

# SHARING IS AIRING: EMPLOYEE CONCERTED ACTIVITY ON SOCIAL MEDIA AFTER HISPANICS UNITED

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## ABSTRACT

*Section 7 of the United States' National Labor Relations Act allows groups of American workers to engage in concerted activity for the purposes of collective bargaining or for "other mutual aid or protection." This latter protection has been extended in cases such as Lafayette Park Hotel to workers outside the union context. Starting in 2005, the National Labor Relations Board increasingly signaled to employers that concerted activity may take place on social media such as Facebook. However, the Board proper delivered its first written opinion articulating these rules in the 2012 case of Hispanics United of Buffalo, Inc. There, the Board found the employer in question to have committed multiple unfair labor practices when it fired five employees over a series of Facebook posts due to violating the employer's zero-tolerance no bullying policy.*

*This article argues that the majority opinion of the Board misapplied Lafayette Park Hotel's test for whether employer conduct "would reasonably tend to chill employees" from legitimate, protected uses of their §7 rights. This article explains the two largest errors in the Board's decision: (1) a failure to identify a missing, important element for concerted activity protection under §7, the nexus between employee discussion and contemplated group action, and (2) asserting an "inferred group intent" existed that was "implicitly manifest" which linked the employees' Facebook posts to contemplated group action protected under §7.*

*Members of the entire Board, as well as other legal scholars writing on this topic, have been guilty at different times of simplifying social media to being like a "virtual water cooler" for the 21st century. The facts in Hispanics United show why this*

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*analogy does not work: rather than a short face-to-face conversation with a finite, known audience in the space of minutes, it was a series of written messages plopped down in sequential order throughout an entire day, written for an audience of unknown size and make-up that may not even include the co-workers it ostensibly addressed. As Hispanics United helps illustrate, the proper handling of employer retaliation on social media remains the sensible application of the established nexus requirement for finding concerted activity.*

#### INTRODUCTION

*'Then you should say what you mean,' the March Hare went on.  
'I do,' Alice hastily replied; ... 'at least I mean what I say—'  
'Not the same thing a bit!' said the Hatter.*

LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND

Section 7 of the National Labor Relations Act ("NLRA") enshrines the right of certain classes of American workers to engage in concerted activity for the purpose of collective bargaining or "other mutual aid and protection."<sup>1</sup> Not only is it illegal for employers to retaliate against employees who have engaged in concerted actions,<sup>2</sup> it is also illegal for employers to adopt company rules that "would reasonably tend to chill employees" in using their § 7 rights.<sup>3</sup> The National Labor Relations Board ("NLRB"), the federal agency established by the NLRA for its enforcement,<sup>4</sup> interprets § 7 protection to apply outside the union context when (1) multiple employees (2) do an activity in concert (3) for those employees' mutual aid or protection, with a nexus between the activity performed and the employees' "interests as employees."<sup>5</sup>

In the seminal case of *Hispanics United*, the National Labor Relations Board answered how traditional §7 protection works in the new

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<sup>1</sup> National Labor Relations Act § 7, 29 U.S.C. § 157 (2006).

<sup>2</sup> *Id.* § 158(a)(1); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) ("If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, then it is a threat of retaliation based on misrepresentation and coercion not protected under the First Amendment.").

<sup>3</sup> *Lafayette Park Hotel*, 326 N.L.R.B. 824, 25 (1998).

<sup>4</sup> National Labor Relations Act § 3.

<sup>5</sup> *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-8 (1978) ("[S]ome concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause.").

context of social media.<sup>6</sup> This case was the first case tried<sup>7</sup> before the NLRB providing the Board's reasoning process for employees' protection under § 7 of the NLRA when using social media in a non-union workplace.<sup>8</sup> As the dissent in the case notes, *Hispanics United* expands the boundaries for when co-workers officially "join in" an activity protected under § 7.<sup>9</sup>

Existing legal scholarship describes the decisions leading up to *Hispanics United* in great detail.<sup>10</sup> This Note instead focuses on the Board's ruling in *Hispanics United*, and explains why it is an unusual decision, even when compared to these earlier cases. As Board member Hayes explains in his dissent, the *Hispanics United* majority erred by inferring a concerted objective where employees "did not suggest or implicitly contemplate doing anything in response," but only engaged in unprotected "mere griping."<sup>11</sup> This Note also challenges both the majority and the dissent's characterization of social media as the 21st century's "virtual water cooler."<sup>12</sup> This comparison emerges in much other legal scholarship on how both employers and the legal system treat or ought to treat social media.<sup>13</sup>

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<sup>6</sup> *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (2012).

<sup>7</sup> In 2011 the NLRB reached a settlement with American Medical Response of Connecticut, Inc., after the NLRB's office in Hartford, CT issued a Complaint against AMR on Oct. 27, 2010, based on the discharge of an employee for posting negative comments about her supervisor on her Facebook page. See Brian Hall, *NLRB's "Facebook Firing" Case Against AMR Settles*, EMPLOYER LAW REPORT (Mar. 18, 2013, 12:00 PM), <http://www.employerlawreport.com/2011/02/articles/workforce-strategies/nlrbs-facebook-firing-case-against-amr-settles>.

<sup>8</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at 2.

<sup>9</sup> See *id.* at \*5-6 (Hayes, dissenting).

<sup>10</sup> See Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. Pa. J. Bus. L. 957, 962-3 (2012) (Examining in detail 36 different charges addressed by the NLRB, its Office of the General Counsel, and its Administrative Law Judges, filed by employees for discipline or discharge that employees allege occurred because of online communications, principally Facebook); Bryan Russell, *Facebook Firings and Twitter Terminations: The National Labor Relations Act as a Limit on Retaliatory Discharge*, 8 Wash. J. L. Tech. & Arts 29, 33-39 (2012).

<sup>11</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*5 (Hayes, dissenting).

<sup>12</sup> *Id.*; see also Mark Pearce, Chairman, NLRB, *quoted in* Stephen Greenhouse, *Even If It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. TIMES, Jan. 22, 2013, at A1 ("Many view social media as the new water cooler . . . All we're doing is applying traditional rules to new technology.").

<sup>13</sup> See Christine O'Brien, 45 Suffolk U. L. Rev. 29, 66 (2011) for an example of formal legal scholarship making a similar analogy ("The web is where employees gather for what used to be onsite "water cooler" discussions regarding terms and conditions of employment."); see also Greenhouse, *supra* note 12, at A1, for similar analogy used in general news press ("As Facebook and Twitter become as central to workplace conversation as the company cafeteria, federal regulators are ordering employers to scale back policies . . .").

But despite social media's differences from other media, these differences do not require the Board to abandon its previous approach towards what constitutes concerted activity, as other writers suggest.<sup>14</sup> Instead, as Board member Hayes suggests in his dissent,<sup>15</sup> the social media paradigm requires a return to the nexus requirement for concerted action.

To serve the original Congressional intent of balancing the interests of employer and employees, existing labor law must be applied in the same way it was always applied to the new realities of social media. This requires asking that plaintiffs meet the initial burden of proof that Hayes demanded and that the majority conceded in *Hispanics United*: plaintiffs *must* allege facts establishing a nexus linking employee online conduct with the workplace. The only other alternative requires the majority's approach in *Hispanics United*: softening the elements required to show that an employer unreasonably chilled an employee's § 7 rights. In *Hispanics United*, the majority accomplished this by identifying an "implicitly manifest" mutual aid objective in the co-workers' Facebook posts. The majority's approach is the wrong treatment of concerted activity in social media, for three fundamental reasons: it goes against the language and purpose of the National Labor Relations Act, it is unfair to employers, and it is a short-sighted treatment of social media as being so innovative that it mandates changing existing labor law as we know it.

## I. FACTS AND HOLDINGS FROM *HISPANICS UNITED*

### A. *Facts of the Case*

*Hispanics United of Buffalo, Inc. (HUB)*, a non-profit in New York state,<sup>16</sup> employed 30 individuals,<sup>17</sup> including Lydia Cruz-Moore and the alleged discriminatees Mariana Cole-Rivera, Damicela Rodriguez, Ludamar

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<sup>14</sup> See Ariana C. Green, Note, *Using Social Networking To Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 Berkeley Tech. L.J. 837, 888-9 (2012) ("[T]he General Counsel should allow NLRB attorneys more leeway in interpreting when online speech is protected on social networks. *Precedent based on standards of concerted activity* and opprobrious behavior *serve in some cases, but in others, the attorneys should display more agility* in considering the context of social networking posts.") (emphasis added).

<sup>15</sup> Cf. *Hispanics United*, 359 N.L.R.B. No. 37 at \*5 (Hayes, dissenting) ("[T]he mere fact that the subject of discussion involve[s] an aspect of employment—i.e., job performance—is not enough to find concerted activity for mutual aid and protection. There is a meaningful distinction between sharing a common viewpoint and joining in a common cause. Only the latter involves group action for mutual aid and protection.")

<sup>16</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*9.

<sup>17</sup> *Id.* at \*12.

“Ludahy” Rodriguez, Yaritza Campos, and Carlos Ortiz de Jesus.<sup>18</sup> During their employment, in personal conversations and text messages with Cole-Rivera and the other discriminatees, Cruz-Moore had criticized other HUB employees for performing poorly at work.<sup>19</sup> On October 9, this alleged pattern of criticism came to a head in a conversation thread Cole-Rivera created on her own Facebook page.<sup>20</sup> Cole-Rivera’s original post was prompted by Cruz-Moore informing Cole-Rivera earlier that day, “that she was going to raise these concerns with [HUB’s] executive director, Lourdes Iglesias.”<sup>21</sup> Perhaps anticipating that Cruz-Moore would allege to Iglesias that Cole-Rivera and other HUB employees performed poorly at work, and exasperated after hearing Cruz-Moore’s past complaints about the same, Cole-Rivera wrote about it on her profile page that day.

Board member Hayes’s dissent alludes to the Facebook postings on October 9th as being like a “colloquy around the Facebook ‘virtual water cooler.’”<sup>22</sup> However, while both the majority and dissent in *Hispanics United* seem comfortable with treating the employees’ postings like an instantaneous conversation between co-workers, the conversation thread was in fact a series of posts exchanged over approximately twelve hours as people checked into and out of Facebook during the morning and afternoon.<sup>23</sup> The sequence of the five discriminatees’ Facebook posts is as follows:

**Table 1: Alleged Discriminatees’ Initial Facebook Posts<sup>24</sup>**

	Time Elapsed	Time of Post	Poster	Text of Post
<b>1</b>		<b>10:14am</b>	Mariana Cole-Rivera	Lydia Cruz, a coworker feels that we don’t help our clients enough at HUB I about had it! My fellow coworkers how do u feel?
<b>2</b>	+5 min.	<b>10:19am</b>	Damicela Rodriguez	What the f. .. Try doing my job I have 5 programs

<sup>18</sup> *Id.* at \*10-11.

<sup>19</sup> *Id.* at \*10.

<sup>20</sup> *Id.* at \*10-11.

<sup>21</sup> *Id.* at \*10.

<sup>22</sup> *Id.* at \*5 (Hayes, dissenting).

<sup>23</sup> *Id.* at \*10-11.

<sup>24</sup> *Id.* (using the unaltered text from original Facebook posts in the Text of Post column).

<b>3</b>	+ 7 min.	<b>10:26am</b>	Ludimar Rodriguez	What the Hell, we don't have a life as is, What else can we do???
<b>4</b>	+45 min.	<b>11:11am</b>	Yaritza Campos	Tell her to come do mt fucking job n c if I don't do enough, this is just dum
<b>5</b>	+30 min.	<b>11:41am</b>	Carlos Ortiz de Jesus	I think we should give our paychecks to our clients so they can "pay" the rent, also we can take them to their Dr's appts, and served as translators (oh! We do that). Also we can clean their houses, we can go to DSS for them and we can run all their errands and they can spend their day in their house watching tv, and also we can go to do their grocery shop and organized the food in their house pantries ... (insert sarcasm here now)
<b>6</b>	+ 4 min.	<b>11:45am</b>	Mariana Cole-Rivera	Lol. I know! I think it is difficult for someone that is not at HUB 24-7 to really grasp and understand what we do ..I will give her that. Clients will complain especially when they ask for services we don't provide, like washer, dryers stove and refrigerators, I'm proud to work at HUB and you are all my family and I see what you do and yes, some things may fall thru the cracks, but we are all human:) love ya guys

The conversation began to diverge after noon, with individuals responding to Facebook posts that were not in sequence and not only responding to the immediately preceding post.

**Table 2: Facebook Posts, Upon Becoming Nonsequential / Off-Topic<sup>25</sup>**

	<b>Time Elapsed</b>	<b>Time of Post</b>	<b>Poster</b>	<b>Text of Post</b>
<b>7</b>	+25 min.	<b>12:10pm</b>	Nannette Dorrios <sup>26</sup>	Who is Lydia Cruz?
<b>8</b>	+26 min.	<b>12:11pm</b>	Yaritza Campos	(responding to #6) Luv ya too boo
<b>9</b>	+ 1 min.	<b>12:12pm</b>	Mariana Cole-Rivera	(responding to #7) She's from the dv program works at the FJC at hub once a week.
<b>10</b>	+58 min.	<b>1:10pm</b>	Jessica Rivera <sup>27</sup>	Is it not overwhelming enough over there?
<b>11</b>	+ 1 hour, 17 min.	<b>2:27pm</b>	Lydia Cruz-Moore	Marianna stop with ur lies about me. I'll b at HUB Tuesday..
<b>12</b>	+29 min.	<b>2:56pm</b>	Mariana Cole-Rivera	Lies? Ok. In any case Lydia, Magalie <sup>28</sup> is inviting us over to her house today after 6:00pm and wanted to invite you but does not have your number i'll inbox you her phone number if you wish.
<b>13</b>	+9 hours, 34 min.	<b>10:30pm</b>	Carlos Ortiz	(responding to #12) Bueno el martes llevo el pop corn [Good, Tuesday, I'll bring the popcorn] <sup>29</sup> .

Lydia Cruz-Moore then complained in a text message to HUB's Executive Director, Iglesias, about the Facebook posts from her co-workers.<sup>30</sup> The Administrative Law Judge ("ALJ") who first heard this case stated that Cruz-Moore "was trying to get Iglesias to terminate or at least discipline the employees," even though it was "not clear why she bore such

<sup>25</sup> *Id.*

<sup>26</sup> Nannette Dorrios serves as a member of HUB's Board of Directors (*id.* (alteration in original)).

<sup>27</sup> Jessica Rivera serves as Secretary to HUD Director Iglesias (*id.* (alteration in original)).

<sup>28</sup> Magalie Lomax, HUB's Business Manager (*id.* (alteration in original)).

<sup>29</sup> *Id.* (alteration in original).

<sup>30</sup> *Id.*

animosity against the other employees” against whom she had no readily apparent prior dispute.<sup>31</sup>

Three days after Cruz-Moore complained about the Facebook posts, Executive Director Iglesias met individually with all five employees who posted the Facebook comments in Table 1.<sup>32</sup> Iglesias told each employee that they had violated HUB’s zero-tolerance employee policy against bullying or harassment of co-workers.<sup>33</sup> At these meetings, Iglesias also alleged that Cruz-Moore suffered a heart attack because of the bullying, and that HUB needed to pay compensation to Cruz-Moore in response.<sup>34</sup> At the trial level, however, the ALJ found that there was zero evidence that a heart attack had ever occurred.<sup>35</sup> In fact, the ALJ found that Iglesias lacked any rational basis for believing that the discriminatees’ Facebook posts were at all related to Cruz-Moore’s health.<sup>36</sup> Nevertheless, Iglesias told each of the five discriminatees “that she would *have* to fire them.” The individual employees received termination letters either on the spot or else several days later in their mailboxes.<sup>37</sup> HUB never replaced any of the fired employees, and instead seemed to absorb the drop in labor from thirty to twenty-five employees by giving their work responsibilities to other employees.<sup>38</sup>

*B. Holdings in Hispanics United: Concerted Activity Occurred, for Implicitly Manifest Goal*

Affirming the ALJ’s decision, a three-member majority of the NLRB found that (1) the Facebook postings by Cole-Rivera and the four other employees in Table 1 were concerted activity protected under § 7 of the NLRA, and that (2) HUB’s discharges of these five employees because of the Facebook postings were unfair labor practices in violation of § 8(a)(1) of the Act.<sup>39</sup> The Board also adopted the ALJ’s recommended remedy, ordering HUB to compensate the discriminatees for lost earnings and benefits, in addition to offering full reinstatement to their former positions.<sup>40</sup>

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<sup>31</sup> *See id.*

<sup>32</sup> *Id.* at \*11-12. Iglesias did not meet with her secretary Jessica Rivera, who posted Comment #10 at 1:10pm. *Id.*

<sup>33</sup> *Id.* at \*12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (emphasis added).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at \*4.

<sup>40</sup> *Id.* at \*4, \*15-16.



The NLRB's opinion in *Hispanics United* begins by examining *Meyers Indus., Inc. (Meyers I)* for the standard for when an employer's discipline or discharge of an individual employee violates § 8(a)(1) and is considered an unfair labor practice.<sup>41</sup> Under *Meyers I*, § 8(a)(1) is violated when (1) the employee engages in concerted activity (within § 7's meaning), (2) the employer knew of the concerted nature of the employee's activity, (3) the concerted activity was protected under the NLRA, and (4) the discipline or discharge was motivated by the employee's activity.<sup>42</sup> The Board took elements (2) and (4) as undisputed, because HUB had fired the employees after making print-outs of the entire Facebook thread on Cole-Rivera's profile page, and because the discriminatees had all posted comments responding to other employees' posts.<sup>43</sup> Instead, the Board centered its analysis on elements (1) and (3).<sup>44</sup> Because Hayes's and this Note's analysis focus on the majority's treatment of element (1), the Board's findings on element (3) (whether the NLRA protects the activity if at all) will be examined first, followed by its findings on element (1) (whether the employee's activity was concerted for purposes of § 7 protection).

*1. Held: The NLRA Protects Employee Discussions on Social Media About Work Performance.*

The Board cited two separate cases for the "long held" proposition "that Section 7 protects employee discussions about their job performance."<sup>45</sup> However, both of these can be distinguished from the facts in *Hispanics United*, because employees that have received § 7 protection have always done something more than just talk.<sup>46</sup>

In the first case the Board cited, *Praxair Distribution*, two employees brought various work-related grievances to their managers.<sup>47</sup> The employer committed an unfair labor practice by firing the two employees after their complaints.<sup>48</sup> *Praxair* is unlike *Hispanics United* because in

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<sup>41</sup> *Id.* at \*2.

<sup>42</sup> *Meyers Indus., Inc. (I)*, 268 N.L.R.B. 493, 497 (1984). The Board's analysis also included the expanded *Meyers II* definition of concerted activity, which includes an individual's activity when done to initiate, induce, or prepare for group action. *Meyers Indus., Inc. (II)*, 281 N.L.R.B. 882, 887 (1986). See below Part I.B.2 for a description of the Board's reasoning using both *Meyers* decisions.

<sup>43</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*2 n.8.

<sup>44</sup> *Id.* at \*2.

<sup>45</sup> *Id.* at \*3 (citing *Praxair Distrib., Inc.*, 357 N.L.R.B. No. 91 at \*11 (2011); *Jhirmack Enters.*, 283 N.L.R.B. 609, 609 n.2 (1987)).

<sup>46</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*6 (Hayes, dissenting).

<sup>47</sup> *Praxair Distrib., Inc.*, 357 N.L.R.B. No. 91 at \*11.

<sup>48</sup> *Id.*

*Hispanics United* neither Cole-Rivera nor any other employees told or planned to tell management about Cruz-Moore's complaints, but only discussed the anticipated complaints between themselves.<sup>49</sup> The *Hispanics United* circumvents this distinction by finding a shared intent to speak to management to have been implied in the HUB employees' private speech,<sup>50</sup> though nothing the employees wrote actually indicates this.<sup>51</sup>

The other case the majority cites, *Jhirmack Enterprises*,<sup>52</sup> is distinguishable because of what was said and to whom. There, the discriminatee was not merely telling a co-worker that other employees complained about the slow pace of his work, but was trying to "encourage [the co-worker others complained about] to take corrective action to protect his job."<sup>53</sup> Furthermore, the discriminatee represented a group of co-workers who were concerned about how one co-worker's slow performance adversely affected the terms and conditions of every other employee's job, such as by reducing the group's chances for winning a weekly production award and by increasing the possibility of the company's employees being asked to work overtime.<sup>54</sup>

The Board's misplaced reliance on *Praxair* and *Jhirmack* allowed it to conclude with too little legal analysis that HUB employees' conversations about Cruz-Moore's complaining might be protected under the NLRA as a form of concerted activity. However, the dissent Hayes's opposite position, that the NLRA clearly does not protect conversations on these topics, is not well-supported by case law either. Instead, the entire Board ought to have started at the statute's language rather than case law: was the conversation "for those employees' mutual aid or protection,"<sup>55</sup> or not? Perhaps the employees were not building an anticipatory defense to Cruz-Moore's complaints with their Facebook posts, but were achieving other mutually-beneficial aims that § 7 would protect. Cole-Rivera's post made the targets of Cruz-Moore's complaints aware of Cruz-Moore's intentions, as well as non-targeted employees with connections to HUB's

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<sup>49</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*6, n.6 (Hayes, dissenting).

<sup>50</sup> *Id.* at \*3.

<sup>51</sup> *See supra* Tables 1, 2, and accompanying notes 24 and 25. One co-worker, Yaritza Campos, suggested telling Cruz-Moore to do Campos's job, but there were no other suggestions about saying anything to anyone else with HUB, let alone HUB management such as Iglesias. *See id.*

<sup>52</sup> *Jhirmack Enters.*, 283 N.L.R.B. 609, 609 (1987).

<sup>53</sup> *Id.* at n.2.

<sup>54</sup> *Id.*

<sup>55</sup> National Labor Relations Act § 3.

management.<sup>56</sup> The discriminatees' Facebook posts also likely relieved workplace stress among Cole-Rivera and her co-workers.<sup>57</sup>

Rather than examine any alternative ends achieved by the HUB employees' Facebook conversation, both the majority and dissent in *Hispanics United* studied only one possible objective of the Facebook posts—preparing a group defense to Cruz-Moore's complaints.<sup>58</sup> Focusing on this one possibility tied this part of the legal analysis to the acting-in-concert test: either the employees had responded to one another's posts intending a prepared, cohesive response to Cruz-Moore's charges, or they were individually griping about work conditions and venting to one another. As the following section explains, the majority erred at this point in identifying an "implicitly manifest" group objective in the sparse text in these Facebook posts.

*2. Held: HUB Employees' Facebook Posts Constituted Concerted Activity Between the Employees, and Was Protected Under § 7.*

The Board also held that the employees' actions constituted concerted action, even though "Cole-Rivera failed to tell her co-workers that Cruz-Moore was going to voice her criticisms to Iglesias."<sup>59</sup> This was based on the Board's dual definition of concerted activity from its two *Meyers* decisions:

- *Meyers I*: Activity which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>60</sup>
- *Meyers II*: Activity in "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."<sup>61</sup>

The Board held that Cole-Rivera's own activity in making her initial Facebook post<sup>62</sup> was concerted under the *Meyers II* expanded definition of concerted activity, because "Cole-Rivera's Facebook communication [under all the circumstances] had the clear 'mutual aid'

<sup>56</sup> See text accompanying notes 26--28 *supra*.

<sup>57</sup> See *supra* Table 1 accompanying note 24, row #6 (Cole-Rivera expressed appreciation to the other four discriminatees for their work at HUB and their responses to her original post).

<sup>58</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*3.

<sup>59</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*2--3.

<sup>60</sup> *Meyers Indus., Inc. (Meyers I)*, 268 N.L.R.B. 493, 497 (1984).

<sup>61</sup> *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986).

<sup>62</sup> Table 1, *supra* note 24, Post #1.

objective of preparing her coworkers for a group defense” to Lydia Cruz-Moore’s complaints to HUB’s Executive Director Iglesias.<sup>63</sup> The objective was clear “[e]ven absent an express announcement about the object of [Cole-Rivera’s] activity [because] ‘a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about workings conditions.’”<sup>64</sup>

The Board also held the activity of all five alleged discriminatees in posting and reposting on Cole-Rivera’s Facebook page as being concerted activity under definitions from either *Meyers* case. According to the majority opinion in *Hispanics United*, their activity was concerted under *Meyers I* because “Cole-Rivera’s four coworkers made common cause with her, and, together [they undertook actions] with . . . other employees.”<sup>65</sup> Alternatively, the five employees’ conduct was concerted under *Meyers II* because “they were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management.”<sup>66</sup>

The NLRB’s alternative theories for why the alleged discriminatees acted in concert all suffer from a lack of supporting evidence in the case’s facts.<sup>67</sup> Going back to § 7’s actual language, activity is protected under the NLRA when “[e]mployees . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>68</sup> Section 7 affords protection only to employees acting on theirs and others’ interest. Yet the Acting General Counsel for the NLRA offered no evidence showing that the original Facebook post or the subsequent posts were done for the mutual aid or protection of the other employees that posted on Cole-Rivera’s Facebook wall.<sup>69</sup> The ALJ discredited testimony from Cole-Rivera that she was planning to speak with Executive Director Iglesias in response to Cruz-Moore’s complaints.<sup>70</sup> This discredited testimony directly undermines the majority’s assertion that Cole-Rivera’s first Facebook post “had the clear ‘mutual aid’ objective of preparing her coworkers for a group defense.”<sup>71</sup> While the majority is correct that “that the intent to be engaged

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<sup>63</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*3.

<sup>64</sup> *Id.* (quoting *Relco Locomotives, Inc.*, 358 N.L.R.B. No. 37, \*2 (2012)).

<sup>65</sup> *Id.* at \*2.

<sup>66</sup> *Id.* (quoting Administrative Law Judge Amchan, at \*14).

<sup>67</sup> *Id.* at \*5 (Hayes, dissenting).

<sup>68</sup> National Labor Relations Act § 7, 29 U.S.C. § 157 (2006) (emphasis added).

<sup>69</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*5-6 (Hayes, dissenting).

<sup>70</sup> *Id.* at \*6, n.6.

<sup>71</sup> *Id.* at \*3 (per curiam).

in group action need not be expressly stated [but] can be inferred,” this still requires *something* from which the necessary intent may be inferred.<sup>72</sup>

The fundamental problem in the *Hispanics United* majority’s analysis is the absence of an essential ingredient: there was simply no “evidence of a nexus between employee discussions and group action.”<sup>73</sup> Evidence linking employee talk to possible group action must exist for § 7 protection over that talk. Without contemplated group action, talk between employees remains just mere talk.<sup>74</sup> This basic, obvious rule appears in *Daly Park Nursing Home*,<sup>75</sup> a case cited in Hayes’s dissent. In *Daly*, one employee spoke with his co-workers about another co-worker’s discharge, but was not protected under the NLRA because “there [was] no evidence that [the employee, or any others she spoke with,] contemplated doing anything about the discharge.”<sup>76</sup> The majority in *Hispanics United* seeks to differentiate *Daly* by claiming that, “[r]ather than preparing for group action,” the employee in *Daly* and her co-workers had agreed that group action would be futile.<sup>77</sup> There was no such agreement in *Daly*, however—only comments from the alleged discriminatee, that “the discharge was ‘unfair’ and that it was a shame [that the discharged co-worker] could not hire a lawyer[, and that hopefully that co-worker] would at least be able to receive unemployment compensation.”<sup>78</sup> The *Daly* discriminatee’s comments only reflected the belief that the co-worker could not do anything; the discriminatee said nothing about whether the other employees could do something in concert to change this outcome. The *HU* majority imputes this disbelief in concerted action’s effectiveness onto the *Daly* discriminatee, once again without supporting evidence from the record. It is a false distinction that impermissibly lets the *HU* majority get away with ignoring the rule in *Daly*.

The *Hispanics United* majority’s logic inverts the nexus requirement shown in *Daly*: it not only presumes that employees will always intend to do something about dissatisfaction with anything to do with work, but will intend to do something *in concert*. There is no evidence of such intent in *Hispanics United*: none of the HUB employees alluded to future activities that they fully intended to do in the future.<sup>79</sup> The HUB employees expressed outrage towards Cruz-Moore’s criticism, but not one

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<sup>72</sup> See also *id.* at \*6, n.7 (Hayes, dissenting) (identifying the absence of calls to action or planned future action in the Facebook posts).

<sup>73</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*6 (Hayes, dissenting).

<sup>74</sup> *Id.*

<sup>75</sup> 287 N.L.R.B. 710 (1987).

<sup>76</sup> *Id.* at 711.

<sup>77</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*3, n.10.

<sup>78</sup> *Daly Park Nursing Home*, 287 N.L.R.B. 710, 710 (1987).

<sup>79</sup> See Table 1, *supra* note 24.

wrote anything suggesting going to Iglesias or any other HUB managers.<sup>80</sup> In the three intervening days between the Facebook conversation and Iglesias's termination of the alleged discriminatees, not one of the discriminatees went to management to discuss or rebut what Cruz-Moore said or would say.<sup>81</sup> Nevertheless, the majority in *Hispanics United* asserts that all five discriminatees' intent to respond in concert to Cruz-Moore's complaints was "implicitly manifest from the surrounding circumstances."<sup>82</sup>

The Board's treatment of the discriminatees' actions on Facebook (and the discriminatees' subsequent *inaction* for three whole days) likely stems from basic, prevailing misunderstandings in labor law over how people actually use social media. In *Hispanics United*, the Board misapplied the law when it looked past whether anything the discriminatees actually said on Facebook indicated or predicated concerted activity or attempts thereof. The Board skipped the traditional nexus requirement by interpolating an "implicitly manifest" intent to act from the HUB employees' Facebook complaints. Interpolating a call to action from mere employee griping on social media is error, however. As the next section explains, social media's very nature limits the probative effect of interactions like Facebook posts. In response to how little social media interactions actually tell us, labor law ought to demand more explicit evidence of some connection between what people say on social media and what they intend to effect.

## II. SOCIAL MEDIA, AND THE EMPLOYEE'S INTENT TO ACT IN CONCERT

### *A. Analysis of NLRB's Treatment of Social Media in Hispanics United*

Both the majority and the dissenting opinions in *Hispanics United* misconstrue the nature of social media. The best example of this categorizing mistake, occurring in both *HU* and in legal scholarship, is that of Facebook being like a water cooler in an office setting where employees meet and share news or gossip.<sup>83</sup> Any treatment of social media under labor law as just a "place where people talk" ignores many important differences between social media and other modes of communication. Understanding these differences is key to applying tried-and-true labor law to social media communication in a way that is consistent with the existing corpus of labor law.

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<sup>80</sup> See *supra* note 51, comparing Tables 1 and 2.

<sup>81</sup> See text accompanying note 32 *supra*.

<sup>82</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*3.

<sup>83</sup> See *supra* Tables accompanying notes 24-25.

First, the amount of time between different individuals' responses on social media can vary significantly. In Cole-Rivera's Facebook discussion, for example, the time that elapsed between new comments to her original post ranged from under a minute to nearly ten hours.<sup>84</sup> The potential length of time between communications makes social media conversation less like a personal or telephone conversation and more like an exchange of traditional post. This variability in the time between responses cuts both ways, however; that traditional post letter will never be read five minutes after being sent, but a Twitter tweet or Facebook post may be read near-instantaneously, depending on message recipients' access to social media at that specific moment of delivery.

Cole-Rivera's initial Facebook post and the subsequent comments also reflect their authors' uncertainty regarding how many people may read or respond to their posts, and even who those people might be. Cole-Rivera addressed her original post to her "fellow coworkers,"<sup>85</sup> yet her post received responses from a larger audience. This unanticipated larger audience included the administrative assistant to HUB's executive director, a member of HUB's board of directors, and the very same person Cole-Rivera criticized in her initial post.<sup>86</sup> The actual audience was also underinclusive of Cole-Rivera's addressed audience, at least according to the scant evidence in the record. HUB employed a total of 30 employees prior to firing Cole-Rivera and the other alleged discriminatees,<sup>87</sup> yet only six co-workers replied to Cole-Rivera's post.<sup>88</sup> Of course, the Facebook "conversation" as reproduced in Tables 1 and 2 *supra* does not necessarily reflect the true conversation that took place: the reader has no idea who read each message, responding to Cole-Rivera's post, at what time, or any individual person read them whether there were additional comments posted and later deleted before they could be responded to. When Cole-Rivera or anyone else posted comments on Cole-Rivera's original Facebook post, they likely would have no idea who would read these comments; or even if the persons they tried to address would read them.

Despite the uncertainty surrounding the intended, expected, and actual audiences, and despite Cole-Rivera's failure to explicitly tell anyone that she sought an objective (i.e. correcting managerial misperceptions

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<sup>84</sup> *Id.*

<sup>85</sup> TABLE 1, *supra* note 24.

<sup>86</sup> TABLE 2, *supra* note 25.

<sup>87</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*12.

<sup>88</sup> See TABLE 1, *supra* note 24. This number does not represent the number of people who read Cole-Rivera's post without responding, or whether those people were also co-workers. The low number of responses strongly indicates, but does not prove, the failure of Cole-Rivera's Facebook post reaching the intended audience.

about the quality of the employees' work), the majority in *Hispanics United* found that Cole-Rivera had a "clear 'mutual aid' objective [or] object of preparing her coworkers for group action [that] was implicitly manifest from the surrounding circumstances."<sup>89</sup> In so doing, the Board treated the record—the Facebook post and comments, as recorded *supra* Tables 1 and 2—as wholly-accurate *facts* made subject to the standard analysis on whether employee concertedness exists. This treatment ignores these Facebook posts' mutability and their elements of uncertainty.

Social media communications are helpful, potentially highly-probative evidentiary pieces. Labor law must bend and flex in such a way that modes like Facebook sharing and Twitter retweets become usable in rendering Board outcomes. At the same time, though, social media communications' evidentiary weight must be balanced against their unique 'unknown' dimensions. The Board could have balanced these competing facets better in *Hispanics United* by giving special attention to any developments (or the lack thereof) between the Facebook conversation and the discriminatees' termination three days later, or whether any of the Facebook posts were edited or modified at any time. It would have been incorrect to simply dismiss the entire Facebook conversation as unusable in making the Board's decision owing to these issues unique to social media. Until law and technology catch up with one another on this area, however, judicial bodies must limit their reliance on social media to a greater degree than as occurred in *Hispanics United*.

### *B. Why Concerted Activity Analysis on Social Media Requires the Nexus Requirement*

Prior to the NLRB's written decision in *Hispanics United*, many writers analyzed the NLRB's many judgments and decisions and had already begun trying to determine a series of rules explaining what employers could do with their social media policies to avoid erring on the side of an unfair labor practice charge, frequently relying on language from NLRB decisions that are less directly on point<sup>90</sup> or else comparing multiple cases to predict how the NLRB will treat an employer.<sup>91</sup> This note will not

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<sup>89</sup> *Hispanics United*, 359 N.L.R.B. No. 37 at \*3.

<sup>90</sup> See Sprague, *supra* note 10, at 1005–06 (quoting Cont'l Grp., Inc., 357 N.L.R.B. No. 39 at \*6) (using the NLRB's decision on overbroad rules to infer that the NLRB will act against an employer with an overbroad social media policy if an employee is disciplined for any concerted activity, regardless of whether or not that concerted activity is in fact protected under § 7 of the NLRA).

<sup>91</sup> See Russell, *supra* note 10, at 38 (“[C]ases seem to indicate that the NLRB is less concerned with whether the employee used social media than with the underlying purpose of those actions.”).



undertake the same kind of meta-analysis that has been done so thoroughly as legal scholars like Robert Sprague, especially since so many authors reach a similar conclusion: enforcement of the NLRA's larger prohibition on § 7-chilling employer policies,<sup>92</sup> as it relates to social media, has been all over the map.<sup>93</sup> In a note on employer policies involving social networking, Ariana Green observed the number of inconsistent NLRB decisions on social media in the last several years.<sup>94</sup> Green blamed these cases' inconsistent results on "an over-reliance on the traditional concerted activity standard,"<sup>95</sup> and (besides recommending several very good ideas)<sup>96</sup> called on the General Counsel for the NLRB to "allow NLRB attorneys more leeway when online speech is protected on social networks," so that attorneys can "display more agility in considering the context of social networking posts."<sup>97</sup>

This proposal is incorrect. The traditional labor laws are not over-relied upon and in need of replacement; they must simply be restored and applied. In order to allow employers and employees to engage in labor law as it was designed, the NLRB should apply a consistent "nexus" analysis.<sup>98</sup> This does not mean reversing the § 7 protection established under *Meyers II* for the individual employee who "seek[s] to initiate or to induce or to prepare for group action" but has not yet done so.<sup>99</sup> This proposal only requires that the plaintiff's prima facie case sufficiently allege that the sort of "mere griping" seen in *Hispanics United* was done in anticipation of doing something about the problem, by providing *some* evidence that the

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<sup>92</sup> Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

<sup>93</sup> See Sprague, *supra* note 10, at 962--63 (comprehensive survey of 36 different cases handled by the NLRB involving social media policies, from mid-2009 to mid-2011), 1002--03 (citations omitted) (concluding that "[w]hile an outright ban on section 7 activities would clearly violate section 8(a)(1), it is not always clear which types of prohibited communications may or may not chill section 7 activities."); Green, *supra* note 11, at 840--41 (citations omitted) ("[W]hen NLRB Field Examiners investigate cases involving Facebook posts, they sometimes miss the context and underlying intent of online comments . . . Failing to recognize the differences between online and offline communications has created discordant legal rulings.").

<sup>94</sup> Green, *supra* note 11, at 840--41.

<sup>95</sup> *Id.* at 840.

<sup>96</sup> See *id.* at 888 (recommending that the NLRB's General Counsel and the Board develop guidance standards for younger individuals who grow up increasingly accustomed with pervasive technology, and that employees gain greater awareness of their rights under the NLRA even if they are not represented by a labor organization).

<sup>97</sup> *Id.*

<sup>98</sup> *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at \*6 (2012) (Hayes, dissenting).

<sup>99</sup> *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 87 (1986).

court deems reliable and sufficient for the claim to go beyond “mere allegations.”<sup>100</sup>

This proposal prevents employees from complaining in public about work, then doubling back and claiming protected concerted activity under § 7 based on what they complained about (work) and not what they intended (enacting concerted activity to do something about it, or merely vent their personal exasperation). The nexus rule as applied allows employers to discipline or discharge the grippers that are not sincerely interested in concerted action, while maintaining the NLRB Office of General Counsel’s strong prerogative to investigate charges for § 8(a)(1) violations involving non-unionized employees’ concerted activity. If Cole-Rivera’s case were done under these rules, for example, the employees could still win by providing reliable testimony or other evidence for the fact-finder that they were going to do something about their co-worker’s complaints to management. This could be any sort of evidence that would convince the fact-finder, such as screen captures of the Facebook pages, or testimony from the employees alleging concertedness. Instead, the ALJ in *Hispanics United* discredited the small amount of evidence that would show this intent: Cole-Rivera’s testimony claiming her intent to speak with HUB’s Executive Director to counteract Cruz-Moore’s complaints.<sup>101</sup> Absent any positive evidence of plans by the discriminatees to do anything besides complain to one another, the HUB employees’ Facebook posts should be construed only as “mere talk.”<sup>102</sup>

#### CONCLUSION

Social media perhaps may prove as transformative as many claim it already is. Yet despite social media’s differences from other communicative media, the same concerted action analysis, requiring a nexus between activity and employee interests, ought to be applied. Without this nexus requirement, § 7’s protection for concerted activity covers employee griping whenever it is done without regard to employees’ intent, as had occurred in *Hispanics United*. It is impossible “that any [and every] conversation between employees comes within the ambit of activities protected by the Act provided it relates to the interests of the employees,”<sup>103</sup> because not *all* griping leads to group action. This is especially for regarding social media, where one worker’s missive to a “world-wide web” always lies within a few mouse clicks.

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<sup>100</sup> Cole-Rivera’s testimony was found unreliable in *Hispanics United*. See *Hispanics United*, 359 N.L.R.B. No. 37 at \*6 n.6 (Hayes, dissenting).

<sup>101</sup> See *supra* notes 70-71 and accompanying text.

<sup>102</sup> See *Hispanics United*, 359 N.L.R.B. No. 37 at \*6 (Hayes, dissenting).

<sup>103</sup> *Mushroom Transp. Co. v. N.L.R.B.*, 330 F.3d 683, 685 (3d Cir. 1964).