Just a Joke? Employers' Use of Social Media as an Unfair Labor Practice under the National Labor Relations Act

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I. INTRODUCTION

On May 20, 2018, while the United Auto Workers Union ("UAW") was conducting an organizing campaign of the California Tesla plant,

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Elon Musk, the CEO of Tesla, Inc., tweeted, "Nothing stopping Tesla team at our car plant from voting union.[1] Could do so tmrw [sic] if they wanted. But why pay union dues & [sic] give up stock options for nothing?"[2] In separate tweets and Twitter threads, Musk also posted that the "UAW does not have individual stock ownership as part of the compensation at any other company," and that if they unionized, employees would lose the benefit of stock options because "UAW does that."[3] Musk's tweets, especially the tweet dated May 20, 2018, led organizers from the UAW to file an unfair labor practice, claiming that the social media post violated the workers' rights granted under Section 7 of the National Labor Relations Act ("NLRA").[4] The NLRA protects employees from employers' "interference with, restrain or coer[cion]" of employees exercising their rights under Section 7 of the Act.[5] These rights include self-organizing, forming and joining labor organizations, bargaining collectively, and engaging in other protected collective activities.[6] This protection extends to statements made by employers, including those made on social media.[7]

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1 Josh Eidelson, *Musk Stock-Option Tweet Violates Labor Law, UAW Alleges*, AP NEWS (May 24, 2018, 6:13PM), https://apnews.com/article/business-united-auto-workers-elon-musk-california-laws-7ba8c89209dd42c4a6c9f41b82fc6359. While at the time of Musk's post on May 20, 2018, the platform was still called Twitter, since then, Musk purchased Twitter and rebranded the social media platform to X. *See* Kate Conger and Lauren Hirsch, *Elon Musk Completes $44 Billion Deal to Own Twitter*, NY TIMES (Oct. 27, 2022), https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html; Irina Ivanova, *Twitter is Now X. Here's What That Means*, CBS NEWS MONEY WATCH (Jul. 31, 2023, 5:18 PM), https://www.cbsnews.com/news/twitter-rebrand-x-name-change-elon-musk-what-it-means/#text2C2220he20added-Twitter20was20acquired20by20X20Corp20both20to20ensure20freedomgoing20back20and20forth20E2809320likeE280A6; Ryan Mac & Tiffany Hsu, *From Twitter to X: Elon Musk Begins Erasing an Iconic Internet Brand*, NY TIMES (Jul. 24, 2023), https://www.nytimes.com/2023/07/24/technology/twitter-x-elon-musk.html. At the time this Comment was written, Twitter is now officially known as X. This Comment will refer to Twitter instead of X in regard to posts that were made when the company was still named Twitter.

2 Elon Musk (@elonmusk), TWITTER (May 21, 2018, 2:44 AM), https://twitter.com/elonmusk/status/998454539941367808?s=20&t=Yy-NAF0R_Y9RrWdQU5mQjw.

3 Tesla, Inc. v. NLRB, 63 F.4th 981, 989 (5th Cir. 2023), *reh'g en banc granted, vacated*, 73 F.4th 960 (5th Cir. 2023).

4 *Id.*

5 National Labor Relations Act, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169); *see also* 29 U.S.C. § 157.

6 29 U.S.C. § 157.

7 *See, e.g.*, Starbucks, 2023 NLRB LEXIS 35, *102–03 (N.L.R.B. January 31, 2023) (Facebook); Miklin Enterprises, Inc., 361 NLRB 283, 290 (N.L.R.B. August 21, 2014) (same).

Musk has not been the only employer to use Twitter to make comments directed toward his employees regarding unionization. In June 2019, the publisher of *The Federalist* and executive officer of FDRLST Media, Ben Domenech, tweeted, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine."[8] This tweet was posted on the same day that unionized Vox Media employees walked off the job.[9] An individual who saw this tweet, but did not work for or have any connection to the employer, filed an unfair labor practice charge.[10] Domenech's tweet, the resulting National Labor Relations Board's ("NLRB"), and subsequent decisions from the United States Court of Appeals for the Third Circuit generated debate about the use of context surrounding employer statements, and the use of social media in deciding unfair labor practices claims.[11]

This Comment will argue that the Board should seek stronger remedies that incorporate social media against employers who are committing unfair labor practices through their social media platforms, but then claim to be "joking" on them. This Comment will also assert that the Fifth Circuit, upon rehearing *Tesla v. NLRB*, should hold that Musk's tweet was an unfair labor practice and must be deleted. Part II will examine the NLRA's background and its establishment of unfair labor practices and protected concerted activities. This section will also discuss employer use of different media that were held to be unfair labor practices under the NLRA, as well as the recent court decisions in *FDRLST Media, LLC v. NLRB*[12] and the pending court decision in *Tesla, Inc. v. NLRB*.[13] Next, Part III will analyze the court's discussion in *FDRLST Media* of the totality of the circumstances test in determining coercion under the NLRA.[14] Additionally, this part will examine "jokes" as an unfair labor practice, including the test for coercion, uses of humor that courts have held to be an unfair labor practice, and uses held not to be an unfair labor practice. Part III will end with a discussion of how the NLRB should seek stronger remedies for violations of the NLRA. Part IV will conclude this Comment with a discussion of the ramifications of the

8 FDRLST Media, LLC v. NLRB, 35 F.4th 108, 113 (3d Cir. 2022).

9 *Id.*

10 *Id.*

11 *See* Hassan A. Kanu, *The Federalist Hit With Labor Complaint Over Founder's Tweets*, BL (Sept. 27, 2019, 7:13 PM), https://news.bloomberglaw.com/daily-labor-report/the-federalist-hit-with-labor-complaint-over-founders-tweets.

12 *FDRLST Media*, 35 F.4th at 108.

13 Tesla, Inc. v. NLRB, 63 F.4th 981, 986 (5th Cir. 2022), *reh'g en banc granted, vacated*, 73 F.4th 960 (5th Cir. 2023).

14 *See* NLRB v. Delta Gas., Inc., 840 F.2d 309, 311 (5th Cir. 1988).

recent Board and court decisions, including *FDRLST Media v. NLRB* and *Tesla v. NLRB*.

II. BACKGROUND

A. The National Labor Relations Act

The NLRA has been "protect[ing] workplace democracy" since its enactment in 1935.[15] The NLRA, also known as the Wagner Act, was passed "[t]o diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes."[16] The original NLRA was amended by the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959.[17] The Taft-Hartley Act amended the NLRA to protect against unfair labor practices committed by unions and to ensure an employee's right to not join a union or labor organization.[18] The Taft-Hartley Amendments shifted the national labor relations policy from supporting unionization to becoming neutral.[19] Some of the major changes introduced with the Taft-Hartley Act were outlawing the secondary boycott and closed shop and permitting "right to work" laws and the open shop.[20] In addition, these amendments allowed employers to express their views and opinions about unions if there was a union drive in their workplace.[21] The Landrum-Griffin Act amended the Taft-Hartley Act with the intention of curbing corruption and misconduct within labor organizations.[22] It encouraged democracy within union government and decisions.[23] With the passage of the NLRA and its

15 N.L.R.B., *National Labor Relations Act*, https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act (last visited Feb. 18, 2024).

16 National Labor Relations Act, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169).

17 N.L.R.B., *1947 Taft-Hartley Substantive Provisions*, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited Feb. 18, 2024) [hereinafter *1947 Taft-Hartley*]; N.L.R.B., *1959 Landrum-Griffin Act*, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act (last visited Feb. 18, 2024) [hereinafter *1959 Landrum-Griffin*].

18 *See 1947 Taft-Hartley*, *supra* note 17.

19 *See* Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, 493 RSCH. HANDBOOK ON THE ECON. OF LAB. AND EMP. L. 427, 436, 442 (2012).

20 *Id.* at 442–43.

21 *Id.* at 443.

22 *See 1959 Landrum-Griffin*, *supra* note 17.

23 *See* Herman Benson, *Union Democracy and the Landrum-Griffin Act*, 11 N.Y.U. REV. OF L. AND SOC. CHANGE 153, 155 (1982).

amendments came a "new national labor policy" that has continued until today.[24]

1. The National Labor Relations Board

The National Labor Relations Board ("NLRB" or "the Board") was established by the NLRA.[25] It has exclusive jurisdiction over labor disputes that arise under the NLRA,[26] empowering it to address Section 7[27] and Section 8[28] claims.[29] Parties may appeal NLRB decisions to an appropriate United States Court of Appeals.[30] When the NLRB was created, it was intended to be non-partisan, with the interests of labor, management, and the public to be equally represented.[31] However, the perception of the NLRB has since changed.[32] The Board has been described as partisan and ideological, "chastised" as a "political animal."[33] This sentiment is reflected by the fact that the NLRB is often described as the current President's Board, such as the "Trump Board," "Obama Board," and "Bush Board," based on presidential appointees.[34]

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24 N.L.R.B., *1935 Passage of the Wagner Act*, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act (last visited Feb. 18, 2024).

25 29 U.S.C. § 153(a).

26 *See* Trs. of the E. States Health & Welfare Fund v. Crystal Art Corp., 2000 U.S. Dist. LEXIS 15091, at *7 (S.D.N.Y. Oct. 10, 2000) (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)) ("the NLRB has 'primary jurisdiction' over matters unique to labor management relations arising under the NLRA including resolving unfair labor practices and representational issues.").

27 29 U.S.C. § 157.

28 29 U.S.C. § 158.

29 *See* Turner v. Vancom Transp., 916 F. Supp. 949, 951 (E.D. Mo. 1996).

30 *See* N.L.R.B., *Decide Cases*, https://www.nlrb.gov/about-nlrb/what-we-do/decide-cases, (last visited Feb. 18, 2024).

31 Erik Loomis, *The Perils of a Partisan NLRB*, DEMOCRACY J. (Oct. 11, 2016, 2:55 PM), https://democracyjournal.org/arguments/the-perils-of-a-partisan-nlrb/.

32 *See* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y. J. 221, 223 (2004–2005) ("Attacks on Board objectivity were made as early as 1939 and have continued periodically for more than half a century. Still, the most recent pattern of pro-management decisions is sufficiently striking to warrant further exploration of the Board's role in implementing and developing labor relations policy."); *see generally* Celine McNicholas et al., *Unprecedented: The Trump NLRB's Attack on Workers' Rights*, ECON. POL'Y INST. (Oct. 16, 2019), https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/.

33 Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223, 226 (2016).

34 *Id.* at 279; *see also* McNicholas et al., *supra* note 32, at 1, 8, 14 (differentiating between the "Trump board" and the "Obama board"). McNicholas et al. define the "Trump Board" as referring to the "decisions and actions by President Donald Trump's Republican appointees to the NLRB . . . 'Trump NLRB' does not refer to Democratic NLRB

The fact that the President appoints the Board members[35] and the structure of the appointment process itself has led to the Board being viewed as on a "seesaw," swinging back and forth between Democratic and Republican, labor-friendly and pro-management.[36] This characterization harms both employers and employees who count on the Board to be objective and fair in its decisions, as Board decisions greatly impact both labor and management.

2. Section 7 Rights

Section 7 of the NLRA protects the rights of employees by guaranteeing them 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 concerted activities for the purpose of collective bargaining."[37] Later amendments to the NLRA left Section 7 rights unchanged, including the right to self-organize, to create and become a member of a labor union, to collectively bargain, and to engage in concerted activities.[38] However, the current version of the NLRA also guarantees employees "the right to refrain from any or all of such activities."[39] Section 7 extends to all communications, including print and online communications.[40]

a. Concerted Activity under the NLRA

While Section 7 of the NLRA states that employees have the right to take part in concerted activities, the Act does not define the term.[41] The Supreme Court has clarified that it "embraces the activities of

member Lauren McFerran . . . or former Democratic NLRB member (and Chairman) Mark Pearce." McNicholas et al., *supra* note 32, 1 n.1).

35 *See* N.L.R.B., *About NLRB*, https://www.nlrb.gov/about-nlrb/who-we-are/the-board (last visited Feb. 18, 2024).

36 William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L. J. 1501, 1506 (2015) ("the characterization of the Board as on a 'seesaw.'") (quoting Bernard D. Meltzer, *Organizational Picketing and The NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962) [https://doi.org/10.2307/1598680]).

37 29 U.S.C. § 157.

38 *Id.* at 453 ("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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection.").

39 29 U.S.C. § 157.

40 *See* RHCG Safety Corp. and Constr. & Gen. Bldg. Laborers, Loc. 79, LIUNA, 365 N.L.R.B. No. 88, at *1 (N.L.R.B. June 7, 2017) (holding that Section 7 protected communications via text message).

41 29 U.S.C. § 152.

employees who have joined together in order to achieve common goals."[42] To be classified as a concerted activity, the action must be "concerted"—meaning that it must relate to forming a group or organization, acting on behalf of a group, or assisting a group.[43] Concerted activity is not defined by the amount of employees who take part in an action. In fact, some individual activity is protected as concerted activity.[44] However, for the Board to determine that an action was a concerted activity, the activity cannot be completed only by one employee on behalf of that one employee.[45] Instead, the action must "be engaged in with or on the authority of other employees."[46] An individual employee's actions may be considered "concerted" as long as the actions impact all employees, especially if the activity is on behalf of other employees' interests or is an action intended to enforce a collective bargaining agreement.[47] The fact that the individual employee may be acting out of self-interest does not disqualify the act from being considered a concerted activity.[48]

The NLRB and courts held employees' use of media to be a "concerted activity," thus protecting employees' use of media under Section 7 of the NLRA.[49] Concerted activity includes written communications, such as an employee's letter to an editor of a local newspaper expressing support for workers in labor disputes.[50] In *Maine Coast Regional Health Facilities*, the court held that this was concerted activity and was thus protected under Section 7 of the NLRA even though the employee did not discuss her letter with anyone prior to sending it to the editor.[51] There is no requirement that communications must be made directly to the employer to be considered a concerted activity.

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42 NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984); *see also* Meyers Indus., 268 N.L.R.B. 493, 494 (1984).

43 *Meyers Indus.*, 268 N.L.R.B. at 494; *see also* Meyers Indus., 281 N.L.R.B. 882, 885 (N.L.R.B. Sept. 30, 1986).

44 *See Meyers Indus.*, 281 N.L.R.B. at 885.

45 *Meyers Indus.*, 268 N.L.R.B. at 497.

46 *Id.*

47 *See* NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 499–500 (2d Cir. 1967); NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984); *Meyers Indus.*, 268 N.L.R.B. at 494–95.

48 *Interboro Contractors*, 388 F.2d at 499 ("[I]t is doubtful that a selfish motive negates the protection that the Act normally gives to Section 7 rights.").

49 *See* NLRB v. Me. Coast Reg'l Health Facilities, 999 F.3d 1, 7–8 (1st Cir. 2021); Pilot Dev't. Southwest, 317 N.L.R.B. 962, 966 (N.L.R.B. June 26, 1995).

50 *Me. Coast Reg'l Health Facilities*, 999 F.3d at 7–8.

51 *Id.*

While employees have a right to concerted activities under Section 7, the actions taken by employees cannot be "such detrimental disloyalty as to provide 'cause'" for an employer to "discharge and discipline those responsible."[52] The protections guaranteed to employees by Section 7 do not encompass employee communications that "disparag[e] the employer's reputation or the quality of its product, nor maliciously motivated employee communications."[53] Even if the employee communications are not "malicious," if they are "materially false" and adversely affect the employer, then the communications will not be protected.[54] Therefore, when an "employee 'attacks' his employer, whether or not he is engaged in 'a concerted activity wholly or partly within the scope of those mentioned in § 7,'" this action is not protected by Section 7 if the attack includes "insubordination, disobedience or disloyalty."[55] An employee may be lawfully terminated for such attacks.[56] In addition, employees cannot communicate to the public using "reckless disregard of . . . its truth or falsity."[57]

3. Unfair Labor Practices

An unfair labor practice is a violation of the NLRA by an employer or a labor organization.[58] Section 8 details what constitutes an unfair labor practice under the statute.[59] Under Section 8(a)(1), it is "an unfair labor practice for an employer 'to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7' of the Act."[60] The employer will be guilty of an unfair labor practice under Section 8(a)(1) if there is a concerted activity and "the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue

52 MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 826 (8th Cir. 2017) (quoting NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464, 471 (1953)).

53 *Pilot Dev't. Southwest*, 317 N.L.R.B. at 966.

54 St. Luke's Episcopal-Presbyterian Hosps. v. NLRB, 268 F.3d 575, 580 (8th Cir. 2001).

55 Endicott Interconnect Techs., Inc. v. NLRB, 453 F.3d 532, 535 (2006) (quoting NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464, 475, 477–78 (1953)).

56 *Id.*; NLRB v. Local Union No. 1229, IBEW, 346 U.S. 464, 472 (1953) ("There is no more elemental cause for discharge of an employee than disloyalty to his employer.").

57 Montefiore Hosp. & Med. Ctr. v. NLRB, 621 F.2d 510, 517 (2d Cir. 1980).

58 SHRM, *What is an Unfair Labor Practice by Management?*, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/managementunfairlaborpractice.aspx (last visited Feb. 18, 2024).

59 29 U.S.C. § 158.

60 NLRB, *What's The Law?*, https://www.nlrb.gov/about-nlrb/rights-we-protect/whats-law/employers (last visited Feb. 18, 2024).

(e.g., discharge) was motivated by the employee's protected concerted activity."[61] Since the passage of the NLRA, the NLRB and courts have held a variety of actions by employers and unions to be unfair labor practices. An unfair labor practice is an action taken by an employer that dissuades employees from becoming union members or interfering with employees' Section 7 Rights.[62]

For example, an employer cannot bestow employee benefits or promise higher wages to employees before union elections to encourage employees to vote against unionization.[63] Nor can an employer take actions "soliciting grievances and promising to remedy the problems complained of in the course of a union campaign."[64] Threatening to terminate, terminating an employee, and threatening to close a company because of unionization are "hallmark" unfair labor practices.[65] To determine whether an employer committed an unfair labor practice, the Board looks for anti-union motivations behind the employer's actions.[66] On the other hand, examples of labor organizations' unfair labor practices include engaging in acts threatening employees with job loss unless they are supportive of the union, striking over issues that do not relate to working conditions or employment, and taking unlawful action against the employer.[67]

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61 Meyers Indus., 268 N.L.R.B. 493, 497 (1984).

62 *See* Kamtech, Inc. v. NLRB, 46 F. App'x 265, 270 (6th Cir. 2002).

63 *See* Beverly Enters. v. NLRB, 139 F.3d 135, 140 (2d Cir. 1998).

64 *Id.* (citing J.J. Newberry Co. v. NLRB, 645 F.2d 148, 151–52 (2d. Cir. 1981)); *see also* HarperCollins S.F. v. NLRB, 79 F.3d 1324, 1330 (2d Cir. 1996) ("[I]t is a violation of § 8(a)(1) of the Act to seek grievances from employees and promise to rectify them if the demand for collective bargaining is dropped.").

65 NLRB v. Gen. Fabrications Corp., 222 F.3d 218, 230 (6th Cir. 2000) ("An employer's threat to close down if the company unionizes is a 'hallmark' violation of the NLRA.") (citing Ind. Cal-Pro, Inc. v. NLRB, 863 F.2d 1292, 1302 (6th Cir. 1988)); *see also* Ctr. Constr. Co. v. NLRB, 482 F.3d 425, 437 (6th Cir. 2007); N.L.R.B., *Interfering With Employee Rights (Section 7 & 8(a)(1))*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 (last visited Feb. 18, 2024).

66 *Gen. Fabrications*, 222 F.3d at 226–27, 228–29, 231; *see also* Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB, 921 F.2d 1275, 1280 (1990) (citing Teamsters Local Union No. 171 v. NLRB, 863 F.2d 946, 955 (D.C. Cir. 1988)); NLRB v. Cook Family Foods, 47 F.3d 809, 816 (6th Cir. 1995) ("The threshold test for determining whether an employee's discharge constitutes an unfair labor practice is whether the discharge was motivated by 'anti-union animus.'"); NLRB v. Consol. Freightways Corp., 651 F.2d 436, 438 (6th Cir. 1981) ("The proper test in determining whether the discharge or failure to hire an employee is an unfair labor practice is whether the anti-union animus was a dominant motive.").

67 N.L.R.B., *Employer/Union Rights and Obligations*, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations, (last visited Feb. 18, 2024).

Under Section 8(a)(1) of the NLRA, employers may express anti-union views to their employees as long as this expression is not threatening or coercive.[68] To be considered a threat, "an employer's statement must warn of adverse consequences in a way that 'would tend to coerce a reasonable employee' not to exercise her labor rights."[69] To qualify as coercion, the court asks whether a reasonable employee could be coerced.[70] The intent of the employer and proof of whether an employee was actually coerced is irrelevant to the court's analysis.[71]

The unfair labor practice charge must be brought to the NLRB.[72] The NLRA does not limit those who may file an unfair labor practice.[73] An employer, union, or individual unaffiliated with the employer or union may file an unfair labor practice charge.[74] The filing individual does not have to be an injured or aggrieved party.[75] For example, in *FDRLST Media,* an individual who saw the employer's tweet online filed the unfair labor practice with the NLRB, even though he was not an employee of FDLRST Media.[76]

a. Employer Statements as Unfair Labor Practices

As long as an employer's statement contains a threat or coercion against employees and their involvement in a labor organization or protected collected action, it will be held as an unfair labor practice regardless of the forum that the employer used to express anti-union

68 FDRLST Media v. NLRB, 35 F.4th 108, 122 (3d Cir. 2022); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

69 *FDRLST Media*, 35 F.4th at 122 (quoting NLRB v. Garry Mfg. Co., 630 F.2d 934, 938 (3d Cir. 1980)).

70 *Id.*

71 *Id.*

72 *See* N.L.R.B., *Unfair Labor Practice Charges Filed Each Year*, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges (last visited Feb. 18, 2024) [hereinafter *Unfair Labor Practice Charges Filed*] ("Charges alleging Unfair Labor Practices are filed . . . at NLRB regional offices, prompting an investigation by regional field examiners and attorneys.").

73 *Unfair Labor Practice Charges Filed*, *supra* note 72 ("Charges alleging Unfair Labor Practices are filed by individuals, unions or employers . . .").

74 *Unfair Labor Practice Charges Filed*, *supra* note 72.

75 *FDRLST Media*, 35 F.4th at 115; 29 C.F.R. § 102.9.

76 *FDRLST Media*, 35 F.4th at 115–19 (reaffirming that Section 10(b) of the NLRA permits "any person" to file an unfair labor practice charge with the NLRB). In this case, even though the charging party "was not personally aggrieved by Domenech's tweet," his unfair labor practice charge was actionable, and the NLRB had the authority to address it).

animus.[77] The Board answers the question of whether an employer's statement or action consisted of coercion or threat from the viewpoint of employees, not the employer.[78] However, even if an employer's statement itself does not include a "threat, coercion nor promise of benefit," the Board will often look to whether such statements should be held as coercive "in the context of other unfair labor practices or considering the totality of the circumstances."[79] Therefore, employers are permitted under the NLRA to "say nearly anything" as long as it is not a threat or coercion.[80] An employer's statements are viewed under an objective test, which does not take into account the employer's motive or if the threat or coercion succeeded.[81] Instead, the Board examines an employer's conduct by whether it reasonably could be viewed as "tending to interfere with the free exercise of employee rights under the Act."[82] However, the Board may look to the employer's motive and whether the conduct was likely to succeed or fail in coercing employees.[83]

The Board has held that statements made through forms of virtual communication are unfair labor practices.[84] In *RHCG Safety Corporation and Construction & General Building Laborers, Local 79, LIUNA*, the Board held that the employer's text to an employee was unlawful interrogation under the totality of the circumstances test.[85] The totality of the circumstances test is a standard where the NLRB and courts make

77 *See* NLRB v. Cook Family Foods, 47 F.3d 809, 816 (6th Cir. 1995) ("The threshold test for determining whether an employee's discharge constitutes an unfair labor practice is whether the discharge was motivated by 'anti-union animus.'"); NLRB v. Consol. Freightways Corp., 651 F.2d 436, 437 (6th Cir. 1981) ("The proper test in determining whether the discharge or failure to hire an employee is an unfair labor practice is whether the anti-union animus was a dominant motive.").

78 Henry I. Siegel Co. v. NLRB, 417 F.2d 1206, 1214 (6th Cir. 1969) ("Moreover, the Board is justified in determining the question of coercion or threat of reprisal from the standpoint of employees over whom the employer has a measure of economic power.").

79 Miller Elec. Pump, 334 N.L.R.B. 824, 830 (N.L.R.B. July 30, 2001).

80 *Id.*

81 *Id.* (citing American Freightways Co., 124 NLRB 146, 147 (1959)).

82 *Id.* ("The Board will not ordinarily look to the Employer's motive, or whether the alleged coercion succeeded or failed, but whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act.").

83 *Id.* (citing Rossmore House, 269 NLRB 1176 (1984), *aff'd*. 760 F.2d 1006 (9th Cir. 1985)).

84 *See* MikLin Enterprises, Inc. v. NLRB, 861 F.3d 812, 827 (8th Cir. 2017) (upholding Board's finding that manager's and supervisors' Facebook posts and comments were unfair labor practices).

85 RHCG Safety Corp. and Constr. & Gen. Building Laborers, Local 79, LIUNA, 365 NLRB No. 88, *1 (N.L.R.B. June 7, 2017).

decisions based on all of the circumstances, or all of the facts present, and make a decision on a case-by-case basis.[86] In *RHCG Safety Corporation*, the employer sent a text stating, "[Are you] working for Redhook or [are you] working in the union?" which the Board found suggests that the employee could not work for the employer while also supporting the union.[87] This was determined to be a threat because, under the NLRA, employees have the right to work under their employer while supporting or joining a union.[88] The Board and courts have determined that employers' statements made through a variety of media are unfair labor practices under the NLRA.[89] No precedent requires that an employer make an oral statement for it to be held as an unfair labor practice.[90]

b. Social Media as an Unfair Labor Practice

The Board has upheld the right to use social media as a protected concerted activity.[91] Workers may use Facebook, Twitter, and other forms of social media to discuss workplace issues and grievances, including "shar[ing] information about pay, benefits, and working conditions with coworkers."[92] Employee social media posts, such as Facebook posts, have been held as protected under Section 7, even if the post contains obscenities.[93] With each new social media platform, the

86 Hotel Emps. & Rest. Emps. Union, Local 11 v. NLRB, 760 F.2d 1006, 1009 (9th Cir. 1985); *see also* Rossmore House, 269 N.L.R.B. 1176, 1178 (N.L.R.B. April 25, 1984) (applying the totality of the circumstances test to employer interrogations of employees).

87 *RHCG Safety*, 365 NLRB No. 88, at *1 (N.L.R.B. June 7, 2017).

88 *Id.*

89 *See, e.g.*, *RHCG Safety*, 365 NLRB No. 88, at *1 (N.L.R.B. June 7, 2017) (employer's text message to employee was unlawful); *MikLin Enter.*, 861 F.3d at 827 (manager's and supervisors' Facebook posts were unlawful); NLRB v. Intertherm, Inc., 596 F.2d 267, 272–73 (8th Cir. 1979) (supervisor's verbal "joke" was unlawful).

90 *See RHCG Safety*, 365 NLRB No. 88, at *7 n.4 (N.L.R.B. June 7, 2017) (text message); *MikLin Enter.*, 861 F.3d at 826–27 (Facebook post); Starbucks, 2023 NLRB LEXIS 35 (N.L.R.B. January 31, 2023) at *102–33 (same).

91 N.L.R.B, *Social Media*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/social-media-0 (last visited Feb. 18, 2024) [hereinafter *Social Media*] ("Using social media can be a form of protected concerted activity.").

92 *Id.*

93 Three D, LLC v. NLRB, 629 F. App'x 33, 37 (2d Cir. 2015) ("The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of social media use."); *see also* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 124–26 (2d Cir. 2017) (holding that employee's Facebook post containing vulgar curse words directed at his supervisor was not "opprobrious conduct" nor did it exceed NLRA protections because the post made union-related comments).

trend of workers discussing work-related issues continues. For example, creators on the social media platform, TikTok, have highlighted various aspects of work, including mental health in the workplace, remote work, and workplace discrimination.[94] A common trend among workplace discussions on TikTok is the use of comedy.[95]

While the NLRA protects employees' concerted activity, this protection does not extend to employers, who already have increased power in bargaining and the overall labor relationship.[96] Therefore, employers' use of social media is analyzed differently by the Board and courts than employees' use. For example, in *Starbucks*, 2023 NLRB LEXIS 35, the Administrative Law Judge ("ALJ") found that a Starbucks assistant manager's Facebook post was coercive and was an unlawful threat.[97] During Starbucks employees' unionization drive, an assistant manager posted multiple Facebook posts discussing the union and the changes that he believed would occur, including employees losing their healthcare and tuition benefits at a local college.[98] The ALJ held that the Facebook post violated the NLRA because the assistant manager threatened to reduce workers' benefits if they unionized.[99] As one of the remedies, the ALJ ordered that Starbucks direct the assistant manager to delete the post online, citing *FDLRST Media* and *Tesla, Inc.* as support.[100] While this decision is not binding beyond the parties in the action, it reflects how employers and members of management have used social media posts to express anti-union sentiments and coerce and threaten employees to discourage them from unionizing.[101]

An employer's use of social media to target employees for exercising their Section 7 rights is unlawful.[102] In *Miklin Enterprises, Inc.*, the Board held that an assistant manager and two supervisors violated Section 8(a)(1) of the NLRA with their Facebook posts listing an

94 Sarah Roach, *Meet the TikTokers Shedding Light on all the Biggest Workplace Issues*, PROTOCOL (April 20, 2022), https://www.protocol.com/workplace/tiktok-corporate-creators.

95 *Id.*

96 *See* 29 U.S.C. § 157.

97 Starbucks, 2023 NLRB LEXIS 35, *102–03 (N.L.R.B. January 31, 2023).

98 *Id.* at *49.

99 *Id.* at *103.

100 *Id.* at *105.

101 This case was transferred to be decided by the National Labor Relations Board. Starbucks, 2023 NLRB LEXIS 37, *1 (NLRB January 31, 2023).

102 *See* MikLin Enter., Inc. v. NLRB, 861 F.3d 812, 827 (8th Cir. 2017) ("We conclude that substantial evidence supports the Board's conclusion that the supervisors' public effort to disparage and degrade union leader Boehnke restrained or coerced MikLin employees in the exercise of their Section 7 rights.").

employee's contact information.[103] In this case, the assistant manager encouraged employees and management to harass a pro-union employee through a Facebook page that was anti-union.[104] The manager posted the union supporter's phone number on this Facebook page, which was used by other employees, and asked them to call him.[105] On top of this, the supervisors encouraged employees to share a degrading photograph of the employee.[106] Both the Board and the United States Court of Appeals for the Eighth Circuit held that the manager's and supervisors' posts were unlawful because they were coercive and discouraged employees from exercising their Section 7 rights.[107] By publicly posting on Facebook and humiliating an employee who supported the union, management impacted the reasonable employee, who would likely be dissuaded from supporting the union out of fear of being the subject of the next Facebook post.

Similarly, in *Cayuga Medical Center at Ithaca, Inc.*, the ALJ found that a supervisor's Facebook posts were unlawful threats that had a "reasonable implication" of being coercive.[108] In this case, a pro-union employee posted on Facebook to encourage employees to support his wife, another employee, who was testifying in a hearing for her sexual harassment charge against the employer.[109] In his Facebook post, the employee named specific supervisors.[110] One of the supervisors, who was mentioned in the employee's post, posted on Facebook twice in response.[111] The supervisor's post included what the court called "a threat of unspecified reprisals" to retaliate against the employee for his

103 Miklin Enter., Inc., 361 NLRB 283, 290 (N.L.R.B. August 21, 2014).

104 *Id.*

105 *Id.*

106 *Id.* Two supervisors commented under the picture of the employee on the anti-union Facebook page. One wrote, "Bahahaha [sic] omg [sic] this is great [sic] can we please post these everywhere [sic]." *Id.* (alteration in original). The other posted, "Bahahahahah! [sic] I love this, [sic] you [sic] should put these up everywhere [sic]." *Id.* (alteration in original).

107 *Id.* ("The supervisors' encouragement of employees to disseminate widely this degrading picture of an employee leader of the Union would reasonably intimidate both Boehnke and other employees who would not want to be subject to the same kind of humiliation and ridicule, thereby dissuading them from supporting the Union."). *MikLin Enter.*, 861 F.3d at 827 ("[t]he degrading posts targeted Boehnke for his general support of the [Industrial Workers of the World] and thus coerced other employees not to engage in protected activity. We enforce this portion of the Board's Order.").

108 Cayuga Med. Ctr. at Ithaca, Inc., 2016 NLRB LEXIS 766, *67–73 (N.L.R.B. October 28, 2016).

109 *Id.* at *62–63.

110 *Id.*

111 *Id.* at *63–66.

social media post.[112] The ALJ also held that the supervisor's second Facebook post, where the supervisor referred to union activists, was unlawful as it explicitly threatened employees with job loss if they followed the union activists.[113] The Board adopted the ALJ's holding that the employer violated Section 8(a)(1) of the NLRA "by threatening employees on Facebook with unspecified reprisals and with job loss in retaliation for employees' protected and concerted activities."[114] The Court of Appeals for the D.C. Circuit denied the employer's petition for review and granted the Board's cross-application for enforcement.[115]

c. FDRLST Media v. NLRB

In *FDRLST Media, LLC. v. NLRB*, the court addressed whether the employer's tweet constituted an unfair labor practice.[116] In this case, the unfair labor practice in dispute concerned statements made in a tweet written by Ben Domenech, the "executive officer of FDRLST Media and publisher of *The Federalist*," a conservative internet magazine.[117] In June 2019, Domenech tweeted, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine," on the same day that unionized Vox Media employees walked off of the job.[118] Domenech posted this tweet from his personal account, which had over 80,000 followers.[119] Of the seven employees, at least one viewed Domenech's tweet.[120] The Board's New York Regional Director "issued an unfair labor practice" against FDRLST Media, alleging that the tweet "threatened employees with reprisals and implicitly threatened employees with loss of their jobs if they formed or supported a union."[121]

112 *Id.* at *70 (finding that the supervisor's posting of "don't mess with me" and "I can go from nice to a bitch in 20 second flat" were not actual threats but were implied threats).

113 *Id.* at *71–72 ("[T]he post warns that following 'the people who are sending you email, sending letters to your home and calling to join [] their cause . . . will lead you to unemployment.").

114 Cayuga Med. Ctr. at Ithaca, Inc., 365 NLRB No. 170, *212 (N.L.R.B. December 16, 2017).

115 Cayuga Med. Ctr. at Ithaca, Inc. v. NLRB, 748 F. App'x 341, 341 (D.C. Cir. 2018).

116 FDRLST Media, LLC v. NLRB, 35 F.4th 108, 113 (3d Cir. 2022).

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

The ALJ held that the tweet was an unfair labor practice as it violated Section 8(a)(1) of the NLRA.[122] The ALJ found that Domenech's tweet threatened FDRLST Media employees as it was directed towards them and in "the totality of the circumstances . . . had no other purpose except to threaten the FDRLST Media employees with unspecified reprisal."[123] While the employer argued that the tweet was a joke, the ALJ disagreed, reasoning that "threats allegedly made in a joking manner violate" the NLRA.[124] The Board affirmed the ALJ's conclusion, entered the cease-and-desist order that the ALJ recommended, and ordered FDRLST Media "to direct Domenech to delete his tweet."[125] The employer appealed the Board's ruling to the United States Court of Appeals for the Third Circuit.[126] The court disagreed with the Board's determination that the tweet was an unfair labor practice.[127] It held that the Board's finding that "a reasonable employee would view Domenech's tweet as a threat is not supported by substantial evidence."[128]

The *FDRLST Media* court highlights that determining whether an employer's statement is a "threat" cannot be done in a "vacuum" because "[c]ontext is an important part of language."[129] The court found that the Board was wrong in not factoring context into its decision.[130] It held that the tweet was not a threat and, thus, not an unfair labor practice because the court could not find that a "*reasonable* FDRLST Media employee would view Domenech's tweet as a plausible threat of reprisal."[131] The reasoning behind the court's finding was that the image of the salt mine that the tweet invoked was "bizarre" and "comical" and

122 FDRLST Media, LLC v. NLRB, 35 F.4th 108, 114 (3d Cir. 2022).

123 *Id.* (quoting FDRLST Media, LLC, 370 NLRB No. 49, 5 (N.L.R.B. November 24, 2020)).

124 *Id.* (quoting *FDRLST Media*, 370 NLRB No. 49 at 5).

125 *Id.*

126 *Id.* at 115. The court found that, under the NLRA, the Board had authority to hear this charge, even though it was brought by someone who was not affected by the alleged unfair labor practice or had any connection to the employer.

127 *Id.* at 121.

128 FDRLST Media, LLC v. NLRB, 35 F.4th 108, 121–22 (3d Cir. 2022); *see also* Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 606 (3d Cir. 2016) ("'Substantial evidence [requires] more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' including 'whatever in the record fairly detracts from [the evidence's] weight.'") (quoting Tri-State Truck Serv., Inc. v. NLRB, 616 F.2d 65, 69 (3d Cir. 1980)).

129 *FDRLST Media*, 35 F.4th at 121.

130 *Id.*

131 *Id.* at 123–24.

there was no "labor friction" between the employer and employees.[132] The court also noted that Domenech posted from his personal Twitter, which has not been used as a form of communication to employees in the past.[133] In addition, the court discussed the specific platform that was used and the employer's choice to use Twitter to make his statement.[134] The employer's use of Twitter to make the anti-union statement was a factor cutting against the tweet being coercive or threatening because the platform "encourages users to express opinions in exaggerated or sarcastic terms."[135] Here, the employer's harkening back to "salt mines" and threatening to send employees "back to the salt mine" was held to be humorous, and not an unfair labor practice.

d. Tesla v. NLRB

In May 2018, while the UAW was conducting an organizing campaign for the California Tesla plant, Elon Musk tweeted,

> Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw [sic] if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare.[136]

The Board held that Musk's anti-union tweet was an unfair labor practice as it "coercively threatened that employees would lose their stock options if they selected the Union as their representative."[137] Alongside other directives, the Board ordered Musk to delete the unlawful 2018 tweet.[138] Tesla appealed.[139]

Following the court's decision in *FDLRST Media*, Tesla argued that the ruling supported its position that Musk's tweet was lawful, stating that "[i]n both cases, the Board inexplicably ignored critical context to

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132 *Id.*

133 *Id.* at 124.

134 *Id.* at 126.

135 FDRLST Media, LLC, v. NLRB, 35 F.4th 108, 126 (3d Cir. 2022).

136 Elon Musk, (@elonmusk), TWITTER (May 21, 2018, 2:44 AM), https://twitter.com/elonmusk/status/998454539941367808?s=20&t=Yy-NAF0R_Y9RrWdQU5mQjw; Josh Eidelson, *Musk Stock-Option Tweet Violates Labor Law, UAW Alleges*, BLOOMBERG, (May 24, 2018), https://www.bloomberg.com/news/articles/2018-05-24/musk-stock-option-tweet-violated-u-s-labor-law-uaw-alleges.

137 Tesla, Inc. 370 N.L.R.B. No. 101, 9 (N.L.R.B. March 25, 2021).

138 *Tesla, Inc.* 370 N.L.R.B. No. 101 at 10.

139 Petition for Review at 1, Tesla, Inc. v. NLRB, No. 21-60285 (5th Cir. Apr. 2, 2021), https://apps.nlrb.gov/link/document.aspx/09031d45833f846c.

mislabel innocent tweets as threats."[140] Tesla argued that Musk's tweet would not be understood as a threat by a reasonable Tesla employee.[141] On the other side, the Board also cited *FDRLST Media* and argued that the court's holding supported the Board's arguments in this case, including the standard for coercion and deference towards the Board's judgment.[142] The Board also distinguished this case from *FDRLST Media* by arguing that Musk's tweet was not a joke, especially in the context of the other unfair labor practice complaints against Tesla, including the firing of employees who were union organizers.[143]

On March 31, 2023, the Fifth Circuit affirmed the NLRB decision and held that Musk's tweet was "unlawfully coercive."[144] In analyzing whether Musk's tweet was an unlawful threat, the court found that "a statement implying that unionization will result in the loss of benefits, without some explanation or reference to the collective-bargaining process, economic necessity, or other objective facts, is a coercive threat."[145] Since Musk's tweet did not include an explanation that the loss of stock options was due to the UAW and the collective bargaining process, the court held that substantial evidence supported the NLRB's determination that Musk's statement was an implied threat to take this action as a form of retaliation.[146] Therefore, the Fifth Circuit granted the NLRB's cross-application to enforce the NLRB order for Musk to delete the tweet.[147]

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140 Response by Intervenor at 1, Tesla, Inc. v. NLRB, No. 21-60285 (5th Cir. May 25, 2022), https://apps.nlrb.gov/link/ document.aspx/09031d4583790ee2.

141 Response by Intervenor at 2, Tesla, Inc. v. NLRB, No. 21-60285 (5th Cir. May 25, 2022), https://apps.nlrb.gov/link/document.aspx/09031d4583790ee2.

142 Respondent's Citation to Supplemental Authority, Tesla, Inc. v. NLRB, No. 21-60285 (5th Cir. May 24, 2022), https://apps.nlrb.gov/link/document.aspx/09031d458378c92f.

143 Respondent's Citation to Supplemental Authority, Tesla, Inc. v. NLRB, No. 21-60285 (5th Cir. May 24, 2022), https://apps.nlrb.gov/link/document.aspx/09031d458378c92f.

144 Joshua Fox & David Gobel, *UPDATE: Fifth Circuit Affirms NLRB Ruling in Tesla Case, Ordering Elon Musk to Delete Union-Related Tweet*, LAB. REL. UPDATE, PROSKAUER, (April 3, 2023), https://www.laborrelationsupdate.com/2023/04/articles/nlrb/update-fifth-circuit-affirms-nlrb-ruling-in-tesla-case-ordering-elon-musk-to-delete-union-related-tweet/.

145 Tesla, Inc. v. NLRB, 63 F.4th 981, 992 (5th Cir. 2023), *reh'g en banc granted, opinion vacated*, 73 F.4th 960 (5th Cir. 2023).

146 *Id.*

147 *Id.* at 993; s*ee also* Jeffrey Rhodes, *Tesla Violated the NLRA When CEO Posted Prediction on Twitter*, SHRM (June 15, 2023), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-tesla-union.aspx.

The Fifth Circuit's decision in March of 2023 seemed like a huge victory for the Tesla workers unionizing, the UAW, and the labor movement overall.[148] This victory, however, was short-lived. On July 21, 2023, the Fifth Circuit granted Tesla's petition for rehearing en banc.[149] Thus, the Fifth Circuit's March 31, 2023, holding was vacated.[150]

III. ANALYSIS

A. Use of Context

Employers cannot make explicit or veiled threats on social media and then hide behind claims of humor to prevent legal consequences. While an employer may argue that their statement was not coercive or a threat because it was intended as a joke, the employer's belief or intention is not what matters. Instead, the employees' understanding and reasonable belief of what the employer's words meant determines whether the employer's statement qualifies as an unfair labor practice.[151] As long as the employer's words "have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party."[152] Therefore, if reasonable employees read the employer's statement and feel coerced or interpret the statement as threatening their Section 7 rights, the employer's statement is a threat, regardless of how the statement is labeled.

When determining whether an employer's statements constitute a threat under the NLRA, courts view the employer's words in

148 *See Elon Musk 2018 Tweet Unlawfully Threatened UAW Efforts at Tesla, Court Rules*, CBS NEWS BAY AREA (Mar. 31, 2023, 4:17 PM), https://www.cbsnews.com/sanfrancisco/news/tesla-elon-musk-court-rules-2018-tweet-unlawfully-threatened-uaw-efforts/ ("'This a great victory for workers who have the courage to stand up and organize in a system that is currently stacked heavily in favor of employers like Tesla who have no qualms about violating the law,' said UAW Region 6 Director Mike Miller."); *see also* AP, *Threat or Not? Elon Musk Gets New Hearing on Tweet About Tesla Workers' Stock Options*, ECON. TIMES (Jul. 22, 2023, 8:59 AM), https://economictimes.indiatimes.com/tech/technology/threat-or-not-elon-musk-gets-new-hearing-on-tweet-about-tesla-workers-stock-amid-uaw-union-effort/articleshow/102029555.cms?from=mdr ("The March ruling was vacated - snatching away, at least for now, a UAW legal victory.").

149 Tesla, Inc. v. NLRB, 73 F.4th 960, 960 (5th Cir. 2023).

150 *Id.*

151 *See* Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954) ("So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.").

152 *Id.*

"the context of the totality of the surrounding circumstances."[153] The Board and courts apply this totality of the circumstances test in evaluating whether the employer's words or actions constitute coercion.[154] When doing so, statements cannot be cherry-picked.[155] Additionally, the Board and courts do not automatically deem an employer's "abrasive and hostile" statements as threats.[156] Instead, the Board and courts look to the totality of the circumstances—meaning the context surrounding the employer's statement—to determine whether the employer's statement was coercive or threatening.[157] As part of the totality of the circumstances analysis, courts consider whether the employer's statement consists of or includes a threat against an employee because the employee engaged in a protected activity.[158]

The Board and courts also use context when evaluating employee interrogations to determine whether the employer violated the NLRA.[159] The context surrounding an employer's statements can help courts determine whether the employer threatened employees with

153 TRW, Inc. v. NLRB, 654 F.2d 307, 313 (5th Cir. 1981); *see also* Cmty. Organized Relief Effort, 2023 N.L.R.B. LEXIS 175, *30–31 (N.L.R.B. April 17, 2023) (defining "totality of the circumstances" as looking not only "at the statement at issue, but also *the circumstances surrounding the context in which the statement was made.* In essence, [the ALJ] had to view all of the facts and factors that led up to the manager making such a statement; not simply interpret the words within the statement itself.") (emphasis in original).

154 *See* NLRB v. Delta Gas., Inc., 840 F.2d 309, 311 (5th Cir. 1988); Henry I. Siegel Co. v. NLRB, 417 F.2d 1206, 1214 (6th Cir. 1969) ("In making its determination, the Board has the right to consider the total context within which the activities occur."); *Cmty. Organized Relief Effort*, 2023 NLRB LEXIS 175 at *28 (citing Am. Freightways Co., 124 NLRB 146 (N.L.R.B. July 16, 1959)) ("Accordingly, the basic test to find an 8(a)(1) violation is whether, under the totality of the circumstances, the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Section 7 of the Act.").

155 *Cmty. Organized Relief Effort*, 2023 NLRB LEXIS 175 at *31 ("in determining whether an ambiguous statement is an unlawful threat due to a person's prior protected concerted activity, I cannot cherry pick and emphasize the problematic statements standing alone, rather I must evaluate the statement(s) ***in context with the totality of the circumstances at issue***.") (emphasis in original).

156 *TRW*, 654 F.2d at 313.

157 *Id.; see also Cmty. Organized Relief Effort*, 2023 NLRB LEXIS 175 at *31 (finding that an employer's email, viewed in its totality of the circumstances including reading all of the statements made in the email, was not a veiled threat towards employees).

158 *TRW*, 654 F.2d at 313.

159 Ridgewood Health Care Ctr., Inc. v. NLRB, 8 F.4th 1263, 1275 (11th Cir. 2021) ("An interrogation crosses the line only when 'the words themselves or the context in which they are used . . . suggest an element of coercion or interference.'") (quoting Delco-Remy Div., Gen. Motors Corp. v. NLRB, 596 F.2d 1295, 1309 (5th Cir. 1979)).

retaliation after union activity.[160] For example, "[i]n the context of a speech harshly critical of recent union activity, the threat to increase enforcement of company rules would reasonably be understood as threatening retaliation because of that activity."[161] The context surrounding the employer's words help determine whether the employer's statement constitutes a threat and, thus, an unfair labor practice.[162]

The Supreme Court established a framework for balancing the rights of employers and employees to express their views while also ensuring protections for employees' Section 7 rights.[163] In *NLRB v. Gissel Packing Co*., the Supreme Court emphasized that courts and the Board must assess the employer's statements in "the context of the labor relations setting," thereby acknowledging the importance of the employer-employee relationship in discerning the meaning of an employer's statement.[164] Courts apply the *Gissel Packing* standard to determine whether an employer's statements are based on objective fact or are threatening, coercive, or retaliatory.[165] Under the *Gissel Packing* standard, an employer has the right to express "general views about unionism or any of his specific views about a particular union," as long as these statements are not a "threat of reprisal or force or promise of benefit."[166]

B. Jokes as Unfair Labor Practices

Lower courts have been faced with interpreting whether statements, that an employer claims are a joke, actually qualified as an unfair labor practice. For example, in *FDRLST Media*, the court applied a "test for coercion" to determine whether the employer's tweet, which he claimed was a joke, constituted an unfair labor practice in violation of the NLRA.[167] To determine whether the use of humor and jokes constitutes an unfair labor practice, the Board and courts use a

160 *See* Cadillac of Naperville, Inc. v. NLRB, 14 F.4th 703, 715 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 2650 (2022).

161 *Id.*

162 NLRB v. Mangurian's, Inc., 566 F.2d 463, 466 (5th Cir. 1978).

163 NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) ("And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.").

164 *Id.*

165 *Id.*; *see also* DTR Indus., Inc. v. NLRB, 297 F. App'x 487, 492–93 (6th Cir. 2008).

166 *Gissel Packing*, 395 U.S. at 618.

167 FDRLST Media, LLC v. NLRB, 35 F.4th 108, 122 (3d Cir. 2022).

reasonableness standard.[168] The test for coercion is objective and looks to "the impression of a reasonable employee."[169] If a reasonable employee could have felt coerced by an employer's statement, then courts consider the statement a threat and, therefore, an unfair labor practice.[170] Similar to how employers may express sentiments against unions, employers may use humor when speaking with their employees.[171] Humor cannot, however, veil an employer's threats against the employees and their rights to collective action.[172]

1. Humor Held Not to be an Unfair Labor Practice

The courts have found that if a reasonable employee would be entertained by an employer's statements or actions, then the employer likely did not threaten their employees as "people who are being threatened do not usually find it amusing."[173] Therefore, courts may consider employees' reactions to their employer's statements to help determine whether a reasonable employee would have felt the same; however, courts must view the record "as a whole."[174]

The courts have also looked at the context of the employer's joke.[175] For example, in *NLRB. V. Champion Laboratories, Inc.*, the court held that the employer's joke was not a threat, partially because there was "'joking going on back and forth' during the conversation" between the employer and a group of employees.[176] In this case, the ALJ also looked to testimony that at the same time as the employer's statements, another worker made joking comments as evidence that the employer did not threaten the employees.[177] Similarly, in *NLRB v. Windemuller*

168 *Id.* at 114 ("[the ALJ] pointed to *The Federalist*'s editorial content as expressing Domenech's own 'anti-union' stance and argued that a reasonable reader could interpret the tweet only as a threat against employee unionization.") (internal citations omitted).

169 *Id.* at 122; *see also* Teamsters Loc. Union No. 171 v. NLRB, 863 F.2d 946, 954 (D.C. Cir. 1988); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 105 (5th Cir. 1963).

170 *FDRLST Media*, 35 F.4th at 122.

171 *See* NLRB. v. Champion Lab'ys, Inc., 99 F.3d 223, 226 (7th Cir. 1996); NLRB v. Windemuller Elec., Inc., 34 F.3d 384, 393 (6th Cir. 1994).

172 *See* NLRB. v. Homemaker Shops, Inc., 724 F.2d 535, 550 (6th Cir. 1984).

173 NLRB v. Windemuller Elec., Inc., 34 F.3d 384, 392 (6th Cir. 1994).

174 *Id.* at 392–93.

175 *See* NLRB. v. Champion Lab'ys, Inc., 99 F.3d 223, 229 (7th Cir. 1996).

176 *Id.* at 226 (holding that a supervisor saying "I hope you guys are ready to pack up and move to Mexico" to employees was a joke because employees responded with jokes of their own).

177 *Id.* at 229 ("The ALJ also credited the testimony that another worker (not Tate, the only supervisor present at the time) had made comments about having to learn Spanish, and reasonably concluded that Champion's (perfectly lawful) letter about being pressured to move to Mexico prompted the employees' comments.").

Electric, Inc., the court held that an employer's joke about receiving a lot of job applications from the union, which caused those who heard the joke to laugh, was not an unfair labor practice.[178] The court made this determination based on context.[179] The court looked in part to the response of employees who heard the comment and the fact that the comment was "spontaneous, unplanned, and unrehearsed."[180] In addition, the statement was an acknowledgment of the employer being "the target of unusual attention from a union," rather than a direct threat to "break the law in response," which impacted the court's decision.[181]

In *NLRB v. Keystone Pretzel Bakery, Inc.*, the president of the company was giving an employee his check, he jokingly said, "Here is your check, union steward."[182] In response, the employee laughed.[183] The employee also testified that he "treated the incident as a joke."[184] The ALJ, in this case, recommended that the Section 8(a)(1) charge relating to this comment be dismissed.[185] The court accepted the ALJ's finding instead of the Board's, reasoning that the judge was in "a far better position than the Board to evaluate the incident." [186] The court found that this joke could not be considered coercive or an unfair labor practice.[187]

In *Fed.-Mogul Corporation v. NLRB.*, in response to laughing, teasing, and bantering with employees, a foreman picked up a union card from one of the employee's tool box and burned it.[188] At the time of the incident, the employee whose union card was burnt, did not "object or protest" and laughed in response.[189] The employee did not deny that this was a joke and he admitted to laughing at the time of the incident.[190] The court held that the incident was a joke and did not constitute an unfair labor practice.[191]

178 NLRB v. Windemuller Elec. Inc., 34 F.3d 384, 392 (6th Cir. 1994).

179 *Id.*

180 *Id.*

181 *Id.*

182 NLRB v. Keystone Pretzel Bakery, Inc., No. 81-2067, 1982 WL 20488, *2 (3d Cir. Apr. 1, 1982), *on reh'g*, 696 F.2d 257 (3d Cir. 1982).

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.* at *3.

187 *Id.* ("It was a trivial matter and should not have been elevated to the stature of an unfair labor practice.").

188 Fed.-Mogul Corp. v. NLRB, 566 F.2d 1245, 1253 (5th Cir. 1978).

189 *Id.*

190 *Id.*

191 *Id.*

2. Humor Held to be an Unfair Labor Practice

Alternatively, courts have found employers' jokes to be threatening and coercive and held that they were an unfair labor practice under the NLRA.[192] An employer cannot use humor to hide threats toward employees.[193] In evaluating an employer's statements to determine if they are threatening, the Board and courts judge an employer's statements "in the light of circumstances in which words innocent in and of themselves may be understood as threats; and the issue of whether such statements are threats is generally one of fact for the Board's initial consideration."[194] The Board must evaluate the statement in the context of when the statement was made.[195] Therefore, the Board must look at the statements made by an employer and then look beyond just the words used because "threatening or manipulative statements can, at times, be couched in ostensibly friendly, or even humorous, terms" but "[t]he threat or manipulation remains nonetheless."[196]

Therefore, employers simply labeling their own statements as jokes does not necessarily make it so.[197] In fact, even the mere presence of laughter does not automatically mean that the employer's statement was a joke and not a threat.[198] In *NLRB v. Intertherm, Inc.*, the employer insisted that there was a "running joke" between the supervisor and employee, but the Board held it was an unfair labor practice, and the court on appeal upheld that conclusion.[199] The "joke" consisted of the

192 *See* NLRB. v. Homemaker Shops, Inc., 724 F.2d 535, 550 (6th Cir. 1984).

193 *See id.* at 550; NLRB v. Benteler Indus., No. 97-5588, 1998 U.S. App. LEXIS 15139, *18 (6th Cir. July 1, 1998); *NLRB v. Windemuller Elec., Inc.,* 34 F.3d 384, 392 (6th Cir.1994).

194 NLRB v. Intertherm, Inc., 596 F.2d 267, 275 (8th Cir. 1979) (citing NLRB v. Crystal Tire Co., 410 F.2d 916, 918 (8th Cir. 1969)).

195 *See* FDRLST Media, LLC v. NLRB, 35 F.4th 108, 121 (3d Cir. 2022); Cmty. Organized Relief Effort, 2023 NLRB LEXIS 175, *31 (N.L.R.B. April 17, 2023) ("in determining whether an ambiguous statement is an unlawful threat due to a person's prior protected concerted activity, I cannot cherry pick and emphasize the problematic statements standing alone, rather I must evaluate the statement(s) ***in context with the totality of the circumstances at issue***.") (emphasis in original).

196 *Homemaker Shops*, 724 F.2d at 550.

197 *See id.* at 549–50 ("Although Company counsel at hearing, and in subsequent argument, has attempted to characterize the whole episode as a joke, we cannot say that there was not a sufficient basis for the Board's inference that this was no joking matter.").

198 *Intertherm*, 596 F.2d at 272–73 ("The mere fact that there was laughter between Sandbothe and Gilliam did not preclude the administrative finding that an act of coercion or restraint had taken place.").

199 *Id.* at 272.

supervisor "covering the union logo but stat[ing] he was only joking."[200] While the supervisor stated that he was joking and there was laughter throughout the conversation, the employee believed that he had to keep his union logo covered.[201] The court determined that the "mere fact that there was laughter" was not enough to "preclude the administrative finding that an act of coercion or restraint had taken place."[202]

Additionally, an employer's threatening statement does not lose its threatening nature even if it may be formed using friendly or funny words.[203] In *NLRB v. Benteler Industries, Inc.*, the supervisor stood near the work area of a visibly pro-union employee, who had testified at an earlier NLRB objection hearing because the employer had objected to the union election.[204] The employee told the supervisor that he had not seen one of the supervisors surveilling him for the past twenty minutes, to which the supervisor responded that "it was his turn to watch" the employee.[205] The supervisor claimed that he was joking with the employee.[206] The court disagreed, relying on precedent that threatening statements from employers are still threatening even if they are said in "friendly, or even humorous, terms."[207] Additionally, the court looked at the context surrounding the statement, such as the supervisor's surveillance of the employee, to find that this "may have lent a coercive tone to an otherwise lighthearted statement."[208] Similarly, in *NLRB v. Deutsch Company, Metal Components Division*, an employer claimed to ask employees questions about a union meeting, including where the meeting was going to be held, in a joking manner.[209] Looking at the surrounding circumstances of the employer's statement, the Board found the employer's questions to be "neither amusing nor lawful."[210]

200 *Id.*

201 *Id.*

202 *Id.* at 272–73.

203 NLRB v. Benteler Indus., No. 97-5588, 1998 U.S. App. LEXIS 15139, *18 (6th Cir. July 1, 1998).

204 *Id.* at *17–18.

205 *Id.* at *18.

206 *Id.* at *18 (Although claiming that his comment was a joke, St. Arnold admitted that he told Williams that it was his, not Forbes's, turn to watch Williams on that day.").

207 *Id.* (quoting *NLRB v. Homemaker Shops, Inc.,* 724 F.2d 535, 550 (6th Cir.1984)).

208 *Id.* (citing *NLRB v. Windemuller Electric, Inc.,* 34 F.3d 384, 392 (6th Cir.1994)).

209 NLRB v. Deutsch Co., Metal Components Div., 445 F.2d 902, 904 (9th Cir. 1971) ("Hanly admitted inquiring of these employees about the place of the purported union meeting and whether they were being paid for submitting signed authorization cards, but maintained these inquiries were made in a jesting fashion.").

210 *Id*.

C. Remedies

When an employer commits an unfair labor practice, the NLRB is limited in the remedies that it may seek.[211] The NLRB can seek make-whole remedies and informational remedies, but it cannot prescribe penalties.[212] Make-whole remedies, also known as traditional remedies, include reinstatement and back pay.[213] Informational remedies include requiring employers to post a notice where they promise not to violate the NLRA.[214]

The Board should incorporate social media within its informational remedies, especially if that is where the unfair labor practice occurred and the social media platform is viewed as a factor by the court when looking at the context of an employer's statement.[215] When an employer commits an unfair labor practice through social media, the Board's first step in response should be to order the employer to delete the post as soon as the unfair labor practice charge is filed. While the erasure of the post will not erase the damage done to employees who were unlawfully threatened, this sends a message that the employer's statements are unacceptable under the NLRA. This remedy has already been sought by

211 *See* N.L.R.B, *Investigative Charges*, N.L.R.B., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges, (last visited Feb. 18, 2024) [hereinafter *Investigative Charges*]; Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1067 (D.C. Cir. 2001) ("[I]n selecting a remedy for NLRA violations, the NLRB must select 'a course that is remedial rather than punitive, and [choose] a remedy which can fairly be said to effectuate the purposes of the Act.'") (quoting *Peoples Gas Sys., Inc. v. NLRB,* 629 F.2d 35, 42 (D.C. Cir. 1980)).

212 *Investigative Charges, supra* note 211; Republic Steel Corp. v. NLRB, 311 U.S. 7, 11–12 (1940) ("We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act . . . . We have said that the power to command affirmative action is remedial, not punitive.").

213 *Investigative Charges, supra* note 211; *see generally* Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1590, 1601 (2005).

214 *Investigative Charges, supra* note 211.

215 FDRLST Media, LLC v. NLRB, 35 F.4th 108, 126 (3d Cir. 2022) ("Domenech posted his message on Twitter, a public platform that limits tweets to 280 characters, which encourages users to express opinions in exaggerated or sarcastic terms.").

the Board in its informal settlement with Barstool Sports,[216] the lawsuit against Tesla,[217] and the decision in the *Starbucks* case.[218]

If the Board finds that an employer violated the NLRA and threatened the employees' labor rights through social media, then the Board should order that the employer not only has to post remedial notices in its workplaces, but that the employer must also post on the social media platform that was used to make the threat. For example, since Musk used his Twitter account to post a tweet that threatened his employees for exercising their Section 7 rights, the court should order Musk to publish a tweet using his personal Twitter handle. The tweet should be a notice of the Section 7 rights that all Tesla employees are protected by and that he, as their employer, cannot infringe upon.[219] While this was not included in the settlement agreement between the NLRB and Barstool Sports, this was the remedy that the charging party requested when submitting the unfair labor practice charge.[220] Such a remedy would provide at least some relief to the employees whose rights were violated. In addition, ordering the employer to post what would basically constitute a public apology would send a strong message to the employees and the public that such behavior is illegal and unacceptable. It would also hopefully deter other employers from making the same "jokes" in the future.

While it is a typical remedy for an employee notice to be posted in all of the employer's workplaces, or at least within the workplace where the unfair labor practice was committed, this remedy is often only a "slap on the wrist" for the employer.[221] In order to prevent employers

216 Letter from John J. Walsh, Jr., Regional Director, NLRB Region 2, to David A. Rosenfeld, Attorney at Law, Weinberg, Roger and Rosenfeld. (Dec. 18, 2019) (on file with author). This letter details the NLRB's decision to approve the settlement agreement and includes the settlement agreement between the charged party, Barstool Sports, and the charging parties, the Industrial Workers of the World Freelance Journalists Union and the Committee to Preserve the Religious Right to Organize.

217 Tesla, Inc. v. NLRB, 63 F.4th 981 (5th Cir. 2023), *reh'g granted, opinion vacated*, 73 F.4th 960 (5th Cir. 2023).

218 Starbucks, 2023 NLRB LEXIS 35, *105 (N.L.R.B. Jan. 31, 2023).

219 Elon Musk (@elonmusk), TWITTER (May 21, 2018, 2:44 AM), https://twitter.com/elonmusk/status/998454539941367808?s=20&t=Yy-NAF0R_Y9RrWdQU5mQjw.

220 Reis Thebault, *Barstool Sports Founder Railed Against Unions. Now His Threats are Under Investigation*, WASH. POST (Aug. 16, 2019, 9:07 PM), https://www.washingtonpost.com/sports/2019/08/17/barstool-sports-founder-railed-against-unions-now-his-threats-are-under-investigation/.

221 David Streitfeld, *How Amazon Crushes Unions*, NY TIMES (October 21, 2021), https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html ("The employee notice was a hollow victory for workers."); *see also* Alana Semuels, *Some*

from taking unlawful steps to prevent unionization in their workplaces, there must be stronger and harsher penalties for employers who break the law.[222]

IV. CONCLUSION

While there are many challenges that workers face, including the current NLRB election system, which "forces workers to run a gauntlet of fear, threats, intimidation, forced propaganda, and stifled speech"[223] and the misclassification of workers as independent contractors,[224] it may seem that employers' use of social media posts to threaten employees is not the most pressing issue to address. However, the use of social media by both employers and employees is commonplace and significantly increasing. For example, as of September of 2022, Elon Musk had "tweeted more than 19,000 times since joining the platform" and in 2022 alone, he "tweeted an average of six times a day."[225] While not all employers tweet or use social media at the same rate, practically all employers, whether through personal or company accounts, are communicating with their employees and the greater public through social media platforms. Since employers' use of social media is more prevalent and far-reaching, the Board should seek stronger remedies to discourage employers from using social media to threaten and coerce their employees from unionizing.

This is why the court's decision in *Tesla v. NLRB* is so significant to the future of labor. The courts' decisions in cases such as *Tesla* will have

Companies Will Do Just About Anything to Stop Workers from Unionizing, TIME (Oct. 13, 2022, 10:12 AM), https://time.com/6221176/worker-strikes-employers-unions/ ("The consequences for skirting the law are minimal" for employers who commit unfair labor practices).

222 *See* Streitfeld, *supra* note 221.

223 Gordon Lafer & Lola Loustanunau, *Fear at Work*, ECON. POL'Y INST. (July 23, 2020), https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/.

224 U.S. DEPT. OF LAB., *Wage and Hour Div., Misclassification of Employees as Independent Contractors*, https://www.dol.gov/agencies/whd/flsa/misclassification (last visited Feb. 18, 2024); *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT (Oct. 26, 2020), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/ ("Employers in an increasing number of industries misclassify their employees as independent contractors, denying them the protection of workplace laws, robbing unemployment insurance and workers' compensation funds of billions of much-needed dollars, and reducing federal, state and local tax withholding and revenues.").

225 Linda Chong et al., *Elon Musk's 19,000 Tweets Reveal His Complicated Relationship with Twitter*, WASH. POST (Sept. 12, 2022, 2:23 PM), https://www.washingtonpost.com/business/interactive/2022/elon-musks-tweets/.

long-lasting ramifications for workers because of the increased use of social media by employers in communicating their anti-union sentiments to their employees and the world. To ensure that workers' rights are protected in Tesla, Inc. and beyond, the Fifth Circuit should hold in *Tesla v. NLRB* that Musk's tweet was a threat and an unfair labor practice under the NLRA. The court should order the tweet to be deleted and remedial notices to be posted in Tesla workplaces and on Musk's personal Twitter account. By holding that Musk's tweet was illegal and threatened Tesla employees from freely exercising their right to unionize, the court will send a message to all employers that threats against employees' benefits, wages, or other work conditions cannot be passed off as a joke.

If the court rules in favor of Tesla, Musk and other employers will be emboldened to post illegal threats and coercive messages on their social media platforms and cite *FDLST Media* and *Tesla* to argue that their statements are protected. Employers will use social media platforms to foster a "culture of fear" and prevent their employees from unionizing and exercising their Section 7 Rights.[226] The Board and courts should avoid setting a dangerous precedent where employers are allowed to threaten their workers' rights to unionize by claiming that their comments were just a joke.

226 Ken Green, *Digital Union-Busting: How Management Uses Technology To Suppress Organizing*, UNIONTRACK (Apr. 5, 2022), https://uniontrack.com/blog/digital-union-busting ("According to New York University professor Kimberly Phillips-Fein, creating that culture of fear is one of the key goals for employers to keep unions out of the workplace.").