Jefferson Standard* properly address the circumstances surrounding social media postings by employees about their employers,⁹² the Second Memorandum suggested "a modified

86. See *supra* note 33 and accompanying text.

87. See *infra* notes 89–121.

88. See *infra* notes 105–20.

89. Second Memo., *supra* note 20, at 24 ("Thus, we decided that a modified *Atlantic Steel* analysis that considers not only disruption to workplace discipline, but that also borrows from *Jefferson Standard* to analyze the alleged disparagement of the employer's products and services, would more closely follow the spirit of the Board's jurisprudence regarding the protection afforded to employee speech."). The facts of *Jefferson Standard* are as follows: during a labor dispute, employees in a union printed 5,000 handbills and distributed them on the picket line and at locations such as barber shops that were two or three blocks from the plant. NLRB v. Electrical Workers Local 1229 (*Jefferson Standard*), 346 U.S. 464, 467–68 (1953). They also mailed the handbills to local businesses. *Id.* The handbills stated that Jefferson Standard Broadcasting Company had inferior equipment and broadcasted inferior television programs in the city. *Id.* The handbills, however, made no reference "to the union, to a labor controversy or to collective bargaining." *Id.*

90. Second Memo., *supra* note 20, at 24.

91. *Id.*

92. *Id.* Neither test is appropriate because:

Considering the focus and traditional application of *Jefferson Standard*, we concluded that it did not provide a suitable framework to analyze the Facebook posting here. We determined that this Facebook discussion was more analogous to a conversation among employees that is overheard by third parties than an intentional dissemination

Atlantic Steel analysis that considers not only disruption to workplace discipline, but that also borrows from *Jefferson Standard* to analyze the alleged disparagement of the employer's products and services."⁹³

The General Counsel has provided guidelines for how to modify the *Atlantic Steel* standard to account for the unique aspects of social media postings.⁹⁴ In particular, the "place of the discussion" factor must be adjusted for a social media analysis.⁹⁵ Under the General Counsel's guidelines, first, the "place" factor should be used to analyze whether the Facebook postings disrupt the workplace.⁹⁶ This analysis comports with the traditional *Atlantic Steel* analysis.⁹⁷ Second, "place" and "nature of the outburst" should "merge to require consideration of the impact of the fact that the discussion could be viewed by third parties."⁹⁸ This change is necessary because by posting on a social media site, the comments are made public.⁹⁹ *Jefferson Standard* should then be incorporated to consider whether

of employer information to the public seeking their support, and thus that an *Atlantic Steel* analysis would be more appropriate. We recognized, however, that a Facebook posting does not exactly mirror the situation in an *Atlantic Steel* analysis, which typically focuses on whether the communications would disrupt or undermine shop discipline. We also noted that the *Atlantic Steel* analysis does not usually consider the impact of disparaging comments made to third parties.

Id.

93. *Id.*

94. *Id.* at 22–25.

95. The other *Atlantic Steel* factors—the outburst's subject matter and whether the outburst was provoked by an unfair labor practice—are unchanged. See *Wolters Kluwer* Advice Memo., *supra* note 85, at 4 ("The application of two of the *Atlantic Steel* factors to a social media posting is straight forward: the subject matter and whether the discussion was provoked by an unfair labor practice."); see also Second Memo., *supra* note 20, at 24–25 (conducting an analysis of the subject matter and unfair labor practice factors that does not incorporate special considerations that social media could warrant).

96. Second Memo., *supra* note 20, at 25.

97. *Atlantic Steel*, 245 N.L.R.B. 814, 816–17 (1979) (reasoning that the outburst took place on the production floor instead of in a grievance meeting and therefore was more likely to undermine shop discipline).

98. Second Memo., *supra* note 20, at 25.

99. However, the General Counsel recognized that social media posts are generally not viewed by a universal audience. *Id.* ("[G]iven that the conversation was also viewed by some small number of non-employee members of the public, we also considered the impact of the . . . posting on the Employer's reputation and business."). Alternatively, where the social media posts were limited to an audience of employees and former employees of the business, the General Counsel only utilized *Atlantic Steel*. Office of the General Counsel, NLRB, Phenom Hospitality, LLC, Case 04-CA-061044 at 6 (Jan. 17, 2012) (utilizing *Atlantic Steel* to determine opprobriousness).

the outburst was “disparaging” to the employer in such a way that it warrants a loss of protection.¹⁰⁰

The General Counsel applied this double analysis of “place” when it analyzed the case of an employee terminated because of her Facebook post criticizing her work environment.¹⁰¹ Under the first analysis of place, the General Counsel concluded that because “[t]he discussion occurred at home during non-work hours, [it] was not so disruptive of workplace discipline as to weigh in favor of losing protection under a traditional *Atlantic Steel* analysis.”¹⁰² Under the second analysis, the General Counsel found the comments were “not defamatory or otherwise so disparaging as to lose protection of the [NLRA].”¹⁰³

Alternatively, the General Counsel conflated the “place” analysis in an advice memorandum regarding *Wolters Kluwer*,¹⁰⁴ where an employer terminated an employee for tweeting a profane message about software used at work on his personal Twitter account.¹⁰⁵ Using the modified *Atlantic Steel* standard, the General Counsel concluded the tweet was not so opprobrious as to lose protection.¹⁰⁶ Analyzing “place” in concert with the “nature of the outburst,” the General Counsel reasoned that “[t]he nature of the discussion, considered in

100. Second Memo., *supra* note 20, at 23–24. The modified *Atlantic Steel* analysis therefore only incorporates the first prong of *Jefferson Standard*. *See id.* at 24.

101. *Id.* at 22–25. The Second Memorandum is a compilation of cases submitted to the Division of Advice in 2011. *Id.* at 1. In this particular case, the facts are as follows: the employee who brought the action under the NLRA worked at a popcorn packaging facility. *Id.* at 22. Prior to the relevant Facebook postings, the employee and several of her coworkers had discussed the operation manager’s negative attitude with one another and with other managers. *Id.* The employee and two of her coworkers had a conversation on Facebook in which they discussed a variety of things related to work. *Id.* at 22–23. The employee stated that she hated working at the popcorn packaging facility, wanted to find a new job, and believed that the operation manager was to blame for the problems at the facility. *Id.* at 23. Shortly after posting these messages, the employee was terminated for her comments on Facebook. *Id.*

102. *Id.* at 25.

103. *Id.*

104. *Wolters Kluwer* Advice Memo., *supra* note 85, at 1.

105. The employee’s tweet complained about a new software system by Ektron. He tweeted: “10x the horsepower but –10x productivity. suck my ass ektron.” *Id.* at 2. *Wolters Kluwer* was published nearly two months before the Second Memorandum. *Compare id.* at 1 (dated Nov. 28, 2011) with Second Memo., *supra* note 20, at 1 (dated Jan. 24, 2012). However, because the Second Memorandum is a compilation of decisions within the last year by the General Counsel, *id.*, it is unclear which case was decided first.

106. *Wolters Kluwer* Advice Memo., *supra* note 85, at 6.

light of the fact that it was not disruptive of the workplace but [could] be viewed by the public, also weighed in favor of protection.”¹⁰⁷ The General Counsel therefore considered both facets of “place” simultaneously, instead of separately, as in the Second Memorandum.¹⁰⁸

The General Counsel further mottled this dual analysis of “place” in a subsequent advice memorandum regarding *Detroit Medical Center*¹⁰⁹ to an employer who terminated an employee for Facebook posts about his coworkers.¹¹⁰ The General Counsel found that “[t]he location of the discussion—on Facebook—resulted in wide circulation of the [employee’s] comments among his coworkers and weigh[ed] against protection because those comments caused a major disruption in the workplace.”¹¹¹ The General Counsel, moreover, did not consider the impact of the employee’s comments on the employer’s image, because “the comments that were the basis for the [employee’s] discipline were directed against his fellow employees and did not disparage the Employer or the services it provides.”¹¹² Thus, the General Counsel only considered the effects of the comments on the workplace and not the impact it might have had on the employer’s reputation.

107. *Id.*

108. Second Memo., *supra* note 20, at 24–25.

109. *Detroit Medical Center* Advice Memo., *supra* note 29, at 1.

110. In one post, the discharged employee stated, “Well the jealous ass ghetto people that I work with took away my opportunity to advance my career today.” *Id.* at 2. In another post, the employee wrote about his opposition to the union at his employer: “United we stand to protect generations of bad lazy piece of shit workers!!!!” and “I can’t wait for Vanguard to get rid of the union at the end of the year[,] enjoy the unemployment line with your no-educated asses.” *Id.*

111. *Id.* at 5. Alternatively, in the Second Memorandum and *Wolters Kluwer*, the General Counsel found that because the employee made the statements on Facebook at home, there was little disruption to the workplace. Second Memo., *supra* note 20, at 5; *Wolters Kluwer* Advice Memo., *supra* note 85, at 6.

112. *Detroit Medical Center* Advice Memo., *supra* note 29, at 4–5. In the Second Memorandum, the General Counsel specified that the *Jefferson Standard* analysis would be of limited use to “analyze the alleged disparagement of the employer’s products and services.” Second Memo., *supra* note 20, at 24.

Like the General Counsel, some ALJs have utilized *Atlantic Steel* in social media cases.¹¹³ In *Triple Play*,¹¹⁴ the ALJ analyzed the discharged employees' Facebook comments¹¹⁵ under *Atlantic Steel* and *Jefferson Standard*, and found the discharge violated the NLRA.¹¹⁶ The ALJ did not merge the analyses of "place" and "nature of the outburst" but instead considered each in turn, incorporating the *Jefferson Standard* concerns under the nature of the outburst analysis.¹¹⁷ Analyzing place, the ALJ reasoned the place of the conversation—Facebook—actually "militate[d] in favor of a finding that [the employees'] comments did not lose the protection of the [NLRA]. The comments occurred during a Facebook conversation, and not at the workplace itself, so there [was] *no possibility* that the discussion would have disrupted [the] work environment."¹¹⁸ While

113. See *Butler Medical Transport, LLC*, NLRB, Case 5-CA-97810, at 3 n.1 (Div. of Judges Sept. 4, 2013) and *Triple Play Sports Bar & Grille*, NLRB, Case 34-CA-12915 (Div. of Judges Jan. 3, 2012).

114. *Triple Play*, Case 34-CA-12915. *Triple Play* was published after *Wolters Kluwer* but before the Second Memorandum. Compare *id.* at 1 (dated Jan. 3, 2012) with *Wolters Kluwer* Advice Memo., *supra* note 85, at 1 (dated Nov. 28, 2011) and Second Memo., *supra* note 20, at 1 (dated Jan. 24, 2012). *Triple Play*, unlike *Wolters Kluwer* and the Second Memorandum, was decided by an ALJ and not the General Counsel. See *Triple Play*, Case 34-CA-12915, at 1 (decided by ALJ Lauren Esposito). However, attorneys from the General Counsel's office argued on behalf of the discharged employees and presented a brief that utilized *Atlantic Steel* and *Jefferson Standard*. See *id.* at 7 (citations omitted) ("Applying the Board's analysis articulated in [*Atlantic Steel*], General Counsel argues that given the location and subject matter of the Facebook discussion, the nature of the 'outburst,' and the extent to which the outburst was provoked by [the employer's] conduct, [the employees'] comments on [the] Facebook account remained protected activity. General Counsel also argues that [the employees'] comments did not constitute disparaging and disloyal statements unprotected under [*Jefferson Standard*] and its progeny."). Therefore, it is reasonable to assume that the ALJ who decided the case was aware of the General Counsel's modified *Atlantic Steel* analysis.

115. *Triple Play*, Case 34-CA-12915, at 9–14. The Facebook conversation regarded a mistake that Triple Play Sports Bar & Grille (the "Restaurant") made in calculating taxes that resulted in their employees owing additional money to the state at the year's end. *Id.* at 3. Upset, a former employee posted about it on Facebook, and some current employees and customers commented on the status, posting negative statements about the Restaurant and its owners. *Id.* at 3–4. Comments by employees included: "I FUCKING OWE MONEY TOO!" and "Such an asshole" (referring to the owner). *Id.*

116. *Id.* at 14.

117. *Id.* at 9–14. Compare *id.* with *Wolters Kluwer* Advice Memo., *supra* note 86, at 6 and Second Memo., *supra* note 20, at 22–25.

118. *Triple Play*, Case 34-CA-12915, at 10 (emphasis added); see *supra* note 109 and accompanying text. But see *Detroit Medical Center* Advice Memo., *supra* note 29, at 5 (finding that a Facebook conversation did disrupt work).

analyzing the place factor, the ALJ noted that customers viewed the conversation, but found there was “insufficient evidence” the employer’s business was in any way harmed by the customers’ viewing of the messages.¹¹⁹ Incorporating *Jefferson Standard* into the nature of the outburst analysis, the ALJ considered whether the Facebook posts constituted a “disparaging attack upon the quality of a company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and its income,”¹²⁰ and found they did not.¹²¹

IV. FURTHER ADAPTING *ATLANTIC STEEL* TO CREATE A WORKABLE STANDARD FOR OPPROBRIOUSNESS IN SOCIAL MEDIA

The NLRB and courts should adopt a modified *Atlantic Steel* standard as a uniform standard for opprobriousness in social media cases. First, there is clear need¹²² for a well-articulated standard for analyzing when social media posts that would otherwise constitute protected concerted activity¹²³ lose their protection due to the opprobriousness of the language. Without a clear standard, employees cannot understand when their rights have been violated, and employers do not realize when they have crossed the line by firing an employee for an NLRA-protected post.¹²⁴

Second, a modified *Atlantic Steel* test has many strengths. *Atlantic Steel* is deep-rooted in NLRB jurisprudence, which lends credibility

119. *Triple Play*, Case 34-CA-12915, at 10. The ALJ reasoned that because the Facebook posts could only be viewed by the “friends” of the people posting on Facebook, the posts were not “specifically directed to the public at large.” *Id.* at 13.

120. *Id.* at 11 (citing *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953)).

121. *Id.* at 13 (reasoning that the comments “were not a gratuitous attempt to injure [their employer’s] business . . . [or] an attack on [their employer’s] product. They did not address, for example, the quality of food, beverages, services, or entertainment at [the] restaurant and bar, but were solely related to the employees’ owing taxes to the state.”).

122. See *supra* note 22 and accompanying text. From 2010 to 2013, more than one hundred social media cases were filed with the NLRB. See Post, *supra* note 20.

123. Likewise, there is a need for clearer guidelines as to when social media posts constitute protected concerted activities. However, this Note focuses on the opprobriousness analysis. See *supra* note 69 and accompanying text.

124. Because non-unionized employers and employees are frequently unaware of their rights under the NLRA, this issue is further exacerbated in non-unionized workplaces. See *supra* notes 26 and 68 and accompanying text.

to its application.¹²⁵ It is also a flexible test that can balance the actualities of the workplace.¹²⁶ Furthermore, the test recognizes that a social media post can both negatively impact the company's image and the well-being of its employees.¹²⁷

Although a modified *Atlantic Steel* test has many strengths, it also has potential shortcomings. While its deep roots in NLRB jurisprudence can be a strength, that might also be a weakness. A modified test is limited by the historical holdings of *Jefferson Standard* and *Atlantic Steel*. For example, in *Detroit Medical Center*, the General Counsel refused to consider *Jefferson Standard* because the employee had disparaged his coworkers, and *Jefferson Standard* only governs disparaging remarks about the employer or his goods and services.¹²⁸ Instead, the General Counsel used the *Atlantic Steel* test, which does not consider the impact social media posts have on an employer's reputation with third parties,¹²⁹ who may draw inferences about the employer based on an employee's comments

125. The Board and ALJs have utilized the *Atlantic Steel* test since it was decided in 1979, and many federal courts have affirmed their decisions. *See, e.g.,* *Media Gen. Operations v. NLRB*, 560 F.3d 181, 186–89 (4th Cir. 2009) (affirming NLRB's decision, which applied *Atlantic Steel* to determine whether a termination was lawful). *Jefferson Standard* is likewise deeply rooted, as it was decided in 1953. *See Jefferson Standard*, 346 U.S. at 472. *Jefferson Standard* has also been utilized and affirmed by the Board, ALJs, and the federal courts. *See, e.g.,* *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 48 (1st Cir. 2008) (affirming NLRB's decision, which considered *Jefferson Standard* when finding employee's conduct was protected concerted activity).

126. For example, in *Detroit Medical Center*, the General Counsel found that because the post was on Facebook and therefore viewable by many of the employee's coworkers, the work environment was disrupted. *Detroit Medical Center Advice Memo.*, *supra* note 29, at 5. Alternatively, in *Wolters Kluwer*, the General Counsel reasoned that because the employee made the statements on Twitter, there was little disruption to the workplace. *Wolters Kluwer Advice Memo.*, *supra* note 85, at 6. This difference illustrates that the standard allows for consideration of whether there actually was disturbance at work, rather than assuming that a social media post will always or will never disturb the work environment. *But see Triple Play*, Case 34-CA-12915, at 10 (“The comments occurred during a Facebook conversation, and not at the workplace itself, so there is *no possibility* that the discussion would have disrupted [the] work environment.”) (emphasis added).

127. *See* Second Memo., *supra* note 20, at 24 (stating that the modified *Atlantic Steel* standard “considers not only disruption to workplace discipline, [but also] the alleged disparagement of the employer's products and services.”).

128. *Detroit Medical Center Advice Memo.*, *supra* note 29, at 4–5.

129. *See* Second Memo., *supra* note 20, at 24 (“[T]he *Atlantic Steel* analysis does not usually consider the impact of disparaging comments made to third parties.”).

about his coworkers.¹³⁰ Likewise, because the *Atlantic Steel* test was developed for outbursts on the shop floor¹³¹ and not outbursts made online, the test is often stretched and pulled to accommodate the social media situation.¹³²

Moreover, a federal court has held *Atlantic Steel* should not be stretched to cover situations too far outside of its original facts.¹³³ In *Starbucks*, the Second Circuit held *Atlantic Steel* did not apply when the employee shouted obscenities at his employer in front of customers.¹³⁴ Instead, the *Atlantic Steel* test was strictly reserved for comments made in front of the employer and other employees.¹³⁵ If the Second Circuit's interpretation of *Atlantic Steel* is adopted in other circuits, it could prevent utilizing the doctrine in social media cases where the Internet is considered a public space viewable to customers.

Despite these limitations, the *Atlantic Steel* test provides a strong framework for the analysis of when a social media post that would

130. Although this example is not one of concerted activity, it is nonetheless illustrative of how social media posts about employees may lead to negative inferences about their employers. In 2013, a Facebook post featuring a photograph of a Taco Bell employee licking taco shells became a viral internet sensation and impugned Taco Bell's reputation. *See Taco Bell Employee Appears to Be Licking A Bunch of Taco Shells In This Facebook Photo*, HUFFINGTON POST, June 4, 2013, http://www.huffingtonpost.com/2013/06/03/taco-bell-worker-licking_n_3377709.html [hereinafter *Taco Bell*] (stating that the photo "may make us think twice before buying our next Doritos Locos Taco"). In essence, the post is a disparaging statement about one employee—this employee does not care about food safety—but a disparaging inference can be drawn about the employer.

131. *See* Second Memo., *supra* note 20, at 24 (recognizing "that a Facebook posting does not exactly mirror the situation in an *Atlantic Steel* analysis, which typically focuses on whether the communications would disrupt or undermine shop discipline"). The employee in *Atlantic Steel* cursed at his foreman on the production floor. 245 N.L.R.B. 814, 814 (1979).

132. Social media complicates the analysis, because the message is potentially seen by third parties and could result in harm to the employer's reputation. In general, the decisions thus far recognize that while social media posts have a broader audience than a statement made on the production floor, they do not gain a universal audience. *See, e.g., Wolters Kluwer Advice Memo.*, *supra* note 85, at 4 (The post "may also be viewed by some small number of non-employee members of the public."). However, the facts of the cases also show how quickly social media posts can circulate. *See id.* at 2 (stating that even though none of the employee's coworkers followed him on Twitter, someone from Ektron nevertheless saw the tweet).

133. *NLRB v. Starbucks*, 679 F.3d 70, 79 (2d Cir. 2012).

134. *Id.*

135. *Id.* ("When the Board formulated its four-factor test in *Atlantic Steel* for determining whether an employee's obscenities would cause the employee to lose the protection of the [NLRA], it was not considering obscenities in a public place in the presence of customers.").

otherwise be protected concerted activity loses its protection because of the opprobrious nature of its language. Following *Starbucks*, however, the NLRB¹³⁶ and courts must recognize that using this test in a social media context does not require a traditional *Atlantic Steel* or *Jefferson Standard* analysis.¹³⁷ Before relying on *Atlantic Steel*, *Jefferson Standard*, and their progeny in a social media setting, the NLRB and courts must consider whether social media gives rise to the same concerns as in traditional settings and adapt the factors as necessary.

First, the NLRB and courts should consider the most traditional elements of the *Atlantic Steel* test: what is the subject matter of the employee's post and was it provoked by an unfair labor practice?¹³⁸ Where the subject matter is unrelated to a traditionally protected topic of conversation, the balance would tip towards a finding of opprobriousness; where the post was provoked by an unfair labor practice, the balance would tip towards a finding of protection. This portion of the test is unaffected by its application to social media.

Second, the NLRB and courts must consider any effect the post has on the day-to-day operations of the workplace.¹³⁹ Although social media posts are generally external to the workplace, they can result in serious disruption to the work environment and to other employees.¹⁴⁰ Therefore, as in *Detroit Medical Center*, courts should consider the actual impact a post has on the work environment, even if the post occurred outside of the work environment.¹⁴¹

136. "The NLRB," as used here and throughout the proposal, includes the policy and decision makers within the agency, including the General Counsel and the ALJs.

137. See Leonard & Hendry, *supra* note 22, at 224 ("The lesson [of *Starbucks*] is that *Atlantic Steel* is not always appropriate . . .").

138. See Wolters Kluwer Advice Memo., *supra* note 85, at 4 ("The application of two of the *Atlantic Steel* factors to a social media posting is straight forward: the subject matter and whether the discussion was provoked by an unfair labor practice.").

139. See Second Memo., *supra* note 20, at 24 ("[A] modified *Atlantic Steel* analysis that considers . . . disruption to workplace discipline . . .").

140. For example, in *Detroit Medical Center*, other employees vandalized the locker of the employee who posted on Facebook. *Detroit Medical Center* Advice Memo., *supra* note 29, at 3. The vandalism caused the employee to fear returning to work. *Id.* Likewise, an employee who learned her coworkers posted negative messages about her on Facebook reportedly became so distraught over the posts that she had a heart attack. Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 12 (2012).

141. The analysis should therefore depart from *Triple Play*, where the ALJ reasoned that there was "no possibility" that a Facebook discussion could impact the work environment.

Third, the NLRB and courts must consider the nature of the outburst. In traditional cases not involving social media, this factors-based analysis includes consideration of the substance of the outburst, such as whether the employee used profane language.¹⁴² Minor outbursts of profanity should be protected, as they traditionally have been.¹⁴³ Continuing this protection makes sense in a social media context—profanity on the internet is commonplace and not shocking.¹⁴⁴ Despite the risk that a customer would see the social media posts,¹⁴⁵ as in *Triple Play*,¹⁴⁶ this fact should not be dispositive.¹⁴⁷

Fourth, the NLRB and courts must borrow from *Jefferson Standard* to ask whether the post potentially harms the company.¹⁴⁸ While not requiring proof of harm¹⁴⁹ for this factor to weigh in favor of finding opprobriousness, there should be a legitimate probability the social media post could, in fact, harm the company. This inquiry should be highly fact-specific. A smaller company, for example, is more likely to be harmed than a larger, well-entrenched company;¹⁵⁰ a comment made to one's "friends" on Facebook is less likely to harm the company than a viral video;¹⁵¹ and a post stating that "X

Triple Play Sports Bar & Grille, NLRB, Case 34-CA-12915 (Div. of Judges Jan. 3, 2012).

142. See, e.g., *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1054–55 (D.C. Cir. 2001) (An analysis under "nature of outburst" includes a discussion of both the language the employee used and whether the employee threatened violence.).

143. See *supra* notes 77–79 and accompanying text.

144. See Matthew J.X. Malady, *No Offense*, SLATE (July 1, 2013), http://www.slate.com/articles/life/the_good_word/2013/07/swear_words_old_and_new_sexual_and_religious_profanity_giving_way_to_sociological.html.

145. A customer seeing the social media posts could potentially raise the Second Circuit's concerns in *Starbucks*. See *NLRB v. Starbucks*, 679 F.3d 70, 79–80 (2d Cir. 2012); see also *supra* notes 135–39 and accompanying text.

146. See *Triple Play*, Case 34-CA-12915, at 10.

147. *Id.* at 4, 10 (holding that an employee's protected concerted activity did not lose its protection when customers saw that she called the owner an "asshole" on Facebook).

148. See Second Memo., *supra* note 20, at 24 (using "a modified *Atlantic Steel* analysis that considers . . . the alleged disparagement of the employer's products and services . . .").

149. Compare with *Triple Play*, Case 34-CA-12915, at 10 ("[T]here is insufficient evidence to find that [the employees'] comments resulted in some sort of harm to [the employer's] business.").

150. For example, although McDonald's #McDStories incident was surely embarrassing, there is no indication that the company was significantly harmed. See *supra* note 44 and accompanying text.

151. However, the fact that the employee intended a post to only be circulated to his friends does not actually stop the post from reaching a far greater audience. For example, in 2013, a

Company did” something is more likely to harm the employer than a statement that does not identify the company.¹⁵² Additionally, the *Jefferson Standard* limitation seen in *Detroit Medical Center* should be discarded, because social media posts that do not pointedly disparage the employer or its services still have the potential to hurt an employer’s reputation.¹⁵³

Finally, it is critical that the opprobriousness standard remain a high standard—in other words, protected concerted activity should seldom lose its protection for opprobriousness, even in the social media context.¹⁵⁴ This is so for a number of reasons. First, it is not clear if employees’ social media posts actually and seriously injure employers’ reputations.¹⁵⁵ Additionally, a high standard leads to more predictable results.¹⁵⁶ Furthermore, and perhaps most importantly, only social media comments that are in fact concerted activity receive protection.¹⁵⁷ Therefore, the majority of social media posts by employees are likely unprotected, because they simply are not concerted activity and an opprobriousness review is irrelevant.

Although this Note’s approach does not create a bright line test, a flexible and workable test is more desirable because of the continually changing technology of the Internet. For example, employers might fear viral messages that result in significant

photo of a Taco Bell employee licking taco shells at work became a viral hit, even though the photo was initially posted to a private Facebook wall. See *Taco Bell*, *supra* note 130 and accompanying text.

152. See Leonard & Hendry, *supra* note 22, at 224–25 (noting that the social media decisions to date fail to consider “how or if the employee has identified to his Facebook friends the name of his employer and/or his affiliation with that employer”).

153. See *Detroit Medical Center* Advice Memo., *supra* note 29, at 5.

154. See *NLRB v. Ill. Tool Works*, 153 F.2d 811, 815–16 (7th Cir. 1946) (reasoning that protection should only be lost in “flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service”).

155. See generally *supra* note 44; see also *Triple Play Sports Bar & Grille*, NLRB, Case 34-CA-12915 (Div. of Judges Jan. 3, 2012) (“insufficient evidence” that the posts harmed the employer).

156. See *Ill. Tool Works*, 153 F.2d at 815–16 (Only “flagrant cases” lose protection.).

157. The NLRA only protects employees engaged in collective activity. See 29 U.S.C. § 151 (2012). Personal grievances are not protected by the NLRA. See *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 833 n.10 (1984) (“[I]f an employer were to discharge an employee for purely personal ‘gripping,’ the employee could not claim the protection of § 7.”).

negative publicity for their companies.¹⁵⁸ But changes in social media could limit this risk. Snapchat, for example, has recently become a major social media platform that allows users to send each other messages that disappear in seconds,¹⁵⁹ thereby minimizing one major concern of employers. As social media platforms transform,¹⁶⁰ the concerns of employers and employees will likewise change, and a flexible standard will best respond to these needs.

CONCLUSION

By adopting and adapting the modified *Atlantic Steel* test for use in social media cases, the NLRB and courts will have a consistent standard for analyzing whether otherwise protected concerted activity loses its protection because of opprobriousness. The standard responds to an employer's concern that an employee's social media posts can hurt both the workplace and the company's reputation to third parties, yet still provides protection for an employee to engage in concerted activity on social media. Although social media creates a greater risk for employers than traditional employee speech around the water cooler,¹⁶¹ the risks for employers are not so great that otherwise protected concerted activity should be curtailed.

In many ways, this proposal merely adds a procedure to the current analysis of social media cases, but this procedure is important.¹⁶² With inexact standards, neither employees nor their

158. According to a recent survey, the greatest concern employers had about social media was negative comments about their company. GRANTTHORNTON, SOCIAL MEDIA RISKS & REWARDS 8 (Sept. 2013), available at <http://www.grantthornton.com/~media/content-page-files/advisory/pdfs/2013/ADV-social-media-survey.ashx>.

159. Jenna Wortham, *A Growing App Lets You See It, Then You Don't*, N.Y. TIMES, Feb. 8, 2013, available at http://www.nytimes.com/2013/02/09/technology/snapchat-a-growing-app-lets-you-see-it-then-you-dont.html?_r=0.

160. See, e.g., Jayson DeMers, *The Top 7 Social Media Marketing Trends That Will Dominate 2014*, FORBES, Sept. 24, 2013, available at <http://www.forbes.com/sites/jaysondemers/2013/09/24/the-top-7-social-media-marketing-trends-that-will-dominate-2014/> (predicting changes to social media for the coming year for the marketing industry).

161. See *Hispanics United of Buffalo*, No. 3-CA-27872, 2011 WL 3894520 (Div. of Judges Sept. 2, 2011); see also Leonard & Hendry, *supra* note 28, at 200 (arguing that analogizing social media posts to the company's "water cooler" is improper).

162. Procedure and transparency may be particularly important for the NLRB, because it is frequently lambasted by its opponents. See Steven Greenhouse, *Labor Board's Exiting Leader Responds to Critics*, N.Y. TIMES, Aug. 29, 2011, available at <http://www.nytimes.com/2011/08/>

employers can understand the contours that exist regarding NLRA protection of social media speech. Inevitably, this will result in either filings with the NLRB and ultimately litigation, or the forfeiture of employees' rights.¹⁶³ The modified *Atlantic Steel* test can provide employers with a framework to analyze employment policies and decisions regarding social media, in order to avoid violations of statutory rights and to protect employees' concerted activity.¹⁶⁴

30/business/national-labor-boards-leader-leaves-amid-criticism.html?pagewanted=all (discussing political criticism of the NLRB under President Obama and his predecessors). Although the NLRA has been in effect for more than seventy-five years, the NLRB continues to face political opposition. *Id.* The same actions that the NLRB's supporters would call incremental are seen as monumental by detractors. *See id.*

163. Moreover, the limited awareness of non-unionized employees of their statutory rights, combined with the minimal statutory remedies provided to an employee under the NLRA, minimizes the incentive of employers to act in full compliance with the law. *See supra* text accompanying note 25; *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1553–54 (2002).

164. Employment law should be proactive in that employers should take steps ahead of time to ensure compliance with the law. In other areas of employment law, this emphasis on taking proactive steps is more apparent. For example, in preventing discrimination, scholars argue for changes in law and policy that would reward employers who took proactive steps to eliminate issues of unequal opportunity. *See* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law For "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 61 (1998).