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Note

Balancing Employer and Employee Interests in Social Media Disputes

Tara R.  
Flomenhoft\*

**I. Introduction**

There is an emerging and unpredictable relationship today between social media and employment. For example, on a snowy New Years Eve in 2011, a truck driver was traveling cross-country and was fired due to his social media use.<sup>1</sup> While en route to his drop-off, he discovered the road was closed due to the snowy conditions and therefore needed to contact the on-call dispatcher to inform her that he would be late for his delivery.<sup>2</sup> He was unable to reach the dispatcher because the phone system had been improperly set up for the holiday.<sup>3</sup> The driver was especially frustrated with the unanswered calls because he was also supposed to assist and advise new drivers, and with the improperly set up phone system, he was unable to do so.<sup>4</sup>

The next morning while still waiting to complete his delivery, he posted to his personal Facebook page about his frustration with the situation.<sup>5</sup> A few days later, the Operation's Manager<sup>6</sup> responded to his Facebook post about the closed roads and unavailable on-call dispatcher.<sup>7</sup> The driver explained he was concerned that he could lose his job over the original Facebook post.<sup>8</sup> The Operation's Manager assured him not to worry about it.<sup>9</sup>

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<sup>1</sup> Advice Memorandum, Buel Inc., No. 11-CA-22936, 2011 WL 3793671, at \*1 (Jul. 28, 2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at \*2.

<sup>5</sup> *Id.*

<sup>6</sup> Lafe E. Solomon, Second Report, NAT'L LABOR RELATIONS BD. (Jan. 24, 2012), <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (follow "second report" hyperlink).

<sup>7</sup> Advice Memorandum, *supra* note 1, at \*1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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\* J.D., Florida State University College of Law, 2016. I would like to thank Professor Mary Ziegler for suggesting this topic and her guidance during the writing process.

About a week later, upon return to his company's facility, the driver learned that he would be stripped of his leadership status because of his alleged unprofessionalism on Facebook.<sup>11</sup> The driver was frustrated and stunned but accepted his discipline; however, this was not the only discipline he would receive.<sup>12</sup> When he returned to the facilities again a few weeks later, none of the office personnel would speak to him.<sup>13</sup> He concluded all he could do was resign since he was unable to receive any of his work assignments from the company.<sup>14</sup> He then filed a claim with the National Labor Relations Board (NLRB) alleging he was forced to resign, but the Board upheld the employer's actions.<sup>15</sup>

For other employees, the law on social media and employment has been much more forgiving. For instance, a BMW salesman was not disciplined for his Facebook posts that were much more derogatory towards his employer.<sup>16</sup> The dealership was holding one of its largest sales events of the year, and the salesman was hoping to make a very large commission.<sup>17</sup> A few days prior to the event, the salesman along with a couple of the other sales people, voiced their disapproval over the food choice for the event.<sup>18</sup> Specifically at issue was a hot dog stand, because they claimed that other dealerships that put on similar events would serve a higher quality food choice.<sup>19</sup> The employer disagreed and used the hot dog stand at the event.<sup>20</sup>

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<sup>10</sup> Solomon, Second Report, *supra* note 6.

<sup>11</sup> Advice Memorandum, *supra* note 1 at \*2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at \*2-3; Solomon, Second Report, *supra* note 6.

<sup>16</sup> Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

On the day of the event, the hot dog stand was present which upset the salesman.<sup>21</sup> He photographed the food at the event which he then shared to his Facebook page under an album titled, “BMW 2011 5 Series Soiree.”<sup>22</sup> He wrote various sarcastic captions criticizing his employers’ food choices, including one photo which featured a coworker holding a bottle of water and read, “No, that is not champagne or wine, it’s an 8 oz. water. Pop or soda would be out of the question. In this photo, [my coworker is] . . . coveting the rare vintages of water that were available for our guests.”<sup>23</sup> The salesman also shared multiple photos of an accident at his employer’s other dealership, where a young boy had driven a model vehicle into a nearby pond with a salesman sitting in the passenger seat, which had taken place a few weeks earlier.<sup>24</sup>

The salesman’s Facebook posts included both the hot dog photos and the accident photos.<sup>25</sup> The salesman was then fired for his Facebook activity.<sup>26</sup> The employer explained he was fired mainly due to the car accident photos, not the hot dog photos.<sup>27</sup> The salesman filed a claim with the NLRB, and the NLRB agreed that the photos of the hot dog stand were protected, but that the accident photos were not, which made his firing lawful.<sup>28</sup>

The truck driver and BMW salesman have both confronted a legal problem that plays an increasingly important part in employment law. How should the law balance the competing concerns of employers and employees in the context of social media? And, how should the law strike a balance between employees’ legitimate interests in privacy and freedom of expression with employers’ business needs?

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

The intersection between social media and the workplace is undeniable. As of January 2014, seventy-four percent of online adults use social media sites.<sup>29</sup> Moreover, the most popular site is Facebook, and at least sixty-three percent of Facebook users sign on daily, and forty percent do so multiple times each day.<sup>30</sup> Users also interact with a variety of other social media platforms on a daily basis, including Instagram,<sup>31</sup> Twitter, and LinkedIn.<sup>32</sup> Furthermore, many social media users are “friends” with their coworkers, and twenty-one percent are even “friends” with their supervisors.<sup>33</sup> Therefore, this overlap between social media and the workplace is undeniable.

Since most employees work in the private sector, federal and state constitutional protections related to privacy or free speech rarely apply to employees’ social media use. Then, with only a handful of employees covered by either contractual protections or state law provisions, the law on social media and employment has emerged largely under the National

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<sup>29</sup> *Social Networking Factsheet*, PEW RESEARCH CTR. (Dec. 27, 2013), <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>. This data included adults from ages 18 to over 65. *Id.*

<sup>30</sup> Maeve Duggan & Aaron Smith, *Frequency of Social Media Use*, PEW RESEARCH CTR. (Dec. 20, 2013) <http://www.pewinternet.org/2013/12/30/frequency-of-social-media-use/>.

<sup>31</sup> Instagram is a social media site, which is used mainly through the downloadable free app, and it allows users to share photos and videos with their families and friends. INSTAGRAM, <http://instagram.com> (last visited June 30, 2016).

<sup>32</sup> Duggan & Smith, *supra* note 30. The numbers associated with these other social media sites dwindle in comparison to Facebook, but are still significant to show the constant interaction with social media today. *Id.*

<sup>33</sup> Keith Hampton et al., *Part 3: Social Networking Sites and Our Lives*, PEW RESEARCH CTR. (June 16, 2011), <http://www.pewinternet.org/2011/06/16/social-networking-sites-and-our-lives/>. (finding that the average Facebook user has 229 “friends” which includes family, friends, coworkers, and other acquaintances, and that out of those 229 “friends” usually 10% are usually coworkers); see Lillian Cunningham, *Should You Friend Your Boss on Facebook?*, WASH. POST (Oct. 25, 2011), [http://www.washingtonpost.com/national/on-leadership/should-you-friend-your-boss-on-facebook/2012/10/25/6a8d5bba-1dff-11e2-ba31-3083ca97c314\\_story.html](http://www.washingtonpost.com/national/on-leadership/should-you-friend-your-boss-on-facebook/2012/10/25/6a8d5bba-1dff-11e2-ba31-3083ca97c314_story.html); Emily Protalinski, *21% Are Facebook Friends with Their Boss*, ZDNET (Feb. 14, 2012, 3:33 PM), <http://www.zdnet.com/article/21-are-facebook-friends-with-their-boss/> (showing a survey conducted by the Russell Herder marketing group which found that not only are 21% of social media users “friends” with their superiors, but that 46% initiated the “friend request” themselves).

Labor Relations Act (NLRA), which is overseen by the NLRB.<sup>34</sup> The NLRA typically regulates the rights of most private sector employers and employees by encouraging collective bargaining, as well as by decreasing harmful labor and management practices.<sup>35</sup> Consequently, the intersection between social media and the workplace rightfully falls under the hand of the NLRB. The outcomes produced under the NLRB's direction in regards to social media disputes have at times been favorable, but still very unpredictable.

The NLRB's standards fail to strike a proper balance between the interests of employers and employees. The NLRB undervalues and disregards employers' interests in discipline and control over the day-to day operations of the business. Moreover, the NLRB's standards are so vague and inconsistently applied that neither employers nor employees have adequate notice of when social media use gains protection. To address these shortcomings, this Note proposes a new bright line distinction designed to better account for the interests of both employers and employees, and to also set a clear line for when social media use in the workplace can give rise to discipline.

Thus, this Note will provide guidance for both employers and employees that the NLRB has lacked. It will explain why the NLRB has applied Section 7 rights to this developing area of the law in Part II. In Part III, this Note will examine the traditional standards that the NLRB applies to Section 7 rights, and then it will examine the reports and Board decisions on social media disputes. Furthermore, in Part IV.A, this Note will critique the NLRB's approach to social media disputes and argue that they lack predictability. Part IV.B will outline the interests of both employers and employees in social media expression that the NLRB ignores in its decisions, and in Part IV.C, this Note will propose a standard that balances those interests more fairly. Finally, Part V will conclude.

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<sup>34</sup> *The NLRB and Social Media*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited June 29, 2016).

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

## II. Why Does the NLRB Regulate Social Media, What is the NLRB, and What Does

### It Use to Regulate This Area of the Law?

Since 2010, the NLRB has regulated the intersection of employment law and social media.<sup>36</sup> Because most employees are employed privately rather than publicly, they do not enjoy the First or Fourteenth Amendment protections that may otherwise cover social media disputes.<sup>37</sup> Moreover, very few states provide any robust privacy protection for private sector employees, which would at least add an additional layer of protection for social media expression.<sup>38</sup> Furthermore, instead of granting broad protections for employee privacy into their contracts, employers attempt to prescribe “social media policies” into their employee handbooks, which try to constrict employees’ social media use.<sup>39</sup> Therefore, this leaves the NLRB to regulate this area of the law since all other areas are essentially unavailable.

#### A. The NLRB

The NLRB is a federal agency that protects the rights of private sector employees to join together to improve their wages and working conditions.<sup>40</sup> It protects private

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<sup>36</sup> *The NLRB and Social Media*, *supra* note 34.

<sup>37</sup> U.S. CONST. amend. I, XIV

<sup>38</sup> See Catherine Crane, *Social Networking V. the Employment-at-Will Doctrine: A Potential Defense Employees Fried for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking*, 89 WASH. U. L. REV. 639, 649-54 (2012) (describing that private sector employees are not provided the same protections as public sector employees in terms of privacy, and any attempts to pursue discrimination and privacy claims are usually unsuccessful); Stephen D. Lichtenstein & Jonathan J. Darrow, *Employment Termination for Employee Blogging: Number One Tech Trend for 2005 and Beyond, or a Recipe for Getting Dooiced?*, 2006 UCLA J.L. & TECH. 4, 26 (2006) (showing that in 2006, only three states recognized that private sector employees had any right to privacy in the workplace).

<sup>39</sup> See generally Christine Neylon O’Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OR. L. REV. 337 (2013) (providing an overview of the most current cases involving employers who attempted to include social media policies in their employee handbooks).

<sup>40</sup> *Rights We Protect*, NAT’L LABOR RELATIONS BD., <http://www.nlr.gov/rights-we-protect> (last visited June 29, 2016). The NLRA does not protect the rights of government employees. *Frequently Asked Questions – NLRB*, NAT’L LABOR RELATIONS BD., <http://www.nlr.gov/resources/faq/nlr#t38n3182> (follow “Which employees are protected under the NLRA?” hyperlink) (last visited June 29, 2016).

employees' rights whether they are in a union or not.<sup>41</sup> It protects these rights via the National Labor Relations Act (NLRA).<sup>42</sup> The NLRA names this right for employees to join together and discuss job-related problems, "protected concerted activity," which was codified into the original act in 1935.<sup>43</sup> In addition to typical disputes over wages, hours, and other unfair working conditions, the NLRB also addresses issues arising over an employee's right to picket and strike, all of which are generally described as "concerted activity."<sup>44</sup> Today, the NLRB has extended its traditional protection of these types of work-related conversations to include when they are conducted on social media.<sup>45</sup>

In 2010, the NLRB began receiving claims in its regional offices from employees asserting that they were unlawfully disciplined due to a social media posting or that the employer's social media policy was unlawful.<sup>46</sup> Its regional offices then began issuing decisions later in 2010.<sup>47</sup> Therefore, in an attempt to ensure "consistent enforcement actions," and also in response to employers requesting guidance in this developing area of the law, the NLRB's Acting General Counsel released three memorandums to detail and clarify the results in several social media regional decisions from 2011-2012.<sup>48</sup> Further, in late September of 2012, the NLRB began issuing official Board decisions in order to establish precedent.<sup>49</sup> Throughout these regional decisions, memorandums, and Board decisions, the NLRB made it clear that "protected concerted activity" covered this area of the law.<sup>50</sup>

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<sup>41</sup> *Rights We Protect*, *supra* note 40.

<sup>42</sup> *Id.*; 29 U.S.C. §§ 151-169 (2012).

<sup>43</sup> *Protected Concerted Activity*, NAT'L LABOR RELATIONS BD., <http://www.nlr.gov/rights-we-protect/protected-concerted-activity> (last visited June 29, 2016); *Rights We Protect*, *supra* note 40.

<sup>44</sup> 29 U.S.C. § 151; *Frequently Asked Questions*, *supra* note 40 (follow "Is it legal to strike or picket an employer?" hyperlink).

<sup>45</sup> *The NLRB and Social Media*, *supra* note 34.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



B. “Protected Concerted Activity” Under the NLRA

The NLRA describes concerted activity under Section 7.<sup>51</sup> Section 7 explains that “Employees . . . have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>52</sup> Section 7 is enforced by section 8(a)(1) which states “[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title [Section 7 of the NLRA].”<sup>53</sup>

Section 7 rights typically include at least two employees acting together to improve wages or working conditions, but the action of a single employee may be covered when he or she is working on behalf of others or involves other coworkers before acting.<sup>54</sup> This employee or group of employees must be acting to improve pay, hours, workload, or some other type of working condition.<sup>55</sup> Some examples would include: employees discussing safety measures together, signing a petition to improve working conditions, or an employer penalizing an employee for joining a union.<sup>56</sup> Therefore, the NLRB intervenes to restore what has been unlawfully taken away from employees if they are fired, suspended, or disciplined for taking concerted action.<sup>57</sup> However, an employee or group of employees will not be covered by Section 7 when they are only making a “personal gripe,” meaning complaining only about his or her job situation or airing grievances about his or her employer,

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<sup>51</sup> 29 U.S.C. § 157 (2012).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at §§157 -158.

<sup>54</sup> *Protected Concerted Activity*, *supra* note 43.

<sup>55</sup> *Id.*

<sup>56</sup> *Employer/Union Rights and Obligations*, NAT’L LABOR RELATIONS BD., <http://www.nlr.gov/rights-we-protect/employerunion-rights-and-obligations> (Nov. 16, 2014); *see also Protected Concerted Activity*, *supra* note 43 (providing an interactive map on the NLRB’s website which includes a variety of cases where protected concerted activity was found).

<sup>57</sup> *Protected Concerted Activity*, *supra* note 43.

coworkers, or customers.<sup>58</sup> Additionally, an employee loses protection under Section 7 if they take action for workplace improvement that is malicious or reckless. For instance, deliberately sabotaging or threatening violence, spreading lies about a product or the company, or revealing trade secrets may cause the employee to lose Section 7 protection.<sup>59</sup>

Section 7 rights have now been extended to include the social media realm when employees share information about the workplace on their personal social media pages.<sup>60</sup> Therefore, the questions is: what is “concerted activity” in the social media context in comparison to what has typically been defined as Section 7 rights? Part III.A will discuss the traditional standards the NLRB has applied to determine whether an action is considered “concerted activity,” and then Part III.B and III.C will show these traditional standards applied and adapted to the social media context.

### **III. Defining Concerted Activity: The State of the Law**

The NLRB has several traditional standards for determining whether an action is concerted, which will be explained in Part A of this section. Part B will then examine the adapted standards that the NLRB set out in the three memorandums from 2011-2012. Finally, Part C will examine the notable Board decisions that examined and applied the traditional standards to social media cases, which began in September 2012.

#### *A. The Traditional Standards*

The NLRB, along with appellate courts and the Supreme Court, have interpreted the meaning of “concerted activity” since 1935 when the NLRA was codified.<sup>61</sup> Over time, the meanings have changed and expanded, yet many of the traditional interpretations still

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *The NLRB and Social Media, supra* note 34.

<sup>61</sup> *Protected Concerted Activity, supra* note 43.

remain. The following section will explain the traditional standards that the NLRB has described and applied for “concerted activity” under the NLRA.

### 1. A Speaker and a Listener

In 1951, the NLRB explained that for an action to be concerted all that is needed is a “speaker and a listener.”<sup>62</sup> But, it has been noted for an action to be concerted it does not require an employee to actually enlist the support of others.<sup>63</sup> Instead, concerted activity may just be an employee’s attempt to incite coworkers into group action for work related interests even if the attempt ultimately fails.<sup>64</sup> This is why there must only be a “speaker and a listener.” This standard is still referred to and has remained an important definitional component to determine whether an action is concerted.<sup>65</sup>

### 2. Meyers I and Meyers II: An Objective Standard

In 1984, in *Meyers Industries, Inc.*, the NLRB stated it would determine whether an action was concerted under an “objective” standard.<sup>66</sup> Known commonly as *Meyers I*, it explained for an action to be concerted an employee must “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself”.<sup>67</sup>

Yet, in *Prill v. NLRB*, which was subsequently decided by the D.C. Circuit in 1985, the court explained that the NLRB needed to reconsider its standard of concerted activity promulgated in *Meyers I*, specifically in terms of scope.<sup>68</sup> The D.C. Circuit claimed that the NLRB’s standard declared in *Meyers I* was too narrow and in conflict with the NLRB’s previous

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<sup>62</sup> *Root-Carlin, Inc.* 92 N.L.R.B. 1313, 1314 (1951).

<sup>63</sup> *NLRB v. Empire Gas, Inc.*, 566 F.2d 681, 684 (10th Cir. 1977).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1314; Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 315-16 (1981); Lauren K. Neal, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715, 1750 (2012).

<sup>66</sup> *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 496 (1984).

<sup>67</sup> *Id.* at 497.

<sup>68</sup> *Prill v. NLRB*, 755 F.2d 941, 953, 957 (D.C. Cir. 1985).

decisions.<sup>69</sup> The D.C. Circuit explained that the standard from *Meyers I* appeared to require authorization by a group of employees in order for an individual employee to come forward with a complaint, rather than protecting, as it traditionally had, an individual employee attempting to induce action independently.<sup>70</sup>

Therefore in *Meyers Industries, Inc.*, which is commonly referred to as *Meyers II*, the NLRB reaffirmed its standard of concerted action from *Meyers I* and clarified it was not intended to be so narrow.<sup>71</sup> The NLRB explained that the standard from *Meyers I* was not meant to be read so broad as to be redundant, but instead that it was specifically expansive enough to include individual activity connected to collective activity.<sup>72</sup> It also highlighted and reaffirmed that concerted activity requires only a “speaker and a listener.”<sup>73</sup> Therefore, *Meyers II* is essentially only a clarification of *Meyers I*, but the definition of concerted activity is more often recognized from *Meyers II*.<sup>74</sup>

### 3. Limitations on Protection under Section 7: Atlantic Steel and the Jefferson Standard

The NLRB has also limited its protection of concerted activity granted under *Meyers II* in both *Atlantic Steel, Co.* and *NLRB v. Local 1229* (Jefferson Standard).<sup>75</sup> In *Atlantic Steel*, which was decided in 1979, the employee had a history of inappropriate behavior at work and was eventually discharged for calling his superior a profanity.<sup>76</sup> The employee tried to claim he was engaged in protected concerted action, but the NLRB disagreed.<sup>77</sup> It explained that even when an employee is acting concerted, the protection may be lost if any behavior is deemed

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<sup>69</sup> *Id.* at 954.

<sup>70</sup> *Id.* at 954-56.

<sup>71</sup> *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 882 (1986); *see also* Neal, *supra* note 65, at 1719-21 (2012) (discussing the adoption of the NLRB’s definition of concerted activity from *Meyers I* and *Meyers II* in more detail).

<sup>72</sup> *Meyers Indus., Inc.*, 281 N.L.R.B. at 885.

<sup>73</sup> *Id.* at 887.

<sup>74</sup> *Id.* at 882; *Meyers Indus., Inc.*, 268 N.L.R.B. at 497; Neal, *supra* note 65, at 1719.

<sup>75</sup> *NLRB v. Local 1229, Int’l Bhd. Elec. of Workers*, 346 U.S. 464, 479-80 (1953); *Meyers Indus., Inc.*, 281 N.L.R.B. at 882, 887; *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

<sup>76</sup> *Atl. Steel Co.*, 245 N.L.R.B. at 814-15.

<sup>77</sup> *Id.* at 816-17.

“opprobrious.”<sup>78</sup> Opprobrious statements are usually obscene and profane and made in a setting in which such conduct is not normally tolerated.<sup>79</sup> However, if these types of statements are made during an organizing effort, they may be deemed protected.<sup>80</sup> Therefore, in *Atlantic Steel*, the NLRB introduced a balancing test for determining whether an employee had acted opprobriously.<sup>81</sup> These factors are as follows: “the place of the discussion; the subject matter of the discussion; the nature of the employee’s outburst; and whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”<sup>82</sup> Thus, by considering all of the employee’s actions in *Atlantic Steel* and balancing them against these factors, the conduct was opprobrious.<sup>83</sup> The NLRB also later noted that usually the *Atlantic Steel* standard is applied to a “public outburst,” rather than an action made in privacy.<sup>84</sup>

The NLRB also limited the protection of Section 7 with the Jefferson Standard in 1953.<sup>85</sup> The Jefferson Standard emphasized that concerted action does not include when an employee is deliberately acting disloyal.<sup>86</sup> The Jefferson Standard explained that unprotected behavior was when an employee makes “sharp, public, disparaging attack[s] upon the quality of the company’s product and business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.”<sup>87</sup> However, the Jefferson Standard is limited in its application; it is only applicable to an issue related to an ongoing labor dispute, and the attack on the employer must be “so disloyal, reckless, or maliciously untrue” in

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 819.

<sup>80</sup> *Id.* at 816.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 816-17.

<sup>84</sup> Lafe E. Solomon, First Report, NAT’L LABOR RELATIONS BD. (Aug. 18, 2011), <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (follow “first report” hyperlink).

<sup>85</sup> *NLRB v. Local 1229, Int’l Bhd. Elec. of Workers*, 346 U.S. 464, 478 (1953).

<sup>86</sup> *Id.* at 479-80.

<sup>87</sup> *Id.* at 471.

order to lose Section 7 protection.<sup>88</sup> Finally, the Jefferson Standard’s analysis focuses mainly on the effects an attack has on third parties.<sup>89</sup>

#### 4. The Chilling Effect: Lafayette Park and Lutheran Heritage

Unlike the other traditional standards stated above, the final traditional standard actually specifically addresses employers, instead of employees.<sup>90</sup> The NLRB has stated an employer cannot enforce a rule that “reasonably tend[s] to chill employees in the exercise of their Section 7 rights.”<sup>91</sup> In order to determine whether a rule does chill an employee’s rights, the NLRB explained it conducts a two-step analysis. <sup>92</sup> The first step is to determine whether a rule “explicitly restricts Section 7 activities” and if so, it is unlawful.<sup>93</sup> Second, if the rule is not explicit, then the NLRB determines whether: “the employees would reasonably construe the language to prohibit Section 7 activity, the rule was promulgated in response to union activity, or the rule has been applied to restrict the exercise of Section 7 rights.”<sup>94</sup> If the employer’s rule is found to prohibit or restrict any of those stated activities, then the rule will be considered unlawful because it chills employees’ rights.<sup>95</sup> This standard usually applies to rules in employers’ handbooks.<sup>96</sup>

The following section will describe these traditional standards applied and adapted to the early social media disputes from 2011-2012.

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<sup>88</sup> Am. Golf Corp., 330 N.L.R.B. 1238, 1240 (2000); *see also* Solomon, First Report, *supra* note 84 (discussing the Jefferson Standard in the social media context).

<sup>89</sup> Am. Golf Corp., 330 N.L.R.B. at 1240.

<sup>90</sup> Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

<sup>91</sup> *Id.*

<sup>92</sup> Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646, 646-47 (2004); *see* Solomon, First Report, *supra* note 84.

<sup>93</sup> Lutheran Heritage Village-Livonia, 343 N.L.R.B. at 646.

<sup>94</sup> *Id.* at 647.

<sup>95</sup> *Id.* at 646-47.

<sup>96</sup> Neal, *supra* note 65, at 1753.

B. *The Traditional Standards Applied and Modified for Social Media Disputes: The*

*Standards from the Memorandums*

In the NLRB's Second Report, it recognized there are "inherent differences" between the situations where the traditional standards have typically applied and those same situations taking place over social media.<sup>97</sup> These differences included the fact that when an employee is discussing labor issues, the conversation takes place at the workplace where, with social media, the same conversation may be discussed from the privacy of the home and essentially anywhere while not on the job.<sup>98</sup> Moreover, when the conversation is over social media, usually other third parties are exposed to it, and therefore that differs from a conversation in the workplace where ordinarily only other employees are exposed.<sup>99</sup> Finally, with the traditional standards, it is easier to understand when a work place discussion is meant to enlist third party support, however this application is less clear when the discussion is made over social media, when it could seem more similar to a conversation simply overheard.<sup>100</sup> The NLRB had to adapt the traditional standards for concerted action to take into consideration the differences that do exist with social media. Those modified standards follow.

1. The Modified Atlantic Steel Standard: Combining the Atlantic Steel and Jefferson

Standards to Better Reflect the Impact on Third Parties on a Social Media Platform

Using the traditional standards typical of labor disputes, the NLRB's Second Report claimed to utilize a modified *Atlantic Steel* standard that incorporated parts of the Jefferson Standard to create a more suitable framework applicable to social media disputes.<sup>101</sup> The NLRB explained that under the *Atlantic Steel* standard, it usually only assessed whether an employee's outburst was a "disruption to [the] workplace" and did not ordinarily consider the "disparaging impact of comments" made on third parties, which is something that the Jefferson Standard usually evaluated.<sup>102</sup> Therefore, the NLRB explained that when

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<sup>97</sup> Solomon, Second Report, *supra* note 6, at 25.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 24-25.

<sup>100</sup> *Id.* at 24.

<sup>101</sup> *Id.* at 24-45.

<sup>102</sup> *Id.*

analyzing an “outburst” on social media, it would “borrow” from the Jefferson Standard in order to account for the effects that social media postings have on third parties.<sup>103</sup> The NLRB noted that by borrowing some of the Jefferson Standard, the analysis of a social media outburst would more “closely follow the spirit of the Board’s jurisprudence regarding the protection afforded to employee speech”.<sup>104</sup>

## 2. Modifying Prongs of the Atlantic Steel Standard

In addition, the Board has not only combined the *Atlantic Steel* and Jefferson Standard, but it has also recognized that certain prongs of *Atlantic Steel* must be modified when applied to social media disputes.<sup>105</sup> The NLRB noted in its Second Report that the “location” and “nature of the outburst” prongs of *Atlantic Steel* must instead reflect the “inherent differences between a Facebook conversation and a workplace outburst.”<sup>106</sup> Thus, the NLRB seemed to realize the impact outbursts might have on third parties when shared on social media.<sup>107</sup>

Therefore, the NLRB adapted the “location” prong of *Atlantic Steel* to depend on whether the social media posting occurred during work place hours.<sup>108</sup> The “nature of the outburst” prong of *Atlantic Steel* was also modified to include whether the posting was “so disruptive of the workplace discipline as to weigh in favor of losing protection.”<sup>109</sup> The NLRB decided it was best

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 25.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See Christine Neylon O’Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK U. L. REV. 29, 48 (2011) (discussing the first application of *Atlantic Steel* to social media); see also Lafe E. Solomon, First Report, *supra* note 84, (discussing the application of the standard for the first time, but identifies the case anonymously); Solomon, Second Report, *supra* note 6, at 25.

<sup>109</sup> Solomon, Second Report, *supra* note 6, at 25.



to merge these factors to better account for the impact that social media postings about the workplace could have on third parties.<sup>110</sup>

However, aside from these memorandums, the NLRB also began releasing Board decisions in late 2012 that only applied the traditional standards to social media disputes. The following section will explain the most notable decisions.

*C. Notable Board Decisions Describing the Law Applied to Social Media Disputes*

1. Karl Knauz Motors, Inc.

*Karl Knauz Motors* is the first decision the Board issued on a social media dispute.<sup>111</sup>

*Karl Knauz Motors* is also one of the cases discussed in Part I of this Note where the BMW salesman shared photos of the hot dog stand to his personal social media page.<sup>112</sup>

The NLRB held that the photos of the hot dog stand were concerted, but the photos of the accident at the employer's adjacent dealership were not.<sup>113</sup> It reasoned that the photos of the hot dog stand were concerted under *Meyers II*, because they were an outgrowth of the salesman's previous conversations with the other salespeople over the employer's food choice for the event.<sup>114</sup> It further explained that because the quality of food could have an effect on the salesman's compensation,<sup>115</sup> it was concerted.<sup>116</sup>

The NLRB also explained that admittedly this was not an "obvious" situation of concerted activity, but since it was "possible" the hot dog stand could have affected the sales people's compensation, though still not "likely," it was concerted activity.<sup>117</sup> It also found that the mocking tone used in the hot dog photo captions was not "disparaging" enough to lose Section 7

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<sup>110</sup> *Id.*

<sup>111</sup> Karl Knauz Motors, Inc. 358 N.L.R.B. No. 164 (2012); *The NLRB and Social Media*, *supra* note 34.

<sup>112</sup> *See supra* text accompanying notes 16-28.

<sup>113</sup> Karl Knauz Motors, Inc. 358 N.L.R.B. No. 164, at \*1, \*10.

<sup>114</sup> *Id.* at \*16.

<sup>115</sup> *See supra* text accompanying note 17.

<sup>116</sup> Karl Knauz Motors, Inc. 358 N.L.R.B. No. 164, at \*16.

<sup>117</sup> *Id.*

protection.<sup>118</sup> However, the NLRB did find that the posts about the car accident were not protected since they had no connection to terms or conditions of employment, nor did any other employee's reaction deem it concerted either.<sup>119</sup>

Yet, the salesman did bring another claim, which concerned the employer's social media policy in the employee handbook.<sup>120</sup> The NLRB analyzed whether the policy would reasonably chill employees in the exercise of their Section 7 rights under *Lafayette Park* and *Lutheran Village*.<sup>121</sup> It examined the dealership's Courtesy Rule that read:

(b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.<sup>122</sup>

The NLRB explained that this rule was too broad, because an employee could reasonably construe that the disrespectful language clause could be interpreted to bar any protest or criticisms that could injure the image of the company.<sup>123</sup> The Board only addressed the language of the Courtesy Rule explaining it could be understood to limit protected rights, but it did not provide any examples of injurious statements which should be protected and which should not.<sup>124</sup>

This was the first time the NLRB struck down a social media policy because it was too broad and could be construed to chill employee's rights.<sup>125</sup>

## 2. Hispanics United of Buffalo

In December 2012, the NLRB issued its' second significant decision, *Hispanics United of Buffalo (HUB)*, where the NLRB applied "settled Board law"<sup>126</sup> to decide whether the

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<sup>118</sup> *Id.* at \*17.

<sup>119</sup> *Id.* at \*18.

<sup>120</sup> *Id.* at \*1-3.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*1.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*1-2.

<sup>125</sup> *Id.* at \*1.

<sup>126</sup> *The NLRB and Social Media*, *supra* note 34. The settled Board law that the NLRB is referring to is what is described in Part III.A. as the traditional standards.

employees' actions were concerted.<sup>127</sup> This was also the first Board decision where the NLRB mandated reinstatement of the employees after a social media firing.<sup>128</sup>

Here, two employees, who worked in two different departments at HUB, were speaking via text message after work hours.<sup>129</sup> During the text message conversation, one of the employees explained she planned to complain to management about several of the departments because she did not believe they were performing satisfactorily.<sup>130</sup> The other employee on the receiving end of the text message was frustrated, because she worked in one of the departments her friend planned to complain about.<sup>131</sup> Therefore, she posted on Facebook from her personal home computer writing, “[my fellow employee] feels that we don’t help our clients enough at [HUB]. I about had it! My fellow coworkers how do u feel?”<sup>132</sup> Four other coworkers who worked in the same department, replied via their personal home computers and objected to the fact that their coworker from a different department was claiming their work was substandard.<sup>133</sup> The employee, who planned to complain about the other departments, replied to the Facebook posting writing, “stop with your lies about me.”<sup>134</sup>

That same employee went to her supervisor, but instead of complaining about the departments like she had planned, she claimed the Facebook posts defamed her.<sup>135</sup> Thereafter, the supervisor fired the employee who originally posted the status and also the other four employees who responded to it.<sup>136</sup> The supervisor claimed they were terminated

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<sup>127</sup> *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. 37, at \*1 (2012); *The NLRB and Social Media*, *supra* note 34.

<sup>128</sup> *Hispanics United*, 359 N.L.R.B. 37 at \*15.

<sup>129</sup> *Id.* at \*1.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at \*2.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

because the remarks on Facebook constituted bullying and harassment of a fellow coworker.<sup>137</sup> Thus, those five employees brought suit.<sup>138</sup>

The NLRB concluded under *Meyers I* and *II* that the terminated employees were unquestionably exercising their Section 7 rights.<sup>139</sup> The NLRB emphasized that these were clearly concerted actions because the comments made by the employees on social media were for the “purpose of mutual aid or protection” which is lawful.<sup>140</sup> The NLRB reasoned that the employee, whom initially shared on social media, was only alerting her fellow coworkers to a complaint about them.<sup>141</sup> And, when she shared this on social media, she not only wanted her coworkers to know how frustrated she was, but also what they thought about the situation too.<sup>142</sup> Therefore, the employees’ responses to the original post were deemed to be in common cause, thereby making their responses plus the original post concerted action.<sup>143</sup> The NLRB concluded this interaction over social media was evidence of the first step of group action against the other employee, which would enable them to come together to defend themselves over any consequences of the complaint.<sup>144</sup>

The NLRB emphasized the purpose for initiating group action does not need to be stated in the initial communication.<sup>145</sup> Instead, the activity between the employees is enough to be concerted.<sup>146</sup> Further, since these comments also centered on job activities, they were certainly protected under the NLRA.<sup>147</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*1.

<sup>139</sup> *Id.* at \*2; *see Meyers Indus., Inc.*, 268 N.L.R.B. 493, 497 (1984) (explaining the other two elements of the *Meyers I* standard).

<sup>140</sup> *Hispanics United*, 359 N.L.R.B. 37 at \*2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at \*3.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at \*4.

The NLRB applied its traditional standards in *HUB* without taking note that these conversations took place over social media. Instead, it applied the traditional standards as it would in any other setting.

### 3. Dish Network Corp.

*Dish Network Corp.* does not involve an employee terminated for utilizing social media, but instead involved an employee terminated for multiple safety violations who challenged the employer's social media policy found in the employee handbook.<sup>148</sup> The NLRB examined the employer's social media policies and held they were unlawful.<sup>149</sup>

The NLRB specifically looked at a section of the policy that explained the employer regarded social media as a form of communication, but that only those who were authorized to speak on behalf of the company may do so through such media.<sup>150</sup> The employer also specifically limited employees from "mak[ing] disparaging or defamatory comments about [the company], its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services."<sup>151</sup> Lastly, the policy explained that other than situations where the employee was "specifically authorized" to use social media, the employee could not use social media on company time or with the company's resources.<sup>152</sup>

The NLRB held these policies were unlawful for two reasons.<sup>153</sup> First, it cited *Karl Knauz Motors* and explained that an employer's social media policy cannot limit negative commentary on social media.<sup>154</sup> By relying on *Karl Knauz Motors*, the Board only applied traditional standards but gave no reason why it did so.<sup>155</sup> Second, it explained that the part of the policy that denied

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<sup>148</sup> Dish Network Corp., 359 N.L.R.B. 108, at \*1, \*8 (2013).

<sup>149</sup> *Id.* at \*7.

<sup>150</sup> *Id.* (noting the policy included blogs, forums, wikis, and professional networks as forms of social media).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at \*8.

<sup>154</sup> *Id.*

<sup>155</sup> Meaning the traditional standards, which were applied in *Knauz BMW*.

the employees ability to participate in negative discussion during company time was improper, because the employer's policy did not explain that the employees could still do so on breaks and other non-working hours.<sup>156</sup>

#### 4. Design Tech. Grp.,

*Design Tech. Grp.* is the most recently released Board decision.<sup>157</sup> The NLRB found that the termination was unlawful and ordered reinstatement because the employees were clearly exercising their Section 7 rights over social media.<sup>158</sup> The NLRB relied on *Meyers I* and *II* to reach its conclusion, but its reasoning was less clear in comparison to the Board's earlier decisions.<sup>159</sup>

In *Design Tech. Grp.*, three sales people, who worked at a clothing store, had several issues with their store manager.<sup>160</sup> Specifically, the issues revolved around closing the store earlier.<sup>161</sup> The sales people wanted earlier closing hours for safety reasons, and they believed the store was also losing money by staying open later.<sup>162</sup> The sales manager disagreed and never delivered the concerns of the sales people to the higher management.<sup>163</sup> However, while the sales manager was on vacation, one of the sales people had the store's owner sanction an early closing.<sup>164</sup> That same night, the store manager tried to call the store while it still should have been open.<sup>165</sup> There was no answer, which upset the store manager, so she called the sales peoples' personal phones to find out why the store was not open.<sup>166</sup>

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<sup>156</sup> *Id.* at \*8

<sup>157</sup> *Design Tech. Grp.*, 361 N.L.R.B. 79, at \*1 (2014).

<sup>158</sup> *Id.* at 1.

<sup>159</sup> *Id.*; see *Design Tech. Grp.*, 2012 WL 1496201, at \*1 (N.L.R.B. Apr. 27, 2012) (showing the case the reasoning that the Board affirmed but delivered a different remedy than the administrative law judge originally did).

<sup>160</sup> *Id.* at \*3.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at \*4.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

One of the sales people explained the store's owner sanctioned the early closing, but the manager did not believe her.<sup>167</sup> The sales person contacted the store's owner to inform her of her recent conversation with the sales manager, and the owner assured her not to worry.<sup>168</sup> The sales manager called the sales person again to explain the store was to continue with its regular hours, and that she was also very frustrated that the sales person spoke with the owner instead of the sales manager about closing earlier.<sup>169</sup>

The sales person then posted to Facebook about her frustration with the manager.<sup>170</sup> She wrote "[I] need[] a new job. I'm physically and mentally sickened."<sup>171</sup> The other two sales people replied that they were both frustrated with the sales manager as well, and did not think anyone was helping the situation.<sup>172</sup> One of the sales people also explained her mother was a lawyer at a firm that specialized in labor law, and that she had looked through a state's workers' rights' handbook where she noticed there were definitely some violations with the clothing store's management.<sup>173</sup> She brought the employee rights' book into work the next day, and the sales people all looked through it together.<sup>174</sup>

Another sales employee who was friendlier with the sales manager, informed the sales manager about the Facebook conversation.<sup>175</sup> A few days later, the sales employees, whom had participated in the Facebook conversation, were all terminated because "things were not working out."<sup>176</sup> One of the sales people sarcastically posted to her Facebook that she was happy to be fired.<sup>177</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at \*5

<sup>177</sup> *Id.*

The clothing store's management claimed the sales personnel were fired for a several different reasons.<sup>178</sup> They claimed that the personnel were fired for other inappropriate conduct that did not involve the Facebook conversation, including insubordination issues, as well as other workplace issues.<sup>179</sup> The sales people then brought suit.<sup>180</sup>

The NLRB reasoned under *Meyers I* and *II* that these employees were undoubtedly trying to improve their working conditions and thus were protected by Section 7.<sup>181</sup> The NLRB explained that the employees' concerns over safety and store profits, which they voiced to their store manager, were considered to be discussion over working conditions, and therefore protected.<sup>182</sup> The NLRB also noted that bringing in the employee rights' handbook was clearly protected concerted activity.<sup>183</sup> The NLRB consequently held that the employer's conduct was unlawful.<sup>184</sup> It also demanded reinstatement of the employees.<sup>185</sup>

The NLRB provided no other reasoning as to why it applied its traditional standards from *Meyers I* and *Meyers II* to reach its decision.<sup>186</sup> Although this was ultimately a good outcome and a clear example of employees exercising Section 7 rights on social media, it still leaves open much uncertainty. Why did the NLRB revert back to its traditional standards for social media disputes after creating modified ones? And accordingly, by providing no explanation as to why it reverted back to its traditional standards, how can an employee or an employer predict what is protected, and what is not over social media? The next section includes a critique of the NLRB's methods, as well as a proposal, which would create a bright line distinction to better balance both employer and employee interests and provide more predictable outcomes for social media disputes.

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<sup>178</sup> *Id.* at \*6.

<sup>179</sup> *Id.* at \*7

<sup>180</sup> *Id.* at \*1.

<sup>181</sup> *Id.* at \*9

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at \*3.

<sup>184</sup> *Design Tech. Grp.*, 361 N.L.R.B. 79, at \*1-2 (2014).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*



#### IV. Critiquing the NLRB's Approach to Social Media Disputes: A Proposal to

##### Balance the Interests of Both Employers and Employees

Given the lack of other relevant law governing social media and employment disputes, the NLRB has served as an important stopgap, offering some guidance to workers and employers in this area. However, the NLRB's reasoning does not strike a fair balance between the competing interests of employers and employees in social media disputes, nor does it provide a consistent or clear enough guide on a crucial issue of workplace management. Therefore, Section A addresses how the NLRB has not adequately modified traditional standards to reflect the unique features of social media cases. Section B develops an alternative to the current approach, enhancing the interests of both sides and providing more notice of when social media use is protected.

##### A. *Did the NLRB Forget That Social Media is "Inherently Different"?*

The NLRB stated in its three memorandums released from 2011-2012 that it hoped to provide some guidance in this area of the law.<sup>187</sup> In the Second Report, the NLRB claimed it recognized the "inherent difference" between exercising Section 7 rights over social media versus a face-to-face discussion.<sup>188</sup> However, in its Board decisions released after the three memorandums,<sup>189</sup> the NLRB does not recognize or mention any differences and instead reverted back to applying its traditional standards to social media disputes rather than its modified ones.

Additionally, the NLRB does not provide any reasoning why it returned to its traditional standards, except noting they are long standing precedent. But, applying traditional

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<sup>187</sup> Solomon, First Report, *supra* note 84; Solomon, Second Report, *supra* note 6; Lafe E. Solomon, Third Report, NAT'L LABOR RELATIONS BD. (May 30, 2012), <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (follow "third report" hyperlink).

<sup>188</sup> Solomon, Second Report, *supra* note 6.

<sup>189</sup> See *Design Tech. Grp.*, 361 N.L.R.B. 79, at \*1; *Dish Network Corp.*, 359 N.L.R.B. No. 108, at \*1, \*8; *Hispanics*

*United of Buffalo*, 359 N.L.R.B. No. 37, at \*1 (2012); *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, at \*1 (2012); Solomon, First Report, *supra* note 84; Solomon, Second Report, *supra* note 6; Solomon, Third Report, *supra* note 187.

precedent to such a non-traditional, unique platform seems improper, especially since the NLRB previously recognized there was a difference.<sup>190</sup> The difference accounted for the effects a social media posting about the workplace may have on third parties. A third party will not usually be exposed to employee workplace issues in the typical face-to-face situations where the traditional standards apply. Alternatively, when an employee shares workplace issues over social media, it is more than likely to reach third parties. Moreover, it is indubitable that social media posts about the workplace may affect a third party's relationship with that business. The third party may choose to take its business elsewhere or even influence others to take their business elsewhere.

The fact that the NLRB did recognize these differences before returning to its traditional standards, creates uncertainty and a lack of guidance for employers and employees. First, it is unclear whether the traditional standards or modified standards should apply. And second, even when the NLRB applies the same traditional standards of Section 7 to a case, it reaches inconsistent results. For example, compare the truck driver's story in Part I of this Note, with *Karl Knauz Motors*, the hot dog story. The NLRB applied *Meyers I* and *II* in each case to reach opposite results.<sup>191</sup> With the truck driver, the NLRB claimed that under *Meyers I* and *II*, the driver's posts were not protected because they did not show intent to create group action, but in *Karl Knauz Motors*, under the same standard, the NLRB protected mocking photos of the hot dog stand because they could have "possibly"<sup>192</sup> been concerted.<sup>193</sup> Even comparing the truck driver case with *HUB*, where the same *Meyers I* and *II* standards were applied, the results are still inconsistent. The truck driver was arguably only complaining about another coworker with his Facebook post, plainly the person who did not forward the calls properly, where the employees in *HUB* were complaining about their fellow

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<sup>190</sup> See *supra* Part III.B.

<sup>191</sup> Advice Memorandum, *supra* note 1, at \*2; see *supra* Part IV.C.1.

<sup>192</sup> See *supra* text accompanying note 117.

<sup>193</sup> Advice Memorandum, *supra* note 1, at \*2; see *supra* text accompanying notes 112-17.

coworker who was planning to complain to management about them.<sup>194</sup> It is difficult to understand the NLRB's rationale behind these two different results when there is no explanation provided.

Therefore, the following section will identify important employer and employee interests, and then propose a more clear and predictable standard to better serve and balance those competing interests.

### B. *Employer and Employee Interests: Where Is the Balance?*

In order for the NLRB to create a clear and predictable standard, the NLRB must address the interests of both employers and employees. This is not an easy feat since at times what is good for an employee may cut hard against what is good for an employer. This section tries to effectuate that balance.

#### 1. Employer Interests

The NLRB barely mentions or even takes into account the impact that employees' social media use may have on employers' interests. Specifically, it can affect the employer's ability to operate efficiently and effectively.<sup>195</sup> It is doubtless that social media use can affect the workplace considering that nearly half of office employees access Facebook during work hours.<sup>196</sup> Certainly though, the social media issues in this Note also include the usage outside of the workplace. Therefore, employers also have a right to a "significant degree of control over employees' words and actions" because otherwise an employee's actions could be in conflict with the operation of the business.<sup>197</sup> Consequently, when the NLRB does not mention employers' interests, it is difficult for an employer to lawfully mitigate the impact of an employee's

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<sup>194</sup> See *supra* text accompanying notes 3-8, 129-32.

<sup>195</sup> See generally *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006) (discussing rights and interests of an employer).

<sup>196</sup> Patricia Sánchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First Century Employee*, 49 AM. BUS. L.J. 63, 106 (2012).

<sup>197</sup> *Id.*

social media use. Many have tried to create social media policies, but because of the NLRB's clear lack of guidance, it makes this especially difficult to do so lawfully.

Thus, employers must be able to create clear social media policies in order to inform employees what they may share about the workplace. Employers are aware that an employee's expression on social media can have an impact on the business. Therefore, the employer has a legitimate interest in what an employee is sharing.

However, employers do recognize that employees also have a valid interest in their Section 7 rights, and therefore certain topics may not be limited. Specifically, discussions over an employee's terms and conditions of employment are still valid when discussed over social media. Still, it is hard to decipher when an employee's social media use is invalid, such as an employee voicing a personal gripe,<sup>198</sup> or if it is valid, such as an actual discussion over terms and conditions of employment. Therefore, the NLRB needs to address this ambiguity rather than turn to traditional standards that do not highlight this difference.

Moreover, while the NLRB has turned to traditional standards to evaluate social media disputes, it has ignored the legitimate interest that an employer has in a social media discussions of employment in comparison to face-to-face discussions. The employer has more of a stake in the social media discussion because it is so easily viewable by the public and others not associated with the business. The NLRB should consider this and continue to expand and apply the modified standards,<sup>199</sup> which accounted for the impact an employee's post can have on third parties.

Furthermore, if there is damage to an employer because of an employee's use of social media, an employer should have a remedy. At this point, there is no discussion of what recourse the employer should have if there was damage from an employee's post. The NLRB should define that recourse.

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<sup>198</sup> See *supra* text accompanying note 58.

<sup>199</sup> See *supra* text accompanying notes 115-125.

Even though employers do have a valid interest in employees' social media use, employees also still have a right to utilize social media.

## 2. Employee Interests

An employee is entitled to concerted action, but when they are applied to social media, it is tough to know where to draw the line. For an employee, the decisions released by the Board provide no clear answer as to what conduct may be protected. Take for example, the truck driver from Part I, whose actions were not protected when he shared his frustration over Facebook that he would be late for a delivery, in comparison to the BMW salesman in *Karl Knauz Motors*, whose actions were protected when he posted mocking photos of a hot dog stand.<sup>200</sup> When comparing the line of reasoning between these two cases, and the lack thereof, it is difficult for an employee to understand which types of action are protected under Section 7.

An employee's Section 7 rights and legitimate interests in self-expression and privacy allow social media use about the workplace. However, this does not mean the NLRB must create a policy that all social media expression is protected. Such a policy would be too expansive when weighed against employers' interests. Take for example, another scholar's argument from 2013, where she asserted that when one employee shares something about the workplace on social media, and then another employee sees it but does not respond to it, it should be concerted.<sup>201</sup> However, if the NLRB granted that type of policy, it would be too broad and sweeping of a rationale that would be unfair to employers.

Nevertheless, there is still concern over chilling employees' Section 7 rights, especially in terms of an at-will employee coupled with the lack of guidance provided by the NLRB. An

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<sup>200</sup> See *supra* text accompanying notes 1-14, 110-23.

<sup>201</sup> Rebecca Stang, *I Get by with a Little Help from my "Friends": How the National Labor Relations Board Misunderstands Social Media*, 62 DEPAUL L. REV. 621, 642-48 (2013).

employee has a right to know what can cause termination, which is unclear with the NLRB's current decisions. There is also a problem when an employee reigns in conduct because of uncertainty. Therefore, it is just as important for an employee to understand the NLRB's standards.

Thus, in order to strike the balance between employer and employee interests for social media expression, the next section will explain a more appropriate standard to apply.

### 3. Striking the Balance

The NLRB must adopt a bright line distinction that would better effectuate this intersection between social media and employment. It needs a standard that creates a plainer distinction between speech covering third parties and speech covering other employees, managers, employers, or workplace conditions. The standard acknowledges that both employers and employees need limitations. The distinction also includes the rationale behind the "damaging" effects that *Atlantic Steel* set forth. It provides clearer guidance, while also respecting employer and employee interests.

Section 7 lays out rights, which are deemed concerted and, thus protected. Therefore, under the NLRA, it is important that an employee be able to discuss wages, safety conditions, length and amounts of breaks, required uniforms or dress style, or anything else related to working conditions. Likewise, complaining about an employer or even a fellow employee, is protected under the NLRA and long-standing precedent, as well.

However, this bright line distinction takes into consideration the impact that an employee's expression on social media about the workplace may have on third parties. The standard complies with the Jefferson Standard and *Atlantic Steel*, which limit an employee's expression when trying to intentionally damage a business. The standard takes seriously that that an employee's conversations can reach third parties easily via social media, which could ultimately hurt the employer and the business. Therefore, this bright-line distinction does not

protect an employee's discussion of customers and customer interaction. Nor, does it protect an employee falsely acting on behalf of the company or in some other representative capacity.<sup>202</sup>

For instance, when applying this standard to the truck driver in the introduction, he would have been protected. The truck driver was only sharing about another employee. He was also not trying to intentionally damage the business, but instead sharing about his frustrations. It would be difficult to say the truck driver's social media use could have an impact on third parties and so, consequently, he would be protected.

Compare this to *Karl Knauz Motors* with the BMW salesman. The salesman's hot dog photos would not be protected. The salesman was pretty clearly attempting to intentionally hurt the dealership by posting the mocking photos. Though, the hot dog photos may have grown from concerted actions related to compensation according to the NLRB,<sup>203</sup> under this bright-line distinction that type of argument would not hold. Usually an act of mocking is meant to hurt somebody or something and therefore, the hot dog photos would not be protected since they were meant to hurt the business.

Finally, applying this standard to *HUB*, the result would still be similar to the NLRB's decision. The sales people in *HUB* were by no means trying to hurt the clothing store at any point. Instead, the employees were dealing with their day-to-day issues with their employer, specifically their manager, not the business itself. Therefore, their actions would be protected.

By considering the impact a social media expression may have on a business and balancing it with an employee's Section 7 rights, this standard better effectuates both party's values. There is no doubt that employers and employees have a valid interest in each other's rights and limits of social media expression, but the NLRB must do more to balance them. The

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<sup>202</sup> This is similar to *Atlantic Steel* and the Jefferson Standard where both consider an employee's actions on the damaging effects to the business.

<sup>203</sup> See *supra* text accompanying notes 113-16.

NLRB should revise its current analysis of social media expression and examine the interests of employers and employees in order to balance them more effectively.

## **V. Conclusion**

This intersection between social media and the workplace is in need of guidance and predictability from the NLRB. The NLRB has not legitimately balanced the values of employers and employees by applying the traditional standards to something, which it pointed out, had “inherent differences.” Therefore, this Note critiques the NLRB’s failure to consider both the employer and employee’s values fairly, and then this Note pinpointed those values to create a clearer and fairer standard. Finally, as Amy Jo Martin pointed out, “Social media is changing the way we communicate and the way we are perceived, both positively and negatively,” and the NLRB needs to take this into account in order to adopt a new approach to social media in the workplace.